



HM Courts & Tribunals Service

**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS)
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000 as
modified by regulation 18 of the ENVIRONMENTAL INFORMATION
REGULATIONS 2004.**

EA/2010/0163

Before:

Brian Kennedy QC
Andrew Whetnall
Melanie Howard

Appearances: For the Appellant - Mr Tony McGleenan of Counsel
For the Respondent – Rachel Kamm of Counsel

B E T W E E N:-

OMAGH DISTRICT COUNCIL

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

DECISION

DECISION:

- [1] We have decided to dismiss the Appeal and uphold the decision of the Information Commissioner (“the Respondent”) contained in a Decision Notice (“DN”) dated 31 August 2010 (reference FER0269957).

BACKGROUND

- [2] In 2004. Mr. Gerald Marshall, a local resident (“the Complainant”), wrote to the Omagh District Council (“the Appellant”) to complain about the location of a memorial on Council owned land. This complaint from a member of the public was in relation to the presence of a memorial commemorating the deaths of IRA members who died during the hunger strikes in 1981. The memorial was erected without the relevant permissions, on the said land, on a site adjacent to an old church in the village of Dromore, County Tyrone. The memorial comprises a headstone with an inscription and a flag pole with the Irish Tricolour flag.
- [3] On the 1st March 2005 the Appellant’s Environmental Services Committee recommended that the land, on which the memorial was sited, be sold to Dromore Memorial Committee, subject to conditions deemed appropriate by the Appellant. It appears that the Dromore Memorial Committee may have been responsible for erecting the memorial.

- [4] On 31st October 2005 the Appellant Council resolved to carry out an Equality Impact Assessment (“EQIA”) on the Council’s **“policy”** on **“Disposal of Land for the Purpose of Erecting or Retaining a Memorial or Monument.”** (our emphasis)
- [5] The policy was subject to an EQIA preliminary screening exercise which was intended to determine whether a policy was likely to have an adverse impact upon equality of opportunity in respect of the nine equality areas outlined in section 75 of the Northern Ireland Act 1998. The screening exercise identified that the policy was likely to impact on equality of opportunity/good relations in respect of religious belief/political opinion.
- [6] The Complainant subsequently made a complaint to the Equality Commission for Northern Ireland (“ECNI”) that, in relation this matter, the Appellant had failed to comply with its approved equality scheme which it is required to maintain under section 75 of the Northern Ireland Act 1998. The ECNI investigated and published its report. The report concluded **“that the Appellant had failed to comply with its approved equality scheme by not conducting a screening exercise in relation to its policies that allowed the memorial to remain on its property”** (our emphasis). The ECNI recommended that the Appellant conduct an Equality Impact Assessment (“EQIA”) on **“Disposal of Land for the Purpose of Erecting or retaining a Memorial or a Monument”**. (our emphasis).
- [7] In April 2009 the Appellant produced a draft EQIA which was sent out for consultation. The Appellant thereafter conducted a full EQIA which it seems was published later in 2009.
- [8] On 1 June 2009 the Complainant made a request to the Appellant in the following terms –

“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?

.....

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”.

- [9]** On 26th June 2009 the Appellant responded and indicated that the draft EQIA was prepared by the Appellants’ officials. The Appellant stated that it would not be appropriate to issue further information until the EQIA was published in final form.
- [10]** The complainant wrote and sought to appeal that decision on 21st July 2009 and the Chief Executive of the Appellant responded on 31st July 2009 affirming the position that had been outlined on 26th June 2009.
- [11]** On 16 September 2009 Complainant made his complaint to the Respondent about the Appellant’s handling of his request for information which complaint was communicated to the Appellant on 9th October 2009. The Appellant responded to the Respondents’ correspondence on 28th October 2009.
- [12]** The complaint was then investigated by the Respondent who provided a report on 23rd April 2010. The report stated inter-alia that it would seem that the appropriate legislation for dealing with this request is the Environmental Information Regulations 2004 (“the EIR”) and could fall within Regulation 2(1)(a) (state of elements – land or landscape) and (c) (measures such as policies, legislation etc). “

[13] The Appellant maintains it issued a substantive response to this letter on 6th July 2010 in which it joined issue with the Respondent's analysis and wherein they stated the Appellant's opinion that:

“the information which the complainant sought, i.e. the names of officials preparing a document, and the copy of a letter forward to the Equality Commission seeking their comment, is not environmental information relating either to the state of the elements or measures affecting the elements. His queries were not about the environment but about a process being used to inform a consultation on a Council decision.”

[14] The Appellant maintains that the Respondent did not engage further in correspondence but issued a Decision Notice on 31st August 2010. The DN stated that the Respondent had not received a substantive response to his letter of 23rd April 2010 (notwithstanding the fact that the Appellant indicates a letter had issued to the Respondent on 6th July 2010). Before this tribunal the Appellant conceded there was no evidence to prove the posting of the letter of the 6th July 2010 from the Appellant to the Respondent. However this Tribunal is of the view that no material significance turns on this for the purposes of our deliberations.

[15] The Respondent took the view that the information requested by the Complainant was environmental information within the meaning of regulation 2(1) of the EIR and that, should the Appellant not wish to disclose the information, it was required to issue a refusal notice under regulation 14 EIR setting out the basis on which it intended to refuse the request.

THE RESPONDENTS DECISION

[16] The Respondent decided (§ 13 DN) that the information requested by the Complainant was as follows:–

- (i) the names, job titles and departments of the Council officials who drafted the EQIA; and
- (ii) correspondence between the Council and the Equality Commission for Northern Ireland regarding the draft EQIA

(hereafter referred to as “the Requested Information”).

[17] The Respondent decided that the Requested Information was “*environmental information*” within the meaning of regulation 2(1)(c) EIR. (§§ 19-24 DN).

[18] The Respondent considered that the EQIA on the Appellants’ policy on the disposal of land was a “measure which is likely to affect the land and landscape” (§22 DN). Furthermore, the Respondent considered that the names of the authors of the EQIA also fell within this definition (§23 DN).

[19] The Respondent therefore directed that the Appellant should respond to Complainant’s request under the EIR either by disclosing the Requested Information in accordance with regulation 5 EIR or providing a valid refusal notice under regulation 14 EIR.

RELEVANT STATUTORY FRAMEWORK

[20] Under regulation 5(1) of the EIR, and subject to and in accordance with various other provisions of the EIR, a public authority that holds environmental information is required to make it available on request.

[21] “Environmental information” is defined in regulation 2(1) of the EIR which provides, in relevant part -

“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 and 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;

(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.”

[22] The enforcement and appeals provisions of the Freedom of Information Act 2000 (“FOIA”) (that is to say, Parts IV and V of FOIA, including Schedule 3 which has effect by virtue of section 55 of FOIA) apply for the purposes of the EIR, as modified by regulation 18 of the EIR.

THE NOTICE OF APPEAL AND THE RESPONSE

[23] The Appellant herein appeals against the DN by way of a Notice of Appeal dated 27 September 2010.

[24] In the Grounds for Appeal, the Appellant asserts that the Respondent erred in deciding that the Requested Information is environmental information within the meaning of regulation 2 EIR.

- [25] The Appellant further asserts in the Grounds of Appeal that it has obtained legal advice that “an EQIA on a policy on the disposal of land is not a *‘measure’ likely to affect the state of the land or landscape in the sense that that term is envisaged in the EIR*”. Further, it states that its legal advice is that the Respondent is wrong *“in taking a further leap in concluding that the identity of the Appellants’ officers who drafted the EQIA on the disposal of land policy, being the ‘measure’ in question is, in itself ‘environmental information’”*.
- [26] The Respondent maintains that his decision, that the Requested Information is environmental information within the meaning of regulation 2(1)(c) EIR, is correct for the reasons set out in the DN.
- [27] In the final paragraph of its Grounds of Appeal, the Appellant states *that “it is inappropriate that the names of lower level officers who may have been involved in developing the document under the direction and control of the Chief Executive should be disclosed”*.
- [28] The Respondent argues that In so far as this is intended to be a ground of appeal it is misconceived. The Respondent claims that it has not ordered that the Appellant must disclose the Requested Information. The Respondent argues that he ordered that the Appellant either disclose the Requested information under regulation 5 EIR or issue a refusal notice under regulation 14 EIR. The Respondent argues that if the Appellant considers that part of the Requested Information is exempt under regulation 13(1) EIR (in that, for example, disclosure would breach one of the data protection principles), then the DN does not oblige it to disclose that information but requires it to issue an appropriate refusal notice under regulation 14 EIR. Disclosure of the Requested Information, the Respondent argues, is not in issue in this appeal.

[29] The Respondent addressed the question of whether the information in question was environmental information at paragraphs 29 *et seq* of the DN. At paragraph 22 the Respondent held:

“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 (sic) and therefore the Commissioner is satisfied that the information falls under the definition of environmental information at regulation 2 (1)(c) of the EIR.”

Accordingly the Respondent decided: *“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.”*

[30] The Respondent decided in light of the foregoing that the Appellant did not deal with the request for information pursuant to the Regulations. The Respondent found that the Appellant had breached Regulation 14 of the Regulations. The Appellant has appealed against this decision.

THE ISSUES:

- [31] The Respondent's decision was that the Requested Information was environmental information within the meaning of regulation 2(1)(c) of the Environmental Information Regulations 2004 ("EIR") and that, should it not wish to disclose the information, the Appellant was required to issue a refusal notice under regulation 14 EIR setting out the basis on which it intended to refuse the request.
- [32] The issue in this appeal is whether the Requested Information is environmental information within the meaning of regulation 2(1)(c) EIR.

REASONS:

- [33] The Respondents argue, that by reason of their decision to carry out the Equality Impact Assessment on their "*policy*" on "*Disposal of Land for the purpose of erecting or retaining a memorial or monument*" the Appellant was engaged in a measure or activity [Regulation 2(1)(c) EIR] that affected or was likely to affect the state of the elements of the environment; namely land or landscape [Regulation 2(1)(a) EIR] and accordingly falls within the definition of environmental information within Regulation 2(1)(c) of the EIR. We accept this argument.
- [34] The ECNI investigation and its published report which concluded "*that the Appellant had failed to comply with its approved equality scheme by not conducting a screening exercise in relation to its policies that allowed the memorial to remain on its property*". This is, we feel, relevant in relation to the Appellants position on their policy and decision making process thereon. The ECNI recommended that the Appellant conduct an Equality Impact Assessment ("EQIA") on "*Disposal of Land for the Purpose of*

Erecting or retaining a Memorial or a Monument". For this reason we feel that the EQIA was in fact related to the Appellants' decision making process pertaining to their policy on the memorial on the land within its ownership. Accordingly we are of the view that the Appellants participation in or engagement with the ECNI was a measure or activity affecting or likely to affect the land or landscape [Regulation 2(1)(a)] and came within Regulation 2(1) (c) of the EIR.

[35] This tribunal wishes to acknowledge and thank the representatives of the parties for their extensive and helpful submissions at the oral hearing of this appeal and in the subsequent supplementary submissions on case law analysis.

[36] In the final paragraph of its grounds of appeal, the Appellant states that *"it is inappropriate that the names of lower level officers who may have been involved in developing the document under the direction and control of the Chief Executive should be disclosed"*. We find the use of the word "inappropriate" is distracting. It is a subjective assessment that has no bearing on the relevant legislation under consideration in the issues herein.

[37] We accept the position as set out by the Respondent in his Response to the appeal. That is to say *"--- the Respondent did not order the Council to disclose the Requested Information. He ordered that the Appellant either disclose the Requested Information under regulation 5 EIR or issue a refusal notice under regulation 14 EIR. If the Appellant consider that part of the Disputed Information is exempt under regulation 13(1) EIR (in that, for example, disclosure would breach one of the data protection principles), then the DN does not oblige it to disclose that information but requires it to issue an appropriate refusal notice under regulation 14 EIR. The Respondent argues that disclosure of the Requested Information is not an is-*

sue in this appeal". This, it seems to us, reflects the reality of the procedure for a public authority addressing the issues herein.

[38] The Respondent argued that the draft EQIA is plainly a measure likely to affect the state of the elements of the environment, i.e. the land or landscape, arguing that "*the outcome of the EQIA will inform current and future policy decisions around this issue*" and that *the result of the EQIA (following consultation) could be the removal of the memorial and flag from the land or the commencement of procedures for a structured disposal of the land*", with the important addition that protection of landscape can be as material a consideration as change to it. We accept this reasoning which further supports our finding at **[33]** and **[34]** above.

[39] Further the Respondent argues with supporting authorities that: " *i) "Information on" [Regulation 2(1)] has a wide meaning, including the names of people with a relevant role. ii) A measure [Regulation 2(1)(c)] does not have to be a final decision and can be submissions to the decision making body or reports setting out options: and iii) the state of the landscape is affected by both small-scale and man made items, such as a fence or a burnt out residential building.*" We accept these submissions and find that the memorial as described at paragraph **[2]** herein affects the land and/or landscape as envisaged by the EIR.

[40] The Appellant on the other hand does not accept that the Requested Information, related to or in any way could be considered environmental information within the meaning of regulation 2(1)(c) of the Environmental Information Regulations 2004 ("EIR") For the reasons given at **[33]** and **[34]** above we reject this assertion.

[41] The Appellant submits that the Tribunal should carefully scrutinise the statutory and factual context in which the complaint originally arose in this case. The Appellant argues inter-alia that:

“--it was endeavouring to manage a dispute about an acutely polarised issue in Northern Ireland politics – the management of memorials erected to those who lost their lives in the recent political conflict. That task is an onerous one that requires a deft diplomatic and political approach by public officials and local authorities. It is made all the more challenging by the statutory framework which has been established in Northern Ireland pursuant to section 75 of the Northern Ireland Act 1998 to promote equality of opportunity and good relations. The Appellant argues that: “It is within that statutory framework that the Appellant council elected to conduct an equality impact assessment into the “policy” of disposing of council land relating to memorials.”

The Appellant also argued that the Equalities Impact Assessment could not lead directly to a disposal of land. There would be further steps before a disposal could be executed. Pointing to the *possible* impact of the EQIA on the land did not, they argue, establish that it was *likely* to affect the land. The Policy and Resources Committee would have to vote on any recommendation. The Council would have to endorse the sale. The Council would have to go through the prescribed processes for disposal of local government land and apply the surplus lands policies set out under the LGNI Act 1972 s 96 (5). Particular mechanisms were required to achieve best value. At some point in that chain it could become clear whether or not an environmental impact was likely, but the EQIA, they argue, could not itself be described as a measure likely to have an environmental impact.

The Tribunal has to decide between these competing arguments, and our decision has not been taken lightly. We have considerable sympathy with the Appellant's argument that the context of the disputed information is more cultural than environmental. The predicament for the Appellant is not primarily environmental, but to do with the deep community sensitivities that flow from social, religious and political contexts.

While we understand and are sympathetic to the Appellants predicament, for the reasons given above we find the Requested Information is "environmental information" within the EIR and must be treated as such. It is important to note, as submitted on behalf of the Respondent that compliance *"does not impose huge requirements, just access to information"* and further as submitted on behalf of the Respondent that the implication is that *"the Appellant either disclose the Requested information under regulation 5 EIR or issue a refusal notice under regulation 14 EIR. If the Appellant considers that part of the Requested Information is exempt under regulation 13(1) EIR (in that, for example, disclosure would breach one of the data protection principles), then the DN does not oblige it to disclose that information but requires it to issue an appropriate refusal notice under regulation 14 EIR. Disclosure of the Requested Information, the Respondent argues, is not in issue in this appeal."* This Tribunal takes cognisance of the fact that Regulation 14 EIR sets out clearly the process whereby the Appellant can properly refuse to disclose requested information and Regulation 12 EIR sets out exceptions to the duty to disclose environmental information while Regulation 13 EIR sets out conditions on the withholding of personal data when exercising the duty to disclose environmental information. For these reasons we agree with these submission made on behalf of the Respondent.

[42] The Appellant submitted:

“--- that in this arena of public law, context is critically important. The dispute that developed between the complainant and the Appellant Council in 2009 had nothing whatsoever to do with environmental issues. The dispute related to the Council’s management of an issue arising directly from the political and religious divisions in Northern Ireland. There is not a single reference in the exchanges of correspondence which relates to environmental matters as defined in Article 2(1) of Directive 2003/4. The complainant was not aggrieved about the environmental impact of the Dromore memorial on land or landscape. The correspondence between the parties never engages with such issues”.

While we do not dispute the factual assertion herein, we find that the duty imposed on the Public Authority is not considered in terms of, or dependent upon, the presence or absence of a motive for a request for information and for the reasons given above we find the Requested Information is environmental information within the definition of the EIR

[43] This Tribunal sought further submissions on case law cited and referred to in a leading text book on the issues between the parties in light of commentary on “Environmental Information” in paragraphs 6 – 008 *et seq* pf Coppel: “Information Rights Law and Practice (third edition). Helpful and extensive submissions were made by both parties. We do not propose to recite the voluminous cases cited in the said text by the Respondent in support of their submissions at [39] above. Many of the cases related to information of more self-evident *environmental* significance than the present case. Matters addressed included the possibility of health risk from mobile

telephone masts, alleged disposal of munitions in mines, decontamination of ships, night flying from airports, energy strategy, transport policy and sustainable development and so on. Others cases concerned planning permissions, planning enforcement matters, building regulations, fences between houses, rights of way, river works, sea defences, bridge building, or pipeline construction. None include particularly helpful discussion of landscape impacts, but where the issue occurred the potential impact was often considerable, for example the fate of a listed building, the building of a major bridge or a fifty-story tower block.

- [44] The Appellant cited the decision of the European Court of Justice in *Glawishhing v Bundesminster fur Sucherheit und Generationen* [2003] ECR 1-5995. where the court held that the Directive was not intended to give a general and unlimited right of access to information held by public authorities that has a connection, however minimal, with one of the environmental factors mentioned in the European legislation upon which the definition of environmental information was based. On careful analysis of the decision of in *Glawishhing v Bundesminster fur Sucherheit und Generationen* [2003] ECR 1-5995 this Tribunal acknowledges that this case does identify circumstances where information is outside the scope of relevant Environmental Information. Further it does establish directive 90/313 on the freedom of access to information on the environment is not intended to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in article 2(a) [of the European directive] as it stands, substantially unamended from the 1990 text. However the chain of reasoning in *Glawischnig* depended heavily on the facts in the case which we feel can be and are distinguished because of. what we find to be, the significant connection of the EQIA process which was engaged within the policy or measures being considered by the Respondent at the material time herein as we have explained at [33] and [34]

above. We find that this is not a case where there is minimal connection with the policy or measures being considered by the Appellant, for the reasons we have indicated above.

This leaves us to assess the weight and significance of the impact, if any, on landscape in the present case, and indeed whether we are entitled to take such factors as weight and significance into account. Can the environmental issues be said to be so minimal or remote, as the Appellant contends, that they can be discounted? Can the dominant cultural and political issues provide a clear pointer to considering the case under the UK framework of law, the Freedom of Information Act?

For the sake of clarity it may help to sort the arguments put to us under several headings:

a) Is the EQIA likely to have a material effect on the landscape, or is it a measure designed to protect the landscape?

The possibility that the EQIA could have set in train a process leading to a disposal of land is clear from its very title: "On the Disposal of Land for the Purpose of Erecting or Maintaining a Memorial or a Monument". Whether that disposal would have had an effect on the landscape is less certain. The disposal might or might not have been decided on. If the decision was made it would have been implemented through another measure or process. Disposal might have been to a group likely to maintain the status quo, in which case there would, as argued by the Appellant, have been no impact on land or landscape because the memorial is already in place. Alternatively the disposal might lead to removal of the memorial, or a decision against disposal could lead to removal of the memorial without disposal of the land. Each of these possible steps might have required decision-making processes additional to the EQIA, and the complexity of the

possibilities may indeed justify a conclusion that the consequence of an alteration in the landscape was less than likely. However under Regulation 2(1) (i) of the Environmental Information Regulations 2004 the test is not only whether a measure affects or is likely to affect one of the elements but also whether a measure is “designed to protect” those elements. The title of the EQIA implies a possible outcome protecting what is already there, so whether a change is likely is not determinative.

b) Is the EQIA a sufficiently final or near final-step in the process of affecting or protecting the landscape?

On the Appellant’s argument that there would have been other Council processes between the finalisation of the EQIA and any disposal of land, our attention was drawn to the decision of the ECJ in the case of Mecklenberg, C-321/96, another case based on Directive 90/313/EC, since superceded. Here the court was asked for a determination of two questions concerning access to a statement of the views of a countryside protection agency on a proposal for a bypass. The Court gave conditional answers. The statement of views would be within the scope of the Directive if it was capable of adversely affecting or protecting the state of one of the elements of the environment, but would count as preparatory to an administrative measure for the purposes of the Directive “only if it immediately precedes a contentious or quasi-contentious procedure and arises from the need to obtain proof or to investigate a matter prior to the opening of the actual procedure.” The Respondent has concluded from this that the text book commentary must be incorrect in suggesting that a measure must be a final decision. It can be part, but not too remote a part, of a chain of decision making. The parallels are not exact, but we accept that the EQIA in the present case could be fairly described as an investigative step prior to a potentially controversial final decision affecting or protecting the landscape, and that the subsequent Council decision making proce-

dures on disposal of the land would amount to the actual decision. On that basis we are of the view that the Appellants' argument based on the incomplete or preparatory nature of the EQIA process fails.

c) Is the possible impact on the landscape so minimal as to be excluded from the scope of the Directive and Regulations?

We explored at the hearing whether it was relevant that the impact on the landscape, either way, from the decision making process was likely to be very minor in strictly visual terms, although far more significant in cultural or political terms. We were shown a photograph of the memorial, and told that the environmental context was a wall bounding a burial ground beside an urban road. The scope for visual as opposed to cultural impact is capable of being regarded as minor. The respondent argued that this was immaterial, and that the EIR definition embraced both minor and major changes.

We find that, objectively viewed, the degree of alteration to the landscape associated with the retention, or not, of a memorial stone in a wall together with a flag is small. We are sympathetic to the Appellants' arguments on the cultural significance and environmental insignificance of the decision facing them. However a division between cultural, aesthetic and environmental responses to landscape can be fine in deed. Landscape signifies different things to different people depending on their viewpoint and the historical context. One person's eyesore is pleasing to others. We accept the Respondents' submission that the state of the landscape can be altered by small and man-made items. We recognise that the subjective response to or interpretation of landscape engages a reading of context and history which can be partly in the mind of the beholder. The physical dimensions of the alteration to the landscape in such a context

can be small in deed. Accordingly we find in favour of the Respondent on this point.

d) Motive

The Appellant points out that there was no environmental motive behind the request for information, saying of the Complainant: "His queries were not about the environment, but about a process being used to inform a consultation on a Council decision" The Respondent argued that no relevance could attach to the apparent motives of the applicant for seeking the information, the legislation was motive-blind and the scope of the EIR should be determined objectively.

It is not possible to infer a motive from the terms of the request for information. Recital 8 of the Council Directive 90/313/EEC stated "It is necessary to ensure that any natural and legal person has a right of access to environmental information held by or for public authorities without his having to state an interest."

We nevertheless explore two ways in which the motive of a requester might have potential relevance:

- If the requester very obviously had no interest in the state of the environment, it might be difficult to show that his environmental information rights were being denied if his information request is considered under FOIA. Indeed his rights might conceivably be restricted by allocation of the case for consideration under the EIR as opposed to the FOIA, for example in any context where the exemptions in the EIR are comparatively restrictive;
- In any case where a balancing test needs to be conducted between the case for and against disclosure, the requester's account of the purpose of a request might be relevant to the weighing up of competing considerations.

We examined the documentation to see if it shed any light on the concerns the requester of information wanted to explore. The complainants' six page response to the consultation on the Draft EQIA was included at p39 of our bundle. This makes clear that the Complainant has strongly negative views on the memorial, and on the conduct of the Appellant in permitting it to remain on their land. The Complainant disputes various statements about historical context: for example on the conduct and reputation of the Ulster Special Constabulary or B Specials. It is clear that his concerns are primarily cultural or political, although in his comments he says: *"The EQIA is not about the disposal of land per se, but rather is about "the Disposal of Land for the Purposes of Erecting or Retaining a Memorial or a Monument."* He adds that *"There are guidelines on the Disposal of Surplus Public Sector Property in Northern Ireland and a public authority must have a very strong business reason for disposing of public sector land. In this instance we are most certainly not talking about land that is surplus to requirements, this is the most "Historic and Prominent" shared space in Our Village, and it would be incomprehensible to consider its disposal for any reason, either completely or in part."* He draws attention to the recommendation in the Equality Commission for Northern Ireland's final report ***" . . . that this Equality Impact Assessment consider, taking into account the nature of the Memorial, and its high level of visibility on a site that is synonymous with the locality . . ."*** (P43 of bundle, our emphasis)

This gives an indication that the Complainant had concerns about the appropriateness and visual impact of the memorial in its prominent site, and hence a concern about impact on landscape. We accept that motive, in so far as it can be discerned, is not relevant to the determination of this case, although the phrase "motive-blind" can sometimes need closer consideration when it comes to deciding a balance of public interest test, and

perhaps when considering whether it is appropriate to take an application for information under EIR or FOIA. However there is enough in the language and concerns cited above to persuade us that impact on landscape is not a remote or irrelevant consideration in this case,

e) Statutory and factual context

As recorded above, the mainstay of the Appellant's case is to urge us to consider the statutory and factual context and to recognise that the Council was trying to manage a dispute about an acutely polarised issue in Northern Ireland politics. It clearly came as a surprise to them when the Information Commissioner proposed that the request should be addressed within the legal framework relating to the environment, and it is unfortunate that their first response to the Information Commissioner's findings, explaining their objections to this, appears to have gone astray.

The Appellant's case is argued plausibly:

“In this arena of public law, context is critically important. The dispute that developed between the complainant and the Appellant Council in 2009 had nothing whatsoever to do with environmental issues. The dispute related to the Council's management of an issue arising directly from the political and religious divisions in Northern Ireland. There is not a single reference in the exchanges of correspondence which relates to environmental matters as defined in Article 2(1) of Directive 2003/4. The complainant was not aggrieved about the environmental impact of the Dro-more memorial on land or landscape. The correspondence between the parties never engages with those issues.”

This somewhat understates the extent to which the Complainant is concerned about what he sees as a visually prominent memorial in a promi-

ment and, in his view, inappropriate site, which we have accepted is in broad terms a landscape issue. However we have a good deal of sympathy with the underlying point that context should be a significant factor in determining whether a matter is dealt with under EIR or FOIA.

In most of the precedents cited in the list of cases there will have been, because of the nature of the subject matter, no doubt or dispute between the parties that environmental issues were central, and that it was appropriate to deal with the matter under the EIR.

Happily, there is rarely ambiguity. So is it invariably the case that if there is any question of impact (however slight) on the elements of the environment or of protection of those elements, the EIR is the relevant framework?

We considered, but have not investigated exhaustively, questions of consistency of approach to the definition of what constitutes an environmental information request. Many different kinds of measures adopted by bodies within the scope of the Environmental Information requirements may have a potential impact on landscape. These might range from cutting a verge, pruning a tree or moving a bus stop, examples where landscape impact is unlikely to be large or permanent, to a decision to build a major structure in a sensitive landscape or to go to war. Some such decisions have from time been addressed under FOIA, even though an environmental impact from the decisions under scrutiny is more than likely. This may have been because requesters of information have made it very clear that their concerns are best addressed under FOIA, for example because they related to concerns largely to do with legality or process of government. It may also be significant that in different formats at different times, or within the national transposition of Environmental Information Directives by member states, there have been restrictive treatments of dis-

closure rules where the information concerned would affect international relations, national defence, or the confidentiality of proceedings of public authorities (See Mecklenberg Judgement, para 8) . The wider public interest factors engaged in such a case may be more likely to be capable of fruitful exploration under the national framework for access to general information, the Freedom of Information Act, because its provisions embrace a wider and more general range of factors and more readily frame the relevant decision as a balancing test between competing factors of public interest.

The essential reason why we have separate environmental information regulations is to ensure that the Directive is fully adopted and transcribed into UK law. The regulations ensure consistency of access to environmental information throughout the European Community, and guarantee that rights to environmental information are respected and enforceable. In this context we believe that both context and the motive of the requester are potentially relevant considerations. If the requester appeared to be wholly unconscious of an environmental aspect or import to his request, and stressed other reasons for his interest in the information, he could not be said to be denied environmental access rights if his request is not considered under EIR.

These considerations point to a purposive interpretation of the regulations. The recital of Directive 2003/4/EC describes its broad purpose and is an aid to purposive interpretation. “1) Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.” This clearly requires environmental decision making to be captured. The Respondent drew our attention to Recital 10 which promotes a wide definition of what

is environmental information, and to cases such as Ofcom set out in the list in the Appendix in which the Tribunal had interpreted Regulation 2(1) accordingly. A narrow and literal interpretation is that any measure which is likely to result in a change to land or landscape, or an environmental impact however minor, or relates to the protection of the environment is caught, and information requests should be dealt with under the regulations. The case history provides plenty of examples which support a broad interpretation of environmental matters. But with one exception (FCO v IC, where reasons for the decision were given in a closed judgement) the list excludes cases where there were possibilities of environmental impact, but the Commissioner and, on Appeal the Tribunal with the apparent agreement of the parties decided to address them under FOIA. Another example may perhaps be the series of cases to do with the Iraq War. A decision to go to war is certain to have environmental consequences. Nevertheless requests for Cabinet Papers and other information concerning the decision have been dealt with under FOIA.

It seems that in the majority of cases it will be relatively straightforward to identify what is and what is not an environmental issue, we reach the conclusion in this case that the contextual considerations are not strong enough to overturn the decision of the Respondent that the matter should be handled under the EIR. We attach some weight to the general consistency of the Information Commissioner's practice.

A more timely conclusion of the initial request could perhaps have been reached if all parties had agreed to take the case under FOIA "on the grounds that the relevant requirements of the two sets of provisions are identical" or "if we are wrong it makes no practical difference." (See note on Spurgeon in the list of cases, although we note the comment of Counsel for the Respondent that this case is unhelpful and not in line with others, and we have not heard arguments whether the requirements of the

two sets of provisions in this case are identical.) However in another case (Markinson) the Tribunal reports that it was common ground between the parties that the domestic Courts are “under an obligation to interpret national law so as to achieve consistency with, and give effect to, European law”. In this case, as in Markinson, we see no need to address the question whether European law has direct effect, and our decision takes no risk of failure to apply the Directive.

If the Complainant had shown no evidence of concern about landscape impact, or if the allocation of the issue to one framework rather than the other could have led to a material difference in treatment of the substantive issue, these would have been relevant factors to take into account.

Only the connection with an impact on land or landscape links the concerns in this case into environmental rights. Had the memorial in question been inside a public building, the landscape context would have been absent but the cultural concerns would not have been different.

[45] The Respondent cited a number of cases where relevant environmental information included inter-alia the names of officials who had dealt with the processing of such information within public authorities concerned with such similar issues in support of their submissions referred to at **[39]** above, which we have accepted. We further accept the submission on behalf of the Respondent that the provisions of Regulation 13 indicate the anticipation and intention of the legislation that personal data, including the names of individuals, is within the definition of environmental information in the EIR. We are reminded in submissions that the issue in this appeal is solely whether the disputed information is environmental information within the meaning of regulation 2(1)(c) EIR. We find that it is. The effect of our decision is that the identity of the author or authors of the EQIA is environmental information for the purposes of the Regulations and Direc-

tive, but it is not the effect of our decision that the information requested must be immediately disclosed.

[46] The Respondent relies in support of the contention that the definition of environmental information is to be construed broadly on the decision in *Mecklenburg v Kreis Penneberg-Der Ladrat*. C-321/96 [1968] ECR 1-3809 AT Paragraphs 19-20. and further relies on Recital 10 to Directive 2003/4 EC in support of the contention that the purpose of the regime is to adopt a wide definition of what is environmental information, and as such the Respondent submits that regulation 2(1) must be interpreted in accordance with that objective. We accept this submission also and further remind ourselves that Regulation 12 (2) EIR states “*A public authority shall apply a presumption in favour of disclosure*”. For this reason also, and in the circumstances set out above, we refuse the appeal.

Signed:

Brian Kennedy QC

Tribunal Judge

20 May 2011