

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

Decision notice

Date: 19 October 2016

Public Authority: **Caerphilly County Borough Council**
Address: **Penallta House**
Tredomen Park
Ystrad Mynach
Hengoed
CF82 7PG

Decision (including any steps ordered)

1. The complainant requested information about a particular planning application and information about the installation of a mirror on a bridge structure. The Council applied regulation 6(1)(b) to information about the planning application and stated it did not hold any information about the mirror in question. The Commissioner's decision is that the Council correctly confirmed that information about the mirror in question is not held and therefore it complied with regulation 5 of the EIR. However, the Council failed to issue a refusal notice within 20 working days and breached regulation 14 of the EIR. The Commissioner also finds that the Council did not breach regulation 11(4) of the EIR in failing to conduct an internal review within the required timescales.

Request and response

2. On 1 October 2014 the complainant wrote to the Council regarding the temporary traffic lights at Bridge Street, West End, Abercarn and the housing development on the old Council Site, West End, Abercarn and requested information in the following terms:

“Under the Freedom of Information Act; will you please supply me with all the details of regarding the application and subsequent approval of Housing Development for this Site. To include: - the full Council feasibility study – what time of day did survey/s take place e.g. rush hour, school times etc ? How many times of day? Did full traffic survey details take place – buses coaches, HGVs taken into account? I will need the names of all the Council Officials involved plus; any vested interests declared (or not declared?) Name of development company and interested companies & parties? How many applications – and for what? Plus; any rejections/objections – and for what? Was the application ‘posted up’ on nearby lamp posts and declared in local press? If so, when? (as I did not see any – and nor did any of the local residents) N/B as I would certainly oppose such a development re: as would the owner of Abercarn Concrete Products! (hence **WHY** the Council personal assurance of ‘no housing development to be allowed’) I will require ALL the Council Mins appertaining to this Application / Approval – and I do mean: ALL. Also I will require all information regarding sewage and drainage N/B there is already ‘major problems’ with excessive water ‘run-off’ and sewage over-flow due to pipework system not being updated since there was just a ‘tin works’ in the area i.e. over a 120yrs ago. Therefore I require a ‘full report’ from yourselves and the water company (Welsh Water) as to whether this serious flood issue has been taken into account i.e there is already sewage and flooding issues with my property: at this present moment! Hence, any further housing development will only increase the problem”

In the same letter as a postscript the complainant also asked “N/B if the Council ‘does not authorise the use of mirrors on the highway’. Why did the Council install said mirrors - on the bridge structure (in the first place?)”

3. The Council responded to the request for planning information on 20 October 2014 and stated that information relating to planning matters associated with the development in question was publicly available. It confirmed that the relevant planning files (paper and electronic) were available to view at its offices in Pontllanfraith. The Council also stated that minutes of meetings associated with the planning applications were available on its website. As such, the Council stated that it considered this information to be publicly available and easily accessible and regulation 6(1)(b) of the EIR applied. The Council issued a further response on 13 November 2014 which addressed the request for information about the mirror situated on the highway and stated it had not erected any mirror on the highway and therefore it did not hold any information.

4. On 7 June 2015 the complainant wrote to the Council and expressed dissatisfaction with its response to the request. He chased the Council for a response on 8 July 2015.

Scope of the case

5. On 5 August 2015 the complainant wrote to the Commissioner about the Council's handling of his request. Following advice from the Commissioner on 20 August 2015 the complainant wrote to the Council and specifically requested an internal review of its handling of his request. This was acknowledged by the Council on 10 September 2015.
6. The complainant wrote to the Commissioner again on 4 December 2015 to confirm that he had still not received the Council's internal review outcome.
7. The Commissioner wrote to the Council on 22 December 2015 reminding it of its obligations under the FOIA and asked that it issue with the outcome of its internal review within 20 working days.
8. On 1 April 2016 the complainant contacted the Commissioner again to confirm that he had still not received the Council's internal review response. As a result of the delays the Commissioner accepted the complaint as eligible for consideration.
9. The Council provided the outcome of its internal review on 10 June 2016. It upheld its position that regulation 6(1)(b) of the EIR applied to planning information about the site in question. The Council confirmed that it had handled the request for information about a mirror on the highway under the FOIA. It apologised for the delay in responding to the request and confirmed that it did not hold any recorded information relating to the mirror.
10. The Commissioner wrote to the complainant on 14 June 2016 to ascertain whether he still wished to pursue his complaint in light of the Council's internal review response. She advised that, based on the evidence available, her preliminary view was that the Council had correctly applied regulation 6(1)(b) to the request for planning information relating to the site, as the information was either available to view at Council offices or on its website. If he still wished to pursue the complaint, the Commissioner asked the complainant to confirm the exact nature of his complaint ie whether it related to:
 - the Council's application of regulation 6(1)(b) of the EIR to the planning information requested,

- whether the Council held any recorded information relating to the request concerning a mirror on the highway, or
 - any other aspects of the Council's handling of the request, and if so, to clarify what these were.
11. The complainant responded to the Commissioner on 21 June 2016. In his letter, the complainant acknowledged that many of the issues he had referred to in his letter would fall outside the Commissioner's remit. For example he raised concerns about the role, function and funding of its information governance unit and pay rises of senior Council officials.
12. In terms of the planning information requested the complainant did not indicate that he was dissatisfied with the Council's application of regulation 6(1)(b). However, he raised concerns about problems a colleague of his had previously encountered when attempting to view information at its offices. The Commissioner advised the complainant that should he be prevented access to view the information once he had made an appointment, this would be an issue she could investigate. However, the Commissioner confirmed that if the complainant was unhappy with the attitude and/or behaviour of any officials during any visit he makes to the Council in the future, the matter would need to be raised with the Council direct.
13. The Commissioner wrote to the complainant on 18 July 2016 and confirmed that her remit was limited to investigating whether a public authority had complied with its obligations under the FOIA or the EIR in its handling of a request. She confirmed that many of the issues he had raised did not fall within her remit and confirmed that the scope of her investigation would be to:
- determine whether the Council held any recorded information relating to his request concerning a mirror on the highway, and
 - investigate the delays in the Council responding to his initial request and his internal review request.

Reasons for decision

Correct Access regime

14. The Council originally considered the request for planning information under the EIR and the request relating to the installation of a mirror on the highway under the FOIA.

15. The Commissioner considers that information relating to planning and development falls within the definition of environmental information for the purposes of the regulations as provided in regulation 2(1)(c): information on “measures (including administrative measure), 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 these elements”. The planning and development of land is a measure or an activity that affects or is likely to affect the elements of the environment, and in particular land and landscape.
16. The Commissioner also considers that the correct access regime for the part of the request relating to the installation of a mirror situated on the highway is the EIR as opposed to the FOIA. This is because the information requested, if held, would fall under the definition of 2(1)(c) as it would be information on a measure, which is likely to effect the elements of the environment, namely land and landscape.
17. In light of the above, the Commissioner has concluded that the request, in its entirety, falls to be considered under the EIR.

Regulation 5 – duty to provide environmental information

18. Under regulation 5 of the EIR, public authorities have a duty to provide environmental information identified in a request.
19. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant’s evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and he will consider any other reasons offered by the public authority to explain why the information is not held. He 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 was held; he is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
20. The Council provided the Commissioner with some background information about the mirror in question. It explained that the mirror in question was fixed to a railway bridge at Bridge Street, Abercarn, which was adjacent to a former Council Building Maintenance Depot. The railway bridge itself was owned by Network Rail and had never been owned by the Council. Ownership of the Maintenance Depot transferred to the Council from a predecessor local authority, Islwyn Borough

Council, following a local government reorganisation in 1996. The site was later sold on 1 August 2005.

21. When the site was owned by the Council it was used by its Building Maintenance Department as a base for their operational vehicles. It also contained areas for material storage for undertaking repairs and maintenance work and a UPVC manufacturing workshop. Whilst the main use of the site was not for storage of waste or waste collection vehicles, there were some skips located on site for waste building materials.
22. In the absence of any recorded information held relating to the mirrors, the Council consulted with two existing staff members who were known to work at the depot many years ago to see if they recalled the mirror in question. Both members of staff were former Islwyn Borough Council employees. One of the individuals believed that the mirror was already in situ when he transferred to the depot in 1985 and the other believed the mirror was replaced when it was hit by a lorry in 1993/94. However, neither officer was aware of who installed or replaced the mirror in question.
23. Taking the above into account, the Council advised that if it had held any records relating to the mirror in question, they would be in excess of 11 years old (in light of the fact that it sold the site in 2005). Any records held would more likely be in excess of 20 years old and relate to the predecessor local authority who originally owned the site (1993/94 when the mirror was believed to have been replaced).
24. In terms of the searches conducted to identify information relating to the request, the Council advised that it did not search records held within its Highways Department. This is because it does not authorise the use of mirrors on the public highways as they are not approved traffic signs. The only information held by the Highways Department relating to such mirrors generally are requests received from members of the public asking the Council to install mirrors on the public highway. However, the Council, as a highways authority, has never installed any mirrors on the public highway and as such no information exists relating to the installation of the mirror in question or any others.
25. The Council's Health and Safety Department confirmed that no records were held in relation to the installation of a mirror at Bridge Street, Abercarn. In addition, the property file for the former Building Maintenance Depot contained no information in respect of the mirror.
26. The Council advised that no emails from Islwyn Borough Council exist. This is because it is unlikely that email would have used to the extent that a modern local authority does. Searches were conducted on emails

held by its Head of Housing, who was formerly the manager of the Building Maintenance Department using search terms such as "mirror" and "Abercarn" and no relevant information was identified. The Council is unaware of any other officers from the relevant work area who are still employed, who were email users in order to carry out any other email searches.

27. The Commissioner asked the Council whether any recorded information was ever held relevant to the request but subsequently deleted/destroyed. The Council advised that, if the mirror had been purchased and installed by Islwyn Borough Council, in the absence of any electronic purchasing system, a paper purchase order would have existed, along with a paper supplier invoice. Any such information may have then passed to the Council in 1996 as a result of the local government reorganisation process, when ownership of the site transferred to it. If the mirror was installed by the Council itself then some record of it would have been held. However, in both these scenarios any information that may have been held would have been destroyed in line with the Council's records retention and disposal policy. This is because any such records would be at least 11 years old (when the site was sold) and could be as much as 20 years old (when the mirror was replaced in 1993/94) or even 30 years old (1985 being the oldest recollection of a Council officer that a mirror was in situ).
28. Based on the representations provided by the Council the Commissioner is satisfied that it has carried out adequate searches of the places where relevant information would be held. There is no evidence of any inadequate search or grounds for believing there is a motive to withhold information. The Commissioner has also considered the Council's representations in relation to the subject matter of the request ie that the Council has never installed any mirrors on the public highway. The Commissioner has also take into account that any records which may have been held relating to the mirror in question would have been destroyed in line with the Council's normal records retention and disposal policy. Based on the searches undertaken and the other explanations provided, the Commissioner is satisfied that, on the balance of probabilities, the Council does not hold any recorded information relating to the request. She has, therefore, concluded that the council complied with regulation 5 of the EIR.

Regulation 5 – the duty to make environmental information available on request

Regulation 14 – refusal of request

29. Under regulation 5(1) of the EIR public authorities have a general duty to make environmental information available when it is requested. When the information is not held, public authorities should issue a refusal notice, in accordance with regulation 14 that cites the exception under regulation 12(4)(a) of the EIR. This exception applies when information is not held.
30. The request concerning a mirror was submitted as a “postscript” within a letter to the Council dated 1 October 2014, the main body of which contained a fairly detailed information request relating to planning information. The Council explained to the Commissioner that because of this it was not immediately identified as an information request. It was only when the Council was preparing a response to the request in the main body of the letter that it identified the request relating to the mirror. As a result, a response was not issued until 14 November 2014 stating that the requested information was not held. It did not, however, refer to regulation 12(4)(a) in its response to the request.
31. In failing to state that the information was not held within 20 working days the Council breached regulation 14(2). In failing to state that it was relying on regulation 12(4)(a) the Council breached regulation 14(3).

Regulation 11 – internal review

32. Regulation 11(1) and 11(2) state:

“11.(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant’s request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement”..

33. Under regulation 11 of the EIR a requester can ask for an internal review if he believes a public authority has failed to deal with his request properly, for example by incorrectly applying an exception, taking more

than 20 working days to respond, or mishandling the request in some other way.

34. In most cases, the date on which the requester believes the authority breached the regulations should be easy to determine. It will usually be the day on which the requester receives a response to his information request. However, in a few cases, identifying this date may not be quite so straightforward. The Commissioner therefore considers it good practice for authorities to exercise a degree of flexibility over the 40 day limit in any case where the exact date on which the requester became aware of a breach cannot easily be established.
35. In this case, the Council responded to the complainant's requests of 1 October 2014 on 20 October 2014 and 13 November 2014. However, the complainant does not appear to have expressed dissatisfaction with its handling of the requests until 7 June 2015. In this letter the complainant refers to the Council's response to his request dated 13 November 2014 and another letter from the Council dated 12 March 2015. The Commissioner understands that, as well as dealing with an information request from the complainant, the Council was involved in other correspondence exchanges with him about the subject matter associated with the request ie the development at Abercarn. The letter of 12 March 2015 was part of these exchanges.
36. The Council advised the Commissioner that it did not believe that the complainant was entitled to the internal review he requested on 7 June 2015 due to the length of time which had elapsed since its final response to the request dated 13 November 2014. However, it appears that the Council did not write to the complainant at the time to advise him of this decision. As stated earlier in this notice, the Council did eventually conduct an internal review and provided its response on 10 June 2016.
37. The Commissioner notes that both of the Council's responses to the requests (20 October and 13 November 2014) referred to its internal review process and provided the relevant contact details. In addition, even if the Commissioner were to take the date that the complainant believed the Council to have breached the EIR as 12 March 2015 (the most recent correspondence quoted in the complainant's letter of 7 June 2015), the complainant still failed to make representations regarding the handling of his request within the required timescale of 40 working days.

In light of the above, the Commissioner finds that the Council did not breach regulation 11 in its handling of this request. However, he would recommend that, in future, if the Council believes an applicant is not entitled to request an internal review because any appeal is out of time, it notifies the applicant accordingly.

Right of appeal

38. 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

39. 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.
40. 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

Andrew White
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