

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 November 2018

Public Authority: Carmarthenshire County Council

Address: foia@carmarthenshire.gov.uk

Decision (including any steps ordered)

1. The complainant requested information about the re-positioning of a particular communications cabinet. The Council provided some information and stated other information was not held. The Council disclosed additional information at the time of the internal review and also during the Commissioner's investigation. The Commissioner's decision is that, on the balance of probabilities, the Council does not hold any further recorded information relevant to the request. However, the Commissioner finds that the Council breached regulation 5(2) of the EIR in failing to provide all of the requested information within the required timescale. The Commissioner also finds that the Council breached regulation 11 of the EIR by failing to carry out an internal review within the statutory time limit. The Commissioner does not require any steps to be taken.

Request and response

2. On 16 October 2017 the complainant wrote to the Council regarding the re-positioning of communication cabinets at Margaret Street, Ammanford and requested information in the following terms:

"Please can you provide all details that the Council holds in relation to the scheme to re-position the cabinet(s), and in particular please ensure that the following information is covered:

How much will this move cost? Please provide a breakdown of all fees and costs incurred to date as well as those forecast.

How many cabinets and where will the replacement(s) be sited?

When does the Council intend this move to happen? How long will the work take overall and how long will the disruption take?

Which budget(s) is this work being funded from?

What capacity (number of subscriber lines and expected throughput) will the new cabinet(s) have? Please identify the capacity to be installed as well as the options for future growth.

Does the infrastructure provider anticipate any degradation to the performance of services existing subscribers already pay for?

Who is the prime contractor for the works and who has been subcontracted to perform the move?

If the new cabinet(s) are to be sited near to the Court House, what surveys have been conducted and what safeguards have been put in place to protect the fabric of the building? (eg not causing the facade to subside/crack by undermining the foundations, nor allowing this building to become as unstable as the former Police Station did). Please provide the name of the company/practitioner who has provided this advice and any warnings/limitations to the scope of their opinion.

What bond or financial surety has the Council obtained to isolate taxpayers from the risks of remediation works that may be needed to historic buildings in the area as a direct consequence of the scope of this work? As the Court House still remains in local authority ownership local taxpayers could pick up a hefty repair bill.

Was Carmarthenshire County Council consulted on the positioning of FTTC Cabinet 6P in 2015? Please provide all recorded details of this consultation.

Additionally, does the Council hold records of how much Welsh Government administered funds (Superfarce [sic] Cymru/BDUK) were spent to site and commission FTTC Cabinet 6P adjacent to PCP Cabinet 6 in 2015? If so, please disclose.

When did the Council inform infrastructure providers, funding partners or other elements of government of the road widening and re-siting of the cabinets?

In recent months BTOR staff working on Superfast enablement in the Amman Valley have been drafted in from as far afield as Surrey, Northumberland and Merseyside (local skills and manpower shortage). Current Welsh Government funding will cease at the end of the year (2017). What is the relative priority of this cosmetic task against the enablement of Superfast services for communities that currently fall well beneath the Universal Service Obligation (eg many subscribers connected with voice/ADSL services to Cabinet 1 with enablement work unfinished after many years and many false promises)?

What notice does Carmarthenshire County Council intend to give to businesses and domestic subscribers ahead of this disruption (if any)? Will the Development team reuse the template from the mayhem wrought on local businesses when they deployed heavy demolition plant in Margaret Street?

As the premises connected cover roughly Ammanford town centre and the area north bounded between Tir-Y-Dail Lane and Union Street, there are a significant number of actively monitored alarm systems deployed at banks, commercial premises, two GP surgeries, two dental practices, two pharmacies (with controlled drugs on site) all within the catchment that will be disabled and/or may be falsely triggered by the outage(s). What information has the County Council shared with the Police and emergency services to allow them to plan patrols accordingly and support vulnerable and elderly residents".

3. The Council responded on 7 November 2017 and provided some information and stated other information was not held.
4. On 1 December 2017 the complainant contacted the Council and requested an internal review of its handling of the request with specific reference to the following points:
 - The Council had not provided "all details" as requested which he considered encompassed detailed street plans/drawings.
 - The Council had only provided a total estimate for the cost of relocating the cabinet as opposed to a breakdown of the costs. The complainant pointed out that he expected to receive copies of authorised purchase orders issued to BT or its contractors.
 - The Council had not provided specific details as to the location of the new cabinets and had merely stated they would be "adjacent to the Court House".

- The Council had confirmed that it was awaiting a timetable of the relevant works from BT but excavations had started the following week.
 - In relation to the request for notices the Council intended to give to businesses and domestic subscribers the complainant indicated that he was looking for copies of any such advice the Council intended to provide to parties.
5. The Council provided the outcome of its internal review on 13 February 2018 and disclosed some additional information held relevant to the request.

Scope of the case

6. The complainant contacted the Commissioner initially on 9 February 2018 to complain about the delay in the Council providing the outcome of its internal review. The complainant contacted the Commissioner again on 29 March 2018 following receipt of the Council's internal review response to complaint about its handling of the request.
7. Based on the content of his complaint to the Commissioner, she agreed with the complainant that the scope of her investigation into this complaint is to:
- a. determine whether the Council holds any further recorded information such as maps or street plans showing the location of the new communications cabinet, and a register of works in relation to the re-positioning of the cabinet;
 - b. consider the Council's response relating to the costs of the works;
 - c. investigate whether the request should be considered under the FOIA or the EIR; and
 - d. consider procedural matters associated with the Council's handling of the request.
8. During the course of the Commissioner's investigation, the Council disclosed additional information relevant to the request, including an email and further drawings/maps showing the location of the communications cabinet, a bill of quantities and a works notice provided to the Council by BT Openreach.

Reasons for decision

Is the information environmental?

9. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

“any information in written, visual, aural, electronic or any other material form on –

(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...”.

10. In coming to her view that the requested information is environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term “any information...on” in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment. In other words information that would inform the public about the element, measure etc under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
11. The information requested by the complainant relates to the re-positioning of a communications cabinet on a public road. The Commissioner considers that the repositioning of such a cabinet is a measure or an activity that it is likely to affect the elements of the environment, and in particular the land and landscape. The Commissioner therefore considers that the request falls to be considered under the EIR.

Regulation 5 – Duty to make environmental information available on request

12. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request.

13. 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 argument. She will also consider the actions taken by the 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 was held, she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
14. The Council advised the Commissioner that, on receipt of the request, it was forwarded to the Environment Department FOIA mailboxes. The Economic Development Manager took responsibility for the request and allocated it to the relevant Area Manager whose service funded the scheme relating to the communications cabinet. The Area Manager undertook the following searches:
 - Manual searches of the 3 electronic scheme files (named 'Highways', 'Junction' and 'BT') held within the Economic Development team on the Council's file plan.
 - Requested copies of drawings from the Council's Highways team who commissioned the scheme design.
 - Contacted the former Project Manager to establish whether she held any relevant information.
15. The Council confirmed that the searches undertaken by the Area Manager should have identified all relevant information as no other officer or service area would have had any involvement in the specific aspects of the scheme covered by the request.
16. However, following the involvement of the Commissioner, the Area Manager undertook a further search of the 'Junction' folder, which contains sub-folders, two of which are named 'BT' and 'Phase 1 Wall'. The Council advised that when it conducted its initial search for information it did not search the contents of the 'Phase 1 Wall' folder as it related to a retaining wall, which was not part of the subject matter of the request. However, when further searches were carried out, an email containing additional drawings of the scheme were identified as having been misfiled in the folder, when it should have been within the 'BT' folder. This information was disclosed to the complainant during the course of the Commissioner's investigation.

17. The Council advised the Commissioner that it has established that using the Council File Plan's search facility (instead of undertaking a manual search) would have identified the email and attachments at the outset, but only if the search term 'plan' was used. The Council has conducted a further search of its File Plan using the term 'plan' and no further relevant information was identified.
18. Based on the representations and evidence provided by the Council the Commissioner is satisfied that it has carried out adequate searches of where relevant information would be held. The Commissioner has not seen any evidence of any inadequate search or grounds for believing there is any motive to withhold information relevant to the request. Based on the searches undertaken the Commissioner is satisfied that on the balance of probabilities, the Council does not hold any further recorded information relating to the request, other than that which it has disclosed.
19. With reference to part 2 of the request relating to the costs involved in the scheme to reposition the communications cabinet, the Council initially stated that the estimated costs for the scheme was £109,000. In his internal review request, the complainant re-iterated that he had requested a breakdown of the costs involved and that he expected this part of his request would encompass "*copies of duly authorised purchase orders issued to BT and other subcontractors*". In its internal review response the Council disclosed copies of a purchase order and invoice for the scheme.
20. In his complaint to the Commissioner, the complainant expressed concern that the Council's original response that the estimated cost for the works was £109,000 did not include VAT of circa £22,000 (as evidenced in the copy of the pro-forma estimate which was disclosed with its internal review. He asked the Commissioner to consider this issue as "*There is an observed trend for the Council to under-report many items of spending, as documented on various blogs*".
21. The Commissioner raised the above point with the Council who advised that it operates its budgets on "*a net of VAT basis as VAT is recoverable*". This is the reason why the figure quoted in its initial response was quoted without the VAT. However, the Council acknowledged that it would have assisted the complainant if it had made this clear in its initial response.
22. The Commissioner accepts the Council's explanations as to why the figure it quoted in its initial response was different to the figure shown in the documentation held relevant to the request. However, she recommends that in the future the Council may wish to indicate whether

any costing figures it provides in relation to a request for information include VAT.

Regulation 5(2) – Time for compliance

23. Regulation 5(2) of the EIR states that information shall be made available *"as soon as possible and no later than 20 working days after the date of the request"*.
24. In this case the request was submitted on 16 October 2017. The Council provided some information with its initial response on 7 November 2017 and disclosed additional information in its internal review response dated 13 February 2018. In addition during the course of the Commissioner's investigation the Council disclosed some additional information held relevant to the request.
25. In failing to provide all of the information held relevant to the request within 20 working days after the date of receipt, the Commissioner finds that the Council breached regulation 5(2) of the EIR.

Regulation 11 – Representations and reconsideration

26. Under regulation 11 of the EIR, *"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"*. In other words, the EIR includes a statutory right for applicants to request an internal review, so long as they submit it within 40 working days of receiving the response. The public authority then has 40 working days in which to carry out its internal review.
27. In this case, the complainant requested an internal review on 1 December 2017; the Council did not complete it until 1 March 2018. By failing to carry out an internal review within the statutory time limit of 40 working days, the Commissioner finds that the Council breached regulation 11 of the EIR.

Right of appeal

28. 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

29. 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.
30. 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

David Teague
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