



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

EA/2015/0193

ON APPEAL FROM:

**Information Commissioner's Decision Notice: FER0576448
Dated: 16 July 2015**

**Appellant: DANIEL MORRIS
Respondent: THE INFORMATION COMMISSIONER**

Date of hearing: 25 February 2016

Date of Decision: 29 February 2016

Date Promulgated: 8th March 2016

**Before
Henry Fitzhugh
Michael Hake
Annabel Pilling (Judge)**

Subject matter:

Environmental Information Regulations 2004 – Reg. 5 – duty to make available environmental information on request

Environmental Information Regulations 2004 – Reg.6(1)(b) - information already publicly available and easily accessible to the applicant in another form or format

Representation:

For the Appellant: Daniel Morris

For the Respondent: Helen Wrighton

Decision

For the reasons given below, the Tribunal refuses the appeal and upholds the Decision Notice dated 16 July 2015.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notices issued by the Information Commissioner (the 'Commissioner') dated 16 July 2015.
2. The Decision Notice relates to a request made by the Appellant to Carmarthenshire County Council ('the Council') to be provided with copies of information relating to a specified planning application.
3. The Council refused to provide copies of the information requested relying on Regulation 6(1)(b) of the Environmental Information Regulations 2004 (the 'EIR') on the basis that the information requested was already publicly available and easily accessible for viewing at its area offices.
4. It upheld that decision following an internal review.
5. The Appellant complained to the Commissioner, who investigated the way in which the request had been dealt by the Council. During the Commissioner's investigation, the Council, following a review of its processes, confirmed to the Commissioner and the Appellant that the requested information was now published and available to view online.
6. As a result of viewing the information online, the Appellant indicated that it was clear that the Council had held much of the information electronically at the time of his request, despite the refusal on the basis that the information was easily accessible for inspection. He also indicated that he did not consider that the Council had in fact provided or published all the information it held which was relevant to his

request. In particular, he referred to the pre-planning advice which had not been disclosed or published, and that the Council had not provided the upload and transfer logs associated with electronic documents held relevant to his request.

7. The Council identified further information falling within the scope of the request, namely information relating to pre-planning advice, which was neither available for viewing at its offices at the time of the request, nor published and available to view online. It subsequently provided that information to the Appellant.
8. The Commissioner concluded that the Council correctly applied regulation 6(1)(b) to some information but breached regulation 5(2) in relation to the pre-planning advice information as it had not provided the information within 20 working days after the date of receipt of the request. As that information had since been provided to the Appellant, the Commissioner did not require the Council to take any further steps.

The appeal to the Tribunal

9. The parties agreed that this was a matter that could be dealt with by way of a paper hearing. The Council was not joined as a party and has taken no part in this appeal.
10. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and written submissions from the parties. We cannot refer to every document or address every point made in the written submissions but have had regard to all the material when considering the issues before us.
11. The Commissioner submits that as the Appellant is in possession of the requested information, this appeal is an academic one. He points out that whilst decision notices from his office may be helpful in setting out the relevant law and the Commissioner's interpretation and/or approach to applying the law, ultimately each case will be decided on its own merits and its own facts. He submits that similarly the decisions of the Tribunal are not binding, merely useful and persuasive.

12. The Appellant disagrees with the weight that can be attached to decisions of the Commissioner and, it must follow, to decisions of the Tribunal. The Appellant has explained that the outcome he is seeking by way of pursuing this appeal is for the Commissioner to change his view on the Council's application of regulation 6(1)(b) and that by doing so discourage public bodies in Wales from attempting to hide behind this regulation.

13. The Appellant's position is that there is merit in this appeal as he submits that he has not received all the information falling within scope of his request which would include the metadata attached to any electronic document.

The Issues for the Tribunal

14. The EIR bring into effect Council Directive 2003/4/EC on public access to environmental information (the 'Directive'). The EIR creates a duty on public authorities to make environmental information available upon request, subject to certain exceptions, if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.

15. Two issues arise in this appeal:

- 1) Whether the Council made available all the information requested. The Appellant submits that the metadata attached to any electronic document falls within the scope of request.
- 2) Whether the Council was entitled to rely on regulation 6(1)(b) to refuse to provide a copy of the requested information on the basis that the entirety of the information was already publicly and easily accessible to the Appellant in another form or format, namely available for inspection at its offices in Llandeilo.

Scope of request

16. The Appellant's request for information was as follows:

“In relation to the planning application E/31117 on the e-Planning section of Carmarthenshire County Council’s website (Discharge of planning conditions 3 & 4 of E/28634), material information needed for Carmarthenshire County Council to conform to the Aarhus Convention appear to be missing.

Documentation available to archive today comprised of a single delegated decision notice and two maps (dates 2013 from E/28634, showing the approved access track for the turbine and construction machinery through the existing farm entrance, as opposed to the hole smashed in the hedge to facilitate the applicant’s unauthorised development activity with C&F Green Energy; which Carmarthenshire County Council’s Contact Centre referred to the Planning Department for enforcement action on 19 February 2015 as per <https://www.fixmystreet.com/report/590519>). There is also a single observation recorded from the Planning Ecology officer.

Please can you provide:

- (a) copies of the site, press and neighbour consultation notices*
- (b) copies of the Detailed Landscape and Biodiversity Compensation Scheme (including the full list of items identified in Notes 105 of E/28634) proposed by the applicant, any correspondence regarding the same, and the final written Scheme as approved by the LPA to satisfy Condition 4 of E/28634*
- (c) copies of the details of when the construction was/is to start and finish, maximum height of any construction equipment, latitude and longitude of the development as submitted by the applicant, correspondence regarding the*

same and the final written scheme as approved by the LPA as per Condition 3 of E/28634

(d) copies of the observation of the Ecology Officer

(e) all other documentation relating to E/31117 neither covered by issues a-d or the material referenced in paragraph two above as publicly available today”.

17. The Appellant submits that the metadata contained in the electronic originals of documents, that is, the electronic footprint of the planning file, is just as much a part of the application documents as the words and lines but cannot be conveyed on paper.

18. He submits that by defining the medium in which he was allowed to view the information, that is to inspect the paper planning file, the Council has partially pre-determined the intent of the requestor. The Council has therefore *“actively censored what information is available to inspect”*. He submits that the electronic files, with the underlying metadata, limit this scope for abuse and, following his examination, have highlighted areas of concern. In his view, the Council *“hid”* behind regulation 6(1)(b) as it *“may not have wanted the further embarrassment revealed by the metadata in the application documents, and its own processing, raising more “awkward” questions of who did what and when”*.

19. The Commissioner refers to his own guidance entitled “Determining whether information is held” which specifically addresses the “electronic footprint” issue:

“...If an applicant specifically requests information on the properties of an electronic document, public authorities will be obliged to provide it, subject to other provisions in the relevant legislation. However, if it is not requested there is no expectation that public authorities will provide it...”

20. The Commissioner submits that unless a requestor specifically requests the metadata behind an electronic document he would not expect a public authority to provide this, whether the requested information is provided in a hard copy or inspected as in this case.

21. This Guidance is not binding on us. Each case must be determined having regard to its circumstances. We have looked at the initial request for information, recorded in full above at paragraph 16. This was a carefully worded request, identifying the specific information sought. It was not a wide, general request such as “any information relating to” a specified planning application. On any reading of the request, the Appellant was very clear about what information was sought, although he did include a slightly more general request at (e). In our view, if the Appellant had wanted the underlying electronic data then he could, would or should have specified it in his request. He did not. It is unrealistic to infer this from the request he made, and we do not consider that it can be “read in” to the request as the Appellant suggests.

Regulation 6(1)(b)

22. Regulation 6(1) provides that:

“Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless-

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible for the applicant in another form or format.”

23. The Appellant had requested “copies” of certain specified information and “all other documentation” relating to the planning application not covered by the specified requests as publicly available today.

24. The Council explained that the information is held as part of a publicly accessible planning application file which could be inspected by virtue of separate statutory provisions in planning legislation. It gave the Appellant details of how to arrange an inspection.

25. The Appellant submits that the information was not easily accessible to him. He submits that the practical steps needed for him to arrange an appointment within the opening hours of the Council's area office were too onerous, particularly in his personal circumstances.

26. The offices are based in Llandeilo and it is understood are open from 0900 until 1630 Monday to Friday.

27. We have considered the various factors put forward by the Appellant as relevant to a consideration of whether the information was easily accessible:

(a) Although the offices in Llandeilo are approximately 8.5 miles from his house, the Appellant submits that the round-trip journey would take approximately 1 hour, not the 18 minutes suggested by the Council. This is based upon his last two journeys passing through Llandeilo when he was stuck in road works and then water mains work. It is not clear when these journeys were made or whether these works were on going around the time of his request. We do not consider a journey of 1 hour to mean that the information was not easily accessible to this Appellant. Living in a rural community will inevitably mean that there is a significant distance between locations.

(b) To make the journey by public transport or on foot would take considerably longer and may not be possible for those with health or fitness issues. This is not something the Appellant suggests is directly relevant in his own case. If the Appellant had needed to rely on public transport we are satisfied that it was available, and that the journey time by public transport is

still within the range of what we consider reasonable when assessing whether the information was easily accessible.

- (c) There was an assumption that he had availability, licence, tax and insurance of a private motor car. The Appellant does not submit that this mode of transport was not available to him and his submissions in respect of journey time and parking make it clear that it was so available.
- (d) Although he agrees he was able to make time to attend a planning meeting in January 2014 during office hours at a more distant location, he submits that this was a matter of particular importance for which he was prepared and able to take a day off work. We agree with the Appellant that this factor is irrelevant to a consideration of whether the information which was the subject of this request was easily accessible to him at the offices in Llandeilo in the spring of 2015.
- (e) The Appellant appears to challenge the Commissioner for accepting the evidence of the Council that the offices were open between 0900 and 1630 on weekdays. He submits that the opening hours of the Council's offices are not available on the Council's website and the Council does not operate an out-of-hours helpline to provide that information. The Appellant makes no mention of the email details that had been provided as a point of contact to make arrangements to inspect the information which we are satisfied would have enabled him to find out that information if he was genuinely concerned about the time frame the area offices of the Council were open. We do not consider the Appellant's submissions in respect of the difficulty which might be faced by his neighbours, who he states are teachers, a pharmacist and shop owners, to be relevant to a consideration of whether the information was easily accessible to the Appellant as the requestor of the information.

- (f) That the Appellant had a busy period at work and insufficient annual leave available to take off a working day.
- (g) That, additionally, the Appellant has significant personal commitments which were a priority and impacted upon his ability to easily access the information. We agree with the Commissioner that, while we acknowledge that, like many people, the Appellant has a busy schedule as a result of work and family commitments, these are not such significant factors as to render the information held at the Council's offices to not be able to meet the test of being publicly available and easily accessible to him within the relevant legislation.

28. We concluded on the basis of all the information before us that it was reasonable for the Council to make the information available in the form it did and that it was publicly available and easily accessible to the Appellant. We are satisfied that the Council's offices are open during normal office hours, not limited to one day or one short window of time. The offices are in Llandeilo which is easily accessible for the Appellant. We consider that the Appellant may prefer not to make the journey and to spend his time working or on family commitments, but we are quite satisfied that the journey required was a modest one and one that was easily achievable within the time taken in pursuing this appeal.

29. We consider that the Council was correct to rely on regulation 6(1)(b) and the Commissioner's decision was entirely correct.

30. We were provided with much by way of background information which we read and which give context to the request but do not fall within the remit of the Tribunal. We were not persuaded that there was any basis for concluding that this Appellant had been treated differently by the Council as a result of previous dealings with the Appellant.

31. For the reasons given we therefore dismiss this appeal.

32. Our decision is unanimous.

Judge Annabel Pilling

29 February 2016