



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

Appeal Reference: EA/2016/0258

Before

Judge

David Farrer Q.C.

Tribunal Members

Jean Nelson

and

Gareth Jones

Between

Graham Smith

Appellant

and

The Information Commissioner (“The ICO”)

Respondent

Decision and Reasons

The Tribunal is satisfied that Caerphilly County Borough Council (“the Council”) did not at the date of the request (and does not) hold the requested information. It was, therefore entitled to rely on a refusal to disclose information provided for in Regulation 12(4) of the Environmental Information Regulations, 2004 (“The EIR”). The Council did not breach EIR Regulation 11(4). The appeal is therefore dismissed.

1. Mr. Smith objected strongly to a number of planning decisions taken by the Council, which affected his property. On 1st. October, 2014, he sent an extensive request for information as to planning matters relating to a neighbouring housing development. He added to that request the question -
“NB 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?)”
2. The Council responded to the request on 20th. October, 2014 by invoking EIR Reg. 6(1)(b) and referring Mr. Smith to the availability of the planning information either at its offices or on its website.
3. On 13th. November, 2014, treating the question as to traffic mirrors as a further request for information, it stated that it had not erected the traffic mirror and held no information in relation to it. That response was late and the ICO, in her Decision Notice (“the DN”), found a breach of EIR Regulation 14.
4. Seven months later, on 7th. June, 2015, Mr. Smith expressed dissatisfaction with the Council’s responses. Following advice from the ICO he made formal representations in relation to his request, purportedly pursuant to EIR Reg. 11(1), on 20th. August, 2015. Those representations were backed up by reminders from both Mr. Smith and the ICO and, eventually, on 10th. June, 2016, the Council provided its decision following consideration of the representations. As to the planning matters it affirmed its reliance on EIR reg. 6(1)(b), that is to say that the requested information was already available to the public. As to the traffic mirror, it repeated its denial that it held any information.

5. The ICO indicated to Mr. Smith that the DN would deal with the traffic mirror issue and the Council's handling of his request for a reconsideration. The planning questions had been resolved and other complaints regarding the Council officers' conduct fell outside the jurisdiction of the ICO or, for that matter, the Tribunal.
6. The DN found (i) that the Council was correct in stating that it held no information relating to the traffic mirror and (ii) that it had not breached Reg. 11(4) as regards the reconsideration. Mr. Smith appealed
7. His grounds, in the form of a letter, raised a number of issues outside the scope of this appeal. However, they included the assertion that the Council had installed the traffic mirror and it was, therefore, "a nonsense" for them to claim otherwise. That claim evidently implied that the Council, having erected the mirror, must hold information relating to it in recorded form. Mr. Smith also raised the question of the Council's delay in considering his representations pursuant to EIR Reg.11(1).
8. The Council's case as to information regarding the mirror, as set out in its response to the ICO's inquiries, is quite simple. The mirror was fixed to a bridge in Bridge Street, Abercarn, which belonged to Network Rail. The bridge was adjacent to a Building Maintenance Depot which the Council sold in 2005. It had owned the Depot since 1996, when it inherited it from the predecessor local authority ("Islwyn") as a result of a local government reorganization in 1996. It has never installed or authorized the installation of traffic mirrors, because they are not an approved traffic sign.
9. Electronic and hard copy searches were conducted of the emails of the manager of the former Building Maintenance Department, the Health and Safety Department and the Property file but nothing relating to a traffic mirror emerged. The Highways Department held nothing concerning traffic mirrors save records of requests from members of the public that the Council should install them, which it never did.
10. Two former employees of Islwyn who had transferred to the Council, recalled a mirror at the relevant site long before the 1996 reorganisation but did not state, and probably did not know, who had installed it.
11. If Islwyn had transferred any relevant record to the Council, it would have been deleted or destroyed in accordance with the Council's Records Retention and Disposal Policy. Such a record would have been at least twenty years old at the date of the request, hence long since disposed of.

12. The information requested by Mr. Smith was undoubtedly “environmental information”, hence his request was subject to the EIR. Regulation 12(4)(a) provides that a public authority may refuse to disclose information to the extent that it does not hold that information when the request was received. The Tribunal’s judgment whether the requested information was held is made on a balance of probabilities. Like the ICO, it has regard to a number of factors in its determination. Is there an obvious reason why the public authority would hold the information, for example, because it is required for the performance of its normal functions? Is there evidence that it did hold the information at a time close to the date of the request, for example, a reference to that information in other documents held by the authority at or about the material time? How thorough was the search for the information? Did it cover the departments by which it was likely to be held, if it was held at all? Does the authority, or a relevant officer within the authority, have a motive for concealing such information, if it exists?
13. We have no doubt that the Council is right when it denies holding any record of this traffic mirror. It was evidently installed before the Council took over the adjacent property from Islwyn. The Council’s policy was never to install such mirrors. It had no reason to hold any such record, which had no relevance to the performance of its duties. If any record, such as a supplier invoice, was transferred to the Council in 1996 (and there is no evidence that such a transfer occurred), it would have been destroyed long ago in accordance with the Records Retention and Disposal Policy. There is no credible evidence to suggest any possible motive for the Council to conceal such information.
14. As to any breach by the Council of EIR Reg. 11(4), Reg. 11(1) empowers an applicant to make representations to a public authority to reconsider a request for information. Reg. 11(2) restricts the exercise of that power to a period of forty days from the date when the applicant believes that the public authority has failed to comply with an EIR requirement, here either the failure to issue its refusal within twenty working days, as prescribed by EIR Reg. 14(2) or the refusal to provide the requested information, contained in the Council’s letter of 13th. November, 2014. We assume that the application made by Mr. Smith on 20th. August, 2015 related to the refusal. The time for such an application expired in late December, 2014.
15. Of course, a public authority may consider an application made out of time, as it did here. However, the duty to do so, expressed in Reg. 11(4),

clearly expires at the end of the twenty working day time limit. The policy of Reg. 11 is to give statutory force to the public authority's duty to review but to place a limit on the time for which it must remain prepared to reconsider its decision so that reviewing officers are not burdened indefinitely with the obligation to scrutinise stale decisions.

16. It is regrettable that, having accepted the task of reconsidering the application, the Council took many months to do so and did not point out to Mr. Smith that he was out of time. Such considerations do not, however, involve a finding that the Council breached Reg. 11(4). Such a breach requires a timely application.

17. For these reasons we dismiss this appeal on both the issues to which it relates.

18. This is a unanimous decision.

David Farrer Q.C.,

Tribunal Judge,

12th. May, 2017