

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 31 October 2016

Public Authority: Welsh Assembly Government
Address: Cathays Park
Cardiff
CF10 3NQ

Decision (including any steps ordered)

1. The complainant has requested various items of information regarding the resurfacing of the A40 from Raglan to Abergavenny. The Welsh Assembly Government confirmed that it had no plans to undertake carriageway resurfacing work on that particular section of the A40, adding that as it has no plans, it does not hold relevant information. The Commissioner's decision is that the Welsh Assembly Government has complied with its obligations under regulation 5 of the EIR. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 8 March 2016, the complainant wrote to the Welsh Assembly Government (Welsh Government) and requested the following information:

"1. Could you please tell me whether the work for the resurfacing of the A40 from Raglan to Abergavenny has been contracted?"

2. If so, please could I read the contract?"

3. Has the decision been made as to what sort of specific resurfacing will be done?"

4. If so, what's the surface and when will work on applying this surface begin? And end?"

5. Are there any plans to replace the projected resurfacing with fences or trees?"

6. *Or carry out this fence/tree work – alongside the resurfacing?*
 7. *If so, can I read the plans or contracts?*
 8. *I would also like a copy of any public communications on the resurfacing of this particular stretch of road (Raglan to Abergavenny, as stated) made in the last five years."*
3. The Welsh Government responded on 10 March 2016 asking the complainant to clarify what she meant by '*public communications*' with the complainant confirming that it meant:

"Any Welsh Government statements made for the consumption of the public on this stretch of road."
 4. On 14 March 2016, the complainant further contacted the Welsh Government to confirm that her request specified the A40 from Raglan to Abergavenny, from the A449 turn off to Monmouth, to the Hardwick roundabout, Abergavenny. She added, that for the avoidance of doubt, it included the A40 road past Raglan Castle.
 5. The Welsh Government sent its substantive response on 24 March 2016. It stated that there are no plans to undertake carriageway resurfacing work on that section of the A40 between Raglan and Abergavenny. It added that as no works have been planned, no contract has been prepared and no decision has been made regarding the surface type, as there is no programme in place.
 6. It further informed the complainant that sections of the A40 have been identified as a Priority One Noise Action Plan area and the initial design indicates that noise fencing would be the most appropriate form of mitigation, although no funding has currently been allocated to this. In terms of tree working, the Welsh Government stated that it has no plans, and as there is no current programme for noise fencing, no plans or contract documents have been prepared to date. Finally, the Welsh Government confirmed that it has not made any public statements in relation to possible resurfacing of this stretch of the A40 in the past five years.
 7. Following an internal review the Welsh Government wrote to the complainant on 6 May 2016. It stated that as there are no plans to undertake resurfacing work on the relevant stretch of the A40, that it does not hold relevant information in respect of items 1 to 4 and item 8 of her request.

Scope of the case

8. The complainant contacted the Commissioner 6 May 2016 to complain about the way her request for information had been handled.
9. The Commissioner considers that if the information was held, it is likely to fall within the definition of environmental information as specified in regulation 2 of the Environmental Information Regulations 2004 ('the EIR'). The scope of the Commissioner's investigation will therefore focus on whether the Welsh Government has complied with its obligations under regulation 5 of the EIR.

Reasons for decision

The appropriate legislation

10. The Commissioner has taken the definition of environmental information as stipulated under regulation 2(1) of the EIR into account when deciding on the appropriate legislation under which to consider this request.
11. Regulation 2(1) of the EIR defines 'environmental information' . The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is any information in any material form on:
 - '(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, 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;*
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (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...'*
12. The Commissioner notes that the information requested (if it were held), relates to plans to resurface a particular stretch of road, including the possibility of adding fencing or trees to mitigate against noise pollution.

If it were held, the information is therefore regarding plans to alter the road surface and to mitigate against noise pollution. The Commissioner therefore considers that the information is environmental, as defined by regulation 2(c) of the EIR in conjunction with both regulation 2(a) and 2(b).

Regulation 5 – duty to make environmental information available on request

13. Under regulation 5(1) of the EIR, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.
14. In her consideration of this case, the Commissioner is mindful of the former Information Tribunal's ruling in EA/2006/0072 (Bromley) that there can seldom be absolute certainty that additional information relevant to the request does not remain undiscovered somewhere within the public authority's records. When considering whether a public authority does hold any additional information therefore, the normal standard of proof to apply is the civil standard of the balance of probabilities.
15. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
16. In this particular case, the complainant does not accept that there is no information held, particularly in respect of item 8 of her request as she has stated that both her local MP and AM have confirmed that they have received communications in the press.

Items 1 to 4

17. The Commissioner notes that items 1 to 4 of the request were in respect of a contract for the resurfacing of the A40 from Raglan to Abergavenny. She therefore contacted the Welsh Government to request details and evidence of, and the rationale for, the search undertaken to determine that no information was held.
18. The Welsh Government confirmed to the Commissioner that there is no scheme or planned works in respect of this particular stretch of the A40. It further confirmed that no search was undertaken for the information as the information does not exist.

19. Whilst the Commissioner would normally expect a public authority to undertake a search for information relevant to a request, she accepts that in this case, the rationale for not searching was reasonable, and has concluded, based on the balance of probabilities, that if there are no plans or schemes for resurfacing that particular stretch of the A40, the Welsh Government will not hold any relevant information for these items of the request.

Item 5 to 7

20. Items 5 to 7 were for plans to replace the projected resurfacing with fences or trees. The Commissioner notes that the Welsh Government's response of 24 March 2016, informed the complainant that sections of the A40 have been identified as a Priority One Noise Action Plan area and the initial design indicates that noise fencing would be the most appropriate form of mitigation. It further confirmed that no funding has currently been allocated to this and that there are no plans in respect of tree work, and since there is no current programme for noise fencing, no plans or contract documents have been prepared to date.
21. The Commissioner therefore asked the Welsh Government to provide a copy of the initial designs which indicated noise fencing would be the most appropriate form of noise mitigation. In response, the Welsh Government informed the Commissioner that the terminology used had been mis-leading as there are no designs since it has not yet undertaken a full study necessary before any design work could commence. It further stated that as the complainant has specifically asked about fencing, it was trying to be helpful in its response, and sought advice from engineers for their initial thoughts. The Welsh Government added that based on the engineer's professional experience, and knowing the type of surface on this stretch of road, the engineer concluded that fencing would likely be the most appropriate. The Welsh Government further confirmed that there have been no studies, or design work undertaken or plans developed.
22. Based on the Welsh Government's explanation, the Commissioner does consider its response of 24 March 2016 to the complainant, and referred to in paragraphs 4 and 20 of this notice could be open to misinterpretation. However, she has no reason to doubt the explanation provided by the Welsh Government, and has therefore concluded that based on the balance of probabilities, that it does not hold relevant information in respect of items 5 to 7 of the request.

Item 8

23. Item 8 was in relation to a copy of any public communications on the resurfacing of the same stretch of road (Raglan to Abergavenny), made

in the last five years. The Commissioner notes that the complainant further clarified this as stated in paragraph 3 of this notice to:

“Any Welsh Government statements made for the consumption of the public on this stretch of road.”

24. The Commissioner also notes that the complainant has stated that both her local MP and AM have received communications in the press during this time period. She therefore asked the Welsh Government whether it has made any statements regarding this stretch of road which are not public in the past five years.
25. The Welsh Government confirmed to the Commissioner that it does hold communications with AMs and MPs that would not constitute statements for the public in respect of the relevant stretch of road. It further confirmed that any statements for public consumption would be in the public domain.
26. The Commissioner notes that whilst the Welsh Government has confirmed that it holds statements to MPs and AMs, that they were not public statements, and since the request was for public statements, these would not fall within the scope of the request subject to this notice.
27. Having considered the Welsh Government's response to all items of the complainant's request, the Commissioner considers that the explanations provided in respect of each of these is reasonable and proportionate. She has concluded therefore, that based on the balance of probabilities, that information is not held relevant to the request, and that the Welsh Government has therefore complied with its obligations under regulation 5 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

Andrew White
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