First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0448 (P)

Decided without a hearing on 26 October and 15 December 2020

Before

JUDGE BUCKLEY
SUZANNE COSGRAVE
ROGER CREEDON

Between

NICHOLAS FENWICK

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

THE WELSH GOVERMENT

Second Respondent

MODE OF HEARING

The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of Chamber's Procedural Rules. The code for the form of remote hearing is P.

DECISION

1. For the reasons set out below the Tribunal allows the appeal on the grounds that the matter should have been considered under the Environmental

Information Regulations (EIR) and substitutes the following decision notice to the effect that the Welsh Government was entitled to withhold the information under regulation 12(4)(b) EIR.

DECISION NOTICE

1. The information requested was environmental information within the EIR.

2. The Public Authority was entitled to withhold the information under regulation 12(4)(b) EIR.

3. There is no breach of regulation 9 EIR.

4. The Public Authority is not required to take any steps.

REASONS

Procedural background

1. By a case management order dated 29 October 2020 the Tribunal required the Welsh Government to provide certain information and gave permission to the parties to file any written submissions as a result of that information. The paper hearing was then reconvened on 15 December 2020.

Introduction

2. This is an appeal against decision notice FS50856505 of 25 November 2019 in which the Commissioner decided that the Welsh Government was entitled to rely on s 12 FOIA (Freedom of Information Act 2000) to refuse the request.

2. The issue of whether the information was environmental information was raised by the Tribunal Registrar in her case management directions dated 14 February 2020. The Welsh Government were subsequently joined as a party.

Factual background

3. Mr. Fenwick is the Head of Policy at the Farmer's Union of Wales (FUW). The request relates to responses to the Welsh Government's consultation Taking Forward Wales' Sustainable Management of Natural Resources (the SMNR consultation) which was launched on 21 June and closed on 30 September 2017. '*The Consultation – summary of response*' sets out that the SMNR consultation:

4.

> …gave an opportunity for stakeholders to provide views on a ranges of proposals to inform the future direction of policy development, in particular:

- Opportunities to further enhance the role of our natural resources to improve resource efficiency (circular economy), provide natural solutions or new economic opportunities;

- Alignment with sustainable management of natural resources to optimise multiple benefits provided by our forests, access to outdoors and our designated landscapes;

- Opportunities to provide improved statutory approaches to regulations in marine planning, fisheries, waste, water abstraction and drainage and environmental quality.

- Opportunities for smarter regulatory approaches to address cumulative environmental impacts of low risk activities in the context of land management.

5. The consultation followed on from the development of the Environmental (Wales) Act 2016 and its supporting White Paper, Towards the Sustainable Management of Wales' Natural Resources and the Green Paper, Sustaining a Living Wales.

6. 17,391 responses to the SMNR consultation were recorded in response to 40 questions relating to 56 proposals. This included responses from individuals, representative organisations and a number of organised campaigns. 923 responses were received from individuals and representative organisations.

7. *'The Consultation – summary of response'* states at para 1.12:

> It was possible to submit responses anonymously without linking to a geographical region or location within the UK. However, of those who included their geographical location the overwhelming proportion (via organisation or submitted individually) was from Wales.

Request, response, decision notice and appeal

Request

8. This appeal concerns the following request made by Bernard Griffiths, a representative of the Farmer's Union of Wales (FUW), to the Welsh Government on 25 April 2019:

> Given the recent revelation that 88% of signatures of a petition supporting a ban of pheasant shooting on land managed by Natural Resource Wales came from outside of Wales, and the significant number of campaigns which were aimed at encouraging individuals from across the UK and even further afield to response to the Taking Wales Forward consultation, I am writing to request a breakdown of the responses to that consultation.
>
> In particular, we would request details of the proportion of the 17,000 or so responses to the consultation submitted by residents:
> (a) Of Wales

(b) From the UK but outside Wales
(c) From outside the UK

We would also be grateful for details of the proportion of Welsh respondents who were supportive or otherwise of each of the proposals set out in the consultation – in particular those relating to changes of access, which as you know were a focus of campaigning by organisations.

Response

9. The Welsh Government replied by letter dated 8 May 2019. It refused the request, which it had treated as a FOIA request, on the basis that it would cost more than the appropriate limit of £600 to answer the request. It stated that it had undertaken a sample of the work required to locate and extract the information and from that exercise it estimated that it would take in excess of 181 hours and cost over £7525 to comply with the request.

10. In his request for an internal review Mr. Griffiths asked 'at the very least' for the proportion of respondents who come from Wales.

11. The Welsh Government upheld its decision on internal review. It stated that it would take a similar time to ascertain the proportion of respondents who come from Wales.

Decision Notice

12. In her decision notice dated 25 November 2019 the Commissioner decided that the Welsh Government's estimate that it would take 181 hours to respond to the first element of the request was reasonable. She accepted that the only way to extract all the information within the scope of the request would be via a manual review of the responses. She accepted that responding to the second element of the request would add significantly to the time and cost. She was satisfied that the request could not be answered without exceeding the cost limit.

13. The Commission concluded that there was no meaningful way in which the request could be refined such that it would fall within the cost limit. There was no useful advice and assistance that the Welsh Government could have offered. The Commissioner found that the Welsh Government complied with its s 16 duty.

Notice of Appeal

14. Mr. Fenwick's notice of appeal dated 5 December 2019 appealed against the Commissioner's decision notice on the following grounds:

    14.1. The Commissioner did not take account of the public interest in disclosure

14.2. Disclosure is overwhelmingly in the public interest.

14.3. Further advice and assistance should have been provided by the Welsh Government in accordance with s 16. The Welsh Government could have processed a statistically significant proportion of the responses and provided estimates which went some way to meeting the public interest arguments underpinning the original request.

Submissions

The ICO's response

15. The Commissioner's response dated 17 January 2020 submits that the Welsh Government's estimate is reasonable and that responding to the request would exceed to appropriate limit. Section 12 is not subject to the public interest test.

16. Under s 16 a public authority is required to suggest obvious alternative formulations of the request which enable it to supply to core of the information sought within the cost limits. It is not required to exercise its imagination to proffer other possible solutions to the problem. There was no breach of s 16.

17. The Commissioner applied to strike out the appeal, but this was refused by the Registrar.

Mr. Fenwick's reply

18. By letter dated 10 February 2020 Mr. Fenwick accepted that there was no breach of s 16.

Submissions of the Commissioner on the EIR (25 February 2020)

19. The Commissioner submits that the information is not environmental information. The Commissioner considers the Welsh Government's 'Taking Forward Wales' Sustainable Management of Natural Resources' proposals to be the relevant measure. The Commissioner accepts that this is a measure falling within the definition under regulation 2(1)(c) EIR as it is a policy/plan/programme that is likely to affect the environmental factors referred to in regulation 2(1)(a)-(f) and is also a measure designed to protect those elements.

20. The Commissioner concluded that the geographical information was not 'on' the proposals. This particular information was too far removed from the measure to be said to be 'on' that measure. The actual substance of the consultation responses would be 'on' the measure. The geographical location of the respondents is not.

21. Given the difficulties in drawing the line as to when information is on a measure likely to affect the environment the Commissioner invited the tribunal to consider the application of the EIR exceptions even if it were to agree that the requested information is not environmental. The Commissioner stated that the tribunal may wish to give consideration to the exception in regulation 12(4)(b) EIR as an alternative to s 12 FOIA based on the burden of compliance.

The Welsh Government's response (9 June 2020)

22. The Welsh Government submits that the information is not environmental information under the EIR. The relevant measure is the proposals in the Welsh Government's 'Taking Forward Wales' Sustainable Management of Natural Resources' consultation. It is not disputed that this is a policy/plan/programme that is likely to affect the environmental factors referred to in regulation 2(1)(a)-(f) and is a measure designed to protect those elements.

23. The Welsh Government concurs with the Commissioner that information in relation to the geographical location of respondents is too far removed from the measure and cannot be defined as environmental information for the purposes of the EIR. The geographical location of the respondents was not integral, critical or fundamental to the proposals to the consultation and therefore does not fall into information on the measure as a whole. The information relates only to the consultation response and has no significance to the measure which are the proposals in the consultation. The Welsh Government did not ask for the location information and it has no bearing on their response if they did.

24. If the information had been considered under the EIR the Welsh Government submits that it would have been entitled to rely on the exception in regulation 12(4). The decision maker is entitled to take the costs of compliance into account in considering whether the request was manifestly unreasonable but would have to balance those costs against the benefits of a disclosure under regulation 12(1)(b) EIR.

25. The Upper Tribunal in **Craven** stated that a public authority is entitled to refuse a single extremely burdensome request under regulation 12(4)(b) as 'manifestly unreasonable' purely on the basis that the cost of compliance would be too great, assuming that the public interest favours maintaining the exception.

26. The Commissioner's guidance states that when assessing whether the cost or burden of dealing with a request is too great, public authorities will need to consider the proportionality of the burden or costs involved and decide whether they are clearly or obviously unreasonable. This means taking account of all the circumstances including:

(a) The nature of the request and the wider value in the requested information being made publicly available;
(b) The importance of any underlying issue to which the request relates and the extent to which responding to the request would illuminate that issue;
(c) The size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services; and
(d) The context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requestor.

27. The Welsh Government believes that in addition to the significant cost, the appellant's request causes a significant burden on staff time and divergence of resources. The Welsh Government believes the resources required to comply with the request are unreasonable considering all the circumstances. The analysis involved would require a significant divergence of resources in order to comply with the request. Agreeing to this approach may allow the Appellant to make future similar requests in relation to other consultations where geographical location of respondents has not been recorded, which would cause further significant resource time and cost burdens.

28. This divergence of public resource is not justified as there would be no value in obtaining the information. A significant proportion of respondents did not supply geographical information. The validity of any geographic analysis is likely to be limited.

29. The validity of the data would be limited because a number of the respondents did not respond to a specific question but elected to make general comments on a specific issue or issues. It would therefore be difficult or not possible to attribute geographic status to their views.

30. This was a consultation not a referendum. There are distinct communities of interest in relation to public access matters. Numeric data is of some value in understanding views on the issues, but more important is an understanding of the key issues and standpoints of the communities of interest which has already been gathered and published in the summary of responses. The considerable effort required to gather geographic data would contribute little of additional value.

31. Given that a significant number of people travel to Wales to engage in outdoor recreation, particularly from England, it seems reasonable that they are able to contribute their views. The community of interest of respondents is a more relevant consideration in terms of developing policy in this area rather than geographic origin.

32. The consultation results have already led to further work, and the outputs of this work are of much greater public interest and in light of the limited

additional value of the requested information, the significant divergence of public resources, cost and time required to comply with the request cannot be justified.

33. The public interest in maintaining the exception is the protection of public authorities from exposure to disproportionate burden, placing a strain on resources. There is a general public interest in disclosure to promote transparency and greater public understanding and public participation in environmental decision making. The geographical location of respondents will be of limited additional value and cannot justify the significant burden on Welsh Government's resources.

34. In relation to regulation 9 there is no meaningful way in which the request could have been refined given the need for manual review of the information. Without knowing if a response did contain a location identifier means that a statistically relevant sample could not be provided.

Further response of Mr. Fenwick (23 June 2020)

35. Mr. Fenwick submits that the information requested is environmental information as defined under the Environmental Information Regulations 2004.

36. The measure should be the policy/plan/programme instigated by the launch of the '*Taking Forward Wales' Sustainable Management of Natural Resources'* Consultation, the development of which the SMNR consultation and the information contained in its responses was an inherent part, rather than the measure being considered to be only what was proposed in the consultation. The consultation responses have an influence on the policy/plan/programme and are therefore environmental information.

37. The summary of responses issued by the Welsh Government on 19 June 2018 states:

> It was possible to submit responses anonymously, without linking to a geographical region or location within the UK. However, of those who included their geographical location the overwhelming proportion (via organisation or submitted individually) was from Wales.
> …
> The level of response illustrates how engaged stakeholders are in policy development. Some have provided a view in response to specific questions, whilst others have provided views in response to the proposals presented in the consultation paper.

38. This statement implies that the Welsh Government has already assessed and analysed the geographic origin of responses but has chosen to withhold the information. It also shows that the geographic origin of responses is an important factor and influenced the measure that the respondents

acknowledge falls within the EIR. This is supported by the fact that the consultation document indicates that normally names and addresses are published, which also shows that the names and addresses are regarded as important in terms of showing that the consultation was carried out properly. The geographic information provides an essential context to the environmental information provided in the response and should be treated as an inherent part of that information. It is integral, critical and fundamental to the responses.

39. In accordance with **Henney** it is permissible to have regard to the bigger picture and there is sufficient connection between the geographic location and the measure.

40. It is accepted that some respondents gave no address, while some would have postcodes which are ambiguous on whether they fall within or outside Wales. These could be placed in an 'uncertain' category and cannot be used as justification for not releasing the information.

41. The Welsh Government is answerable first and foremost to the Welsh electorate which elected it. The views of those outside Wales are not irrelevant, but the views of those directly affected by legislation and policies created by politicians elected to represent them should be given greater weight than the views of those in other political regions of countries.

42. The information should be released so that the Welsh electorate can understand how the Welsh Government has assessed and weighed consultation responses in relation to the measure in question and how their views have been taken account of and weighted alongside the views of those from outside Wales.

43. The request would not be too burdensome or disrupt the Welsh Government's ability to perform its core functions. The request is not unreasonable and is for information that has already apparently been considered and analysed by the Welsh Government in order to justify its claims in the summary of responses regarding the geographic origin of responses.

44. There is an overwhelming public interest in disclosure of the information. There is clear evidence of large numbers of individuals, including from outside the UK, responding to Welsh consultations, including as a result of targeted campaigns with the specific aim of changing Welsh policies. Given that the consultation related to dramatic changes to a vast array of Welsh policies and measures which will have a direct influence on almost all individuals in Wales, there is an inherent and far reaching interest in releasing the information, including highlighting and monitoring in increases in such campaigning from outside Wales.

45. The Welsh Government is the largest public authority in Wales and the extent to which it would be distracted from delivering other services it negligible.

Further submissions of the Welsh Government (8 July 2020)

46. The fact that a new burdensome analysis is required to collate the information supports the submissions that the connection between the measure and the information is far too minimal and remote.

47. The process of reading and reviewing the responses focussed on the more detailed and evidenced responses, which came primarily from organisations and stakeholders in Wales, or from British organisations with a Welsh membership. On this basis the Welsh Government is confident that the views of people living in Wales are understood and have appropriately been taken into account. The country of origin or respondents is not irrelevant but is not fundamental to an understanding of the views of Welsh stakeholders and the time and cost of getting this additional information is not merited.

48. The Welsh Government continues to engage with Welsh stakeholders. As part of the response to the SMNR consultation the Welsh Government established the Access Reform Advisory Group (ARAG) which draws members of its three expert groups from Welsh organisations or Welsh representatives of British groups and is responsible for developing detailed options for several of the proposals set out in the SMNR consultation.

49. The Welsh Government has consistently stated that the request requires a new analysis of the responses in order to carry out analysis of the geographical locations of each individual respondent.

50. It is not in the public interest that resources are diverted from other core duties in order to comply with this request. There is extensive engagement with stakeholders and communities of interest. The Access Reform Programme has already required the Welsh Government to procure additional resources to support it as the existing team is at capacity so additional work cannot be easily accommodated. It would be to the detriment of the ongoing timetable and the wider team's work to divert resources to this request.

51. The original consultation took place in 2017 and there is more public interest in ensuring that this work can continue resourced and undisturbed.

Further submissions of Mr. Fenwick (8 July 2020)

52. The formation of the three ARAG expert groups is the result of decision made by the Welsh Government in light of the consultation responses and cannot be regarded either as part of the consultation process or as justification for any failures during the consultation process.

Further submissions of the Welsh Government (10 July 2020)

53. ARAG is not an alternative or part of the consultation process. It simply demonstrates that the views of people living in Wales are understood and have appropriately been taken into account.

Further submissions of the Welsh Government (20 November 2020)

54. These submissions were filed in response to the case management order dated 29 October 2020 requiring the Welsh Government to explain the basis on which, in the document entitled *Consultation - summary of response, Taking Forward Wales' Sustainable Management of Natural Resources* dated June 2018 it was able to reach conclusions that of those who included their geographical location:
    (i) the overwhelming proportion of responses submitted via organisation was from Wales;
    (ii) the overwhelming proportion of responses submitted individually was from Wales.

55. The Welsh Government has reviewed the rationale and files that underpinned the summary of responses to the SMNR consultation which was published in September 2017. Some officials directly involved are no longer available.

56. The original analysis of the consultation responses was carried out by individual policy teams, pulled together by a coordination team and then presented to the Minister. The analysis of the responses presented to the Minister recorded their support/opposition to specific questions and the proposals and collated significant comments and feedback. Due to the volume of responses it was not practicable to record the demographic information of all the responses.

57. Because the consultation was promoted via Policy teams contacting their key stakeholder list and via their regular engagement activities, the Welsh Government believes that awareness of the consultation amongst Welsh stakeholders was high and the pattern of responses would have reflected this.

58. There were some instances where individual policy teams undertook some geographical analysis, but this was not an exercise which was compiled together for all individual responses. Chapter 1 of the consultation (seeking general views) did record whether responses were from outside Wales. 1 response out of 150 was recorded as having come from outside Wales.

59. The policy team on Chapter 8 (Smarter Regulations) has recorded if respondents were from outside Wales for its 88 respondents. Only 1 response out of 88 was identified as being from outside Wales.

60. Chapter 4, which relates to land access received 16,6556 and there was no geographical analysis undertaken. [*Note – the tribunal has proceeded on the basis that this is a typographical error and the correct figure should be 16,655 or 16,656. The summary of responses states that the total number of responses to the consultation was 17,391.*]

61. The request amounts to a new analysis which would not be straightforward.

62. The reliability and usefulness of any statistical geographical evidence would be limited. It would be unfair to suggest that responses which do not specify a location are inherently more questionable. There would be no method for weighting the difference between an organisational response and an individual response. Campaigns could distort any findings.

63. Particular focus was given to more detailed and substantive responses. The influence of campaigns was considered in the original analysis. The analysis being suggested would not provide any further reliable clarity to what is already available.

64. As no geographical analysis formed part of the published summary of responses, the issues with, for example, ensuring accuracy of geographical location along the border between Wales and England would not necessarily have been taken into account by individual policy teams. In order to ensure accuracy, a consistent methodology would need to be applied and any limited analysis already undertaken would need to be reviewed and validated and would not necessarily substantively reduce the resources required to comply.

Further submissions of Mr. Fenwick (11 December 2020)

65. Mr. Fenwick summarises his previous submissions. In response to the further submissions of the Welsh Government he submits that the evidence from previous consultations and campaigns in response to the SMNR consultation demonstrate the large proportions of consultation that can be received from outside Wales. The Welsh Government was familiar with the campaigns run in response to the SMNR consultation and therefore Mr. Fenwick rejects the speculation that the pattern of responses would have reflected large numbers of Welsh respondents.

66. Despite the assertion in the summary of responses that the overwhelming proportion of those who included their geographical location was from Wales, the submissions of 20 November 2020 only refer to 238 consultation responses for which an assessment of the geographic origin was undertaken, and the actual number of responses analysed is likely to have been lower due to overlap. The assertion in the summary of responses was therefore based on an assessment of just 1.4% of consultation responses.

67. Responses to Chapter 4, which accounts for 94.9% of the responses, have not been considered in terms of geographic origin. It generated major internet campaigns from organisations such as Cycling UK and the Ramblers representing those from outside Wales which urged individuals to respond wherever they lived. The assertions in the summary of response about the proportion of respondents from Wales must have been based on speculation rather than facts or analysis and is highly unlikely to have had any foundation.

68. Preliminary figures release by the Welsh Government in 2018 show that more than 70 percent of responses were generated by internet campaigns run by UK as opposed to Welsh organisations. This does not support the Welsh Government's assertion that 'the pattern of responses would have reflected' large numbers of Welsh respondents.

69. The submissions and information produced by the Welsh Government in response to the order of 29 October support Mr. Fenwick's submissions about the validity of claims made by the Welsh Government in statements to the public; that the information requested is 'on' the measures and that the release of the information is in the public interest.

Legal framework

70. For the reasons set out below, we have concluded that the EIR is the appropriate regime, and accordingly we set out the legal framework only under the EIR.

Environmental information

71. Regulation 2(3) of Aarhus defines environmental information as:

> Any information in written, visual, aural, electronic or any other material form on:
> (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
> (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision making;
> (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment, or through these elements, by the factors, activities or measure referred to in subparagraph (b) above;

72. Regulation 2(1) of the EIR defines environmental information as information 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)… as well as measures or activities designed to protect those elements

73. It is not necessary to set out article 2(1) of the Directive because the EIR's definition and the categories in sub-paragraphs (a) – (f) of regulation 2(1) are in identical terms.

74. In **BEIS v IC and Henney** [2017] EWCA Civ 844 ('**Henney'**) the Court of Appeal held that:

> 35. …an approach that assesses whether information is "on" a measure by reference to whether it "relates to" or has a "connection to" one of the environmental factors mentioned, however minimal…is not permissible because, contrary to the intention of the Directive, it would lead to a general and unlimited right of access to all such information.
>
> 37. …It is therefore first necessary to identify the relevant measure. Information is "on" a measure if it is about, relates to or concerns the measure in question. Accordingly, the Upper Tribunal was correct first to identify the measure that the disputed information is "on".
>
> 42. Furthermore, Mr Choudhury accepted that it is possible for information to be "on" more than one measure. He was right to do so. Nothing in the EIR suggests that an artificially restrictive approach should be taken to regulation 2(1) or that there is only a single answer to the question "what measure or activity is the requested information about?". Understood in its proper context, information may correctly be characterised as being about a specific measure, about more than one measure, or about both a measure which is a sub-component of a broader measure and the broader measure as a whole. In my view, it therefore cannot be said that it was impermissible for the Judge to conclude that the Smart Meter Programme was "a" or "the" relevant measure.
>
> 43. It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context and is not strictly limited to the precise issue with which the information is concerned, here the communications

> and data component, or the document containing the information, here the Project Assessment Review. It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself. It was not in dispute that, when identifying the measure, a tribunal should apply the definition in the EIR purposively, bearing in mind the modern approach to the interpretation of legislation, and particularly to international and European measures such as the Aarhus Convention and the Directive. It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1).

Regulation 12

75. Regulation 12 EIR provides, insofar as relevant:

> (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if–
> (a) an exception to disclosure applies under paragraphs (4) or (5); and
> (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
> (2) A public authority shall apply a presumption in favour of disclosure.
> …
> (4) For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that-
> …
> (b) the request is manifestly unreasonable.

76. The following analysis is adopted, with only minor changes to the wording, from the Upper Tribunal decision in **Vesco v (1) Information Commissioner and (2) Government Legal Department [**2019] UKUT 247 (TCC)).

77. As the Court of Justice of the European Union ("CJEU") has said:

> The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information only in a few specific and clearly defined cases. The grounds for refusal should therefore be interpreted restrictively, in such a way that the public interest served by disclosure is weighed against the interest served by the refusal. **Office for Communications v Information Commissioner Case C-71/10** at paragraph 22.

78. This is why the EIR is deliberately different from the Freedom of Information Act 2000 ("FOIA") in that all exceptions are subject to a public interest test and there is a presumption in favour of disclosure.

79. The EIR do not contain an express obligation to interpret grounds for refusal in a restrictive way, but, given the obligation to interpret the EIR purposively

in accordance with the Directive the overall result in practice ought to be the same: the grounds for refusal under the EIRs should be interpreted in a restrictive way (**Vesco v (1) Information Commissioner and (2) Government Legal Department [**2019] UKUT 247 (TCC))

80. A three-stage test applies, on the wording of Regulation 12:
1. Is the request manifestly unreasonable? (Regulation 12(1)(a))
2. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information, in all the circumstances of the case? (Regulation 12(1)(b))
3. Does the presumption in favour of disclosure mean that the information should be disclosed? (Regulation 12(2))

81. Under the first stage we must decide if the request is manifestly unreasonable. Unlike under s 12 FOIA there is no 'cut off' once the appropriate cost limit has been exceeded. However, the Upper Tribunal in **Craven v Information Commissioner and Department for Energy and Climate Change** [2012] UKUT held that the costs of complying with "an extremely burdensome request" could be the basis for concluding that a request to which the EIR applied, or might apply, was manifestly unreasonable under that regime, (para. 25, approved of by the Court of Appeal in para 29 and 83 of the Court of Appeal's decision in **Craven/Dransfield v Information Commissioner** [2015] 1 WLR 5316.

82. Authorities on "vexatiousness" under Section 14 of FOIA may be of assistance at this stage, because the tests for vexatiousness and manifest unreasonableness are similar (**Craven**). The hurdle of satisfying the test is a high one.

83. In considering manifest unreasonableness, it may be helpful to consider factors set out by the Upper Tribunal in **Dransfield v Information Commissioner and Devon County Council** [2012] UKUT 440 at paragraph 28.

84. These are:
1) the burden (on the public authority and its staff), since one aim of the provision is to protect the resources of the public authority being squandered;
(2) the motive of the applicant - although no reason has to be given for the request, it has been found that motive may be relevant: for example a malicious motive may point to vexatiousness, but the absence of a malicious motive does not point to a request not being vexatious;
(3) the value or serious purpose of the request;
(4) the harassment or distress of staff.

85. This is not an exhaustive checklist, and other factors that may be relevant are previous requests (including number, subject matter, breadth and pattern), whether they were to the same or a different body, the time lapse since the

previous requests, and whether matters may have changed during that time. If, after applying the first stage of the test, the conclusion is that the request is not manifestly unreasonable, then the information requested should be disclosed (assuming no other exemptions apply).

86. The Commissioner's guidance on manifestly unreasonable requests also highlights factors which we consider to be relevant:

> 19. In assessing whether the cost or burden of dealing with a request is "too great", public authorities will need to consider the proportionality of the burden or costs involved and decide whether they are clearly or obviously unreasonable.
> 20. This will mean taking into account all the circumstances of the case including:
> • the nature of the request and any wider value in the requested information being made publicly available;
> • the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;
> • the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services; and
> • the context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
> 21. It should be noted that public authorities may be required to accept a greater burden in providing environmental information than other information.

87. If it has been established that a request falling under the EIRs is manifestly unreasonable within Regulation 12(4)(b), that of itself is not a basis for refusing the request. We must then go on to the second stage and apply the public interest test in Regulation 12(1)(b). Application of this test may result in an obligation to disclose, even if a request is manifestly unreasonable.

88. The starting point for the public interest test is the content of the information in question, and it is relevant to consider what specific harm might result from the disclosure (**Export Credits Guarantee Department v Friends of the Earth** [2008] EWHC 638 paragraphs 26-28). The public interest (or various interests) in disclosing and in withholding the information should be identified; these are "the values, policies and so on that give the public interests their significance" (**O'Hanlon v Information Commissioner** [2019] UKUT 34 at paragraph 15). "Which factors are relevant to determining what is in the public interest in any given case are usually wide and various", and will be informed by the statutory context (**Willow v Information Commissioner and the Ministry of Justice** [2018] AACR 7 paragraph 48)

89. The statutory context includes the backdrop of the Directive and Aarhus discussed above, and the policy behind recovery of environmental information. Once the public interests in disclosing and withholding the information have

been identified, then a balancing exercise must be carried out. If the public interest in disclosing is stronger than the public interest in withholding the information, then the information should be disclosed.

90. If application of the first two stages has not resulted in disclosure, we must go on to consider the presumption in favour of disclosure under Regulation 12(2) of the EIRs. It was "common ground" in the case of *Export Credits Guarantee Department v Friends of the Earth* [2008] Env LR 40 at paragraph 24 that the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations.

The role of the Tribunal

91. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence

92. We took account of an open bundle of documents and an open bundle of additional documents.

Issues

93. The issues for us to determine are:

1. What is the measure or activity that the information is 'on' or 'about'?
2. Does that measure or activity have the requisite environmental impact for the purposes of regulation 2(1)?
3. Is the request manifestly unreasonable? (Regulation 12(1)(a))
4. If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information, in all the circumstances of the case? (Regulation 12(1)(b))
5. Does the presumption in favour of disclosure mean that the information should be disclosed? (Regulation 12(2))

Discussion and conclusions

Is the information environmental?

94. Taking into account the guidance in **Henney** as applied in **DfT and Porsche Cars GB v Information Commissioner and John Cieslik** [2018] UKUT 127 (AAC) (**'Cieslik'**), we take the following approach. First, we need to identify the 'measure' or 'activity' that the information is 'on' or about. Then we must ask if that measure or activity has the requisite environmental impact for the purposes of regulation 2(1).

95. For the reasons set out below we have concluded that the information is 'on' the consultation, which is an activity with the requisite environmental impact for the purposes of regulation 2(1).

What measure or activity is the information 'on' or about?

96. In **Henney** at para. 42 where the Court of Appeal sets out the question to be answered: 'what measure or activity is the requested information about?'

97. This is not restricted to the measure or activity the information is specifically, directly or immediately about. The information can be about more than one measure or activity. The relevant measure or activity is not required to be that which the information is "primarily" on. A mere connection, however minimal, is not sufficient.

98. Identifying the measure or activity that the disputed information is "on" may require consideration of the wider context and is not strictly limited to the precise issue with which the information is concerned, or the document containing the information.

99. It may be relevant to consider:
    (i) the purpose for which the information was produced,
    (ii) how important the information is to that purpose,
    (iii) how it is to be used, and
    (iv) whether access to it would enable the public to be informed about, or
    (v) to participate in, decision-making in a better way.

100. The statutory definition in regulation 2(1)(c) does not mean that the information itself must be intrinsically environmental.

101. We have considered the **Henney** factors, including the purpose of the information, how it is to be used and its usefulness in informing the public and allowing participations in decision-making.

102. The information was not 'produced' for a particular purpose – it was possible to submit responses anonymously without linking to a geographical region or location. We note that Welsh Government felt that it was appropriate to include in the summary of responses a statement that the overwhelming

proportion of responses via organisation and submitted individually was from Wales. Further, some of the policy teams did collate and report on this information. This suggests that geographic origin is of at least some degree of importance, and that some of the information held on geographic origin was put to some use in considering the responses.

103. We accept that the geographical origin of the respondents to a consultation, would also, *in principle*, be useful to inform the public about the decision-making process.

104. Taking this into account, and looking at the wider context, we find that the information requested, i.e. the geographical origin of the respondents to the consultation is information 'on' the consultation.

Does that measure or activity have the requisite environmental impact for the purposes of regulation 2(1)?

105. We find that a consultation of this nature by the Welsh Government is an activity which is likely to affect the state of the elements of the environment such as air, land, landscape and natural sites, taking into account the purpose of the consultation and its role in informing the future direction of policy development in the areas set out under 'Factual background' above.

Is the request manifestly unreasonable? (Regulation 12(1)(a))

106. We accept the Welsh Government's evidence that responding to the request would involve an assessment of each of the 17,391 responses received to identify, if this is possible given the responses had no set form or format, their geographical location and collate how each response was supportive or otherwise of each of the proposals. We accept that the refinement of the request to simply the proportion of respondents who came from Wales would not significantly reduce the amount of time required. We accept that the estimate of in excess of 181 hours, which was based on a sampling exercise, is a reasonable estimate. Mr Fenwick did not challenge the estimate.

107. It is somewhat surprising to us that the Welsh Government felt able to state in the summary of responses that 'of those who included their geographical location the overwhelming proportion (via organisation or submitted individually) was from Wales'. Despite the attempts by the Welsh Government to explain how this conclusion was reached, it remains unclear to us how that firm conclusion could have been reached on the basis of the very limited analysis of geographical origin that had been carried out.

108. We do, however, accept that only very limited analysis of geographic origin has been carried out, to the extent detailed in the Welsh Government's submissions of 20 November 2020. It is clear to us that the limited analysis

already carried out would not materially reduce the time required to respond to the request, for the reasons highlighted in those submissions, including for example, the need to scrutinise postcodes on the borders between England and Wales, and the simple fact that it applied to a very small proportion of the total responses.

109. There is no equivalent of s 12 FOIA in the EIR, and therefore the cost limit which is, in this case, equivalent to 24 hours work, should not be used as a benchmark. It is however relevant, in our view, that the amount of time it would take to comply with the request in this case is over 7 times the appropriate limit in FOIA.

110. This is a very significant burden, even taking account of the fact that, in our view, public authorities should accept a greater burden in providing environmental information than other information.

111. We accept also that answering the request would divert resources from the ongoing work arising out of the consultation, particularly in the light of the fact that additional resources have already been required to support it as the existing team is at capacity.

112. We accept that Mr. Fenwick, on behalf of the FUW, has a genuine purpose behind the request, and there is no suggestion of any harassment or distress to staff. This not part of a series of similar requests.

113. We have considered the nature of the request and the wider value of the requested information being made publicly available, and the extent to which the request would illuminate the underlying issue.

114. Mr. Fenwick argues, in essence, that the analysis is important because the consultation may have attracted significant numbers of responses from outside Wales and failing to distinguish between Welsh and non-Welsh residents may have given Ministers an unbalanced picture of the view of Welsh residents. He argues that the views of those directly affected by legislation and policies created by politicians elected to represent them should be distinguished from and given greater weight than the views in other political regions or countries.

115. The Welsh Government has explained its reasons for not undertaking the geographical analysis at the time. It has explained how it says it has taken proper account of the views of the Welsh people. It is not for the tribunal to decide if the Welsh Government has appropriately weighted the views of those who elected it, nor whether it should have asked all respondents to provide their addresses, nor whether it should have undertaken a more detailed analysis of geographical origin of respondents at the time.

116. Mr. Fenwick states that the information would allow the Welsh electorate to understand:

(i) how the Welsh Government has reached conclusions regarding the proportion of responses submitted from within Wales;
(ii) how the Welsh Government has assessed and weighed consultation responses in relation to the measure in question; and
(iii) how their views have been taken account of and weighted alongside the views from outside Wales.

117. We do not accept that the requested information would allow the Welsh electorate to understand any of the above. The Welsh Government had not analysed or collated the information at the time that it reached those conclusions, nor when it assessed and weighed the consultation responses nor when it took account of and weighted the views. We understand Mr. Fenwick's view is that it *should* have taken the requested information into account, but it is clear that it did not, apart from to a very limited extent, because it had not collated the information at the time. The information cannot therefore illuminate the decision-making process.

118. We do accept that, *in principle*, knowing the proportion of respondents from Wales and elsewhere could contribute to a more informed debate.

119. However, the contribution of the requested information to such a debate would be extremely limited in our view for a number of reasons. Firstly, the fact that responses could be submitted anonymously reduces the value of the information, because it is not a complete picture. Secondly, many of the responses were submitted by organisations, on behalf of their members. and therefore, a simple statement of the 'proportion of respondents' who were from Wales would not accurately reflect the engagement and input of people inside or outside Wales. On this basis, we find that there is very limited wider value in the requested information being made publicly available, and that it would not illuminate the underlying issue to any significant extent.

120. Taking all the above into account, we find that the significant burden on the Welsh Government is clearly and obviously unreasonable and disproportionate to the value of the information once disclosed. We find that the request is manifestly unreasonable.

If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information, in all the circumstances of the case? (Regulation 12(1)(b))

121. The public interest in maintaining the exception lies primarily in the matters set out above. It is not in the public interest for significant resources to be diverted from other public work to answer a manifestly unreasonable request.

122. We do not accept that there is additional weight to the public interest in maintaining the exception because of the risk of future requests in relation to other consultations. Future requests will carry a different burden, and the public interest in disclosure will be different. If disclosure were ordered in this case, it would be highly unlikely to be of assistance in indicating whether disclosure should be made in relation to future requests.

123. In relation to the public interest, we accept that the issues raised by Mr Fenwick are matters of important public debate. We accept, in principle, that there is a strong public interest in the disclosure of information which can inform that debate, and which can cast light on the decision-making processes of the Welsh Government, in particular in areas which have an impact on the environment and are therefore governed by the presumption of disclosure.

124. We have considered the value of the information requested above, and the points that we make there apply equally here. There are serious limitations to the data, which severely limit its use in informing public debate on this issue. It was not requested, collated or taken account of by the Welsh Government in that form and therefore it cannot illuminate their decision-making process. The Welsh Government states that it used other ways of making sure it took proper account of the views of the Welsh people.

125. Further, the consultation was not designed to produce information which could be used to calculate the proportions requested by Mr Fenwick: respondents were not required to give their addresses and responses could be submitted by organisations which represent many individuals from within and outside Wales. The simple proportions of such information as is available is likely to present a misleading picture. For all those reasons we conclude that the information will be of very little value in informing the public or enabling transparency in relation to public decision making. For those reasons we conclude that there is limited public interest in disclosure of this particular information.

126. We accept that there is some additional interest in disclosure of the information to enable to public to ascertain if the statement of the Welsh Government that 'of those who included their geographical location the overwhelming proportion (via organisation or submitted individually) was from Wales' was accurate on the basis of information technically held, if not collated and taken into account, by the Welsh Government when the statement was made. We have found above that this statement meant that geographic origin had at least some degree of importance, and that some of the information held on geographic origin was put to some use in considering the responses.

127. However, although we have indicated above that we are unsure how the Welsh Government reached its conclusions on the proportion of respondents from Wales, we do not accept that there is a significantly increased public interest in disclosure as a result. It is clear that the conclusion was not reached on the basis of the requested information, because it had not been collated at the time. Further, as stated above, the Welsh Government has explained how it assured itself that it had taken proper account of the views of the Welsh people. In that context it is clear that this particular conclusion taken in isolation had limited impact on the decision-making process.

128. We do not accept that there is any additional weight in disclosing the information to enable to the public to be reassured that the consultation was carried out 'properly'. It is a fact that responses could be submitted anonymously. The disclosure of the requested information will not give the public any more information on whether or not the consultation was carried out properly.

129. We accept that there is a general public interest in transparency and in disclosure of any information held by the Welsh Government in relation to a consultation with a likely impact on the environment.

130. Taking the presumption of disclosure into account, we have balanced the specific public interest in this particular information and the general public interest in disclosure against the significant impact on the Welsh Government's resources.

131. We have taken account of the fact that there is some additional public interest in ascertaining whether or not the statement made in the summary of responses was accurate, but we have concluded that this is limited, because the conclusion had limited impact, in isolation, on the decision-making process.

132. We have taken account of the fact that the burden of responding is very significant, requiring the Welsh Government to spend over 7 times the amount of time that Parliament deemed appropriate when responding to a request for information which was not environmental, no matter how high the public interest in disclosure.

133. On these particular facts and taking all the matter set out above into account we find that the public interest favours maintaining the exception.

Regulation 9

134. For the same reasons as those given by the Commissioner under s 16 FOIA we find that there was no breach of regulation 9. We agree that there is no meaningful way in which the request could have been refined given the need

for a manual review of the information. Although a public authority should consider obvious alternatives formulations of the request, it is not required to exercise its imagination to proffer other possible solutions to the problem.

S 12 FOIA

135. For completeness we record that the tribunal considered what its decision would have been if it had concluded that FOIA applied. We would have decided that the Welsh Government was entitled to withhold the information under s 12 FOIA.

Disposal

136. For those reasons we allow the appeal and substitute a decision notice to the effect that the Welsh Government was entitled to withhold the information under regulation 12(1)(a) EIR and that there was no breach of regulation 9 EIR.

Signed Sophie Buckley

Judge of the First-tier Tribunal
Date: 8 January 2021
Promulgated Date: 11 January2021