

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 21 August 2013

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

Decision (including any steps ordered)

1. The complainant requested a copy of a Planning Inspector's report in relation to a specific planning appeal. The Welsh Government refused to disclose the information by virtue of regulation 12(4)(e) of the EIR. The Commissioner's decision is that regulation 12(4)(e) is engaged and that, in all the circumstances, the public interest in disclosure is outweighed by the public interest in maintaining the exception. The Commissioner does not require the Welsh Government to take any steps as a result of this notice.

Background

2. The request in this case is for a copy of the Planning Inspector's report in respect of a recovered appeal under section 78 of the Town and Country Planning Act 1990 ('TCPA 1990') for a proposed land reclamation and coal recovery scheme at a site in Varteg Hill, Varteg.
3. As background information to this complaint, the Welsh Government provided the following information to the Commissioner:
4. Jurisdiction over planning appeals made to the Welsh Ministers under section 78 of the TCPA 1990 is transferred, by regulations to Planning Inspectors appointed for the purpose of determining those appeals. If an appeal meets certain published criteria the Welsh Ministers will recover

jurisdiction over it from the appointed Planning Inspector and determine it themselves – these are referred to as 'recovered' appeals.

5. Recovered appeals are usually dealt with by means of a hearing or public inquiry. The Planning Inspector produces a written report following closure of the hearing and/or inquiry which is provided to officials in the Welsh Government for consideration. The Inspector's report contains an assessment of, and conclusions on, the evidence and submissions considered in the course of an inquiry or hearing. It does not include a formal decision but includes a recommendation from the Inspector to the Welsh Ministers as to whether or not planning permission should be granted. The Inspector's Report is an important document in the Welsh Minister's consideration of a recovered appeal and this is reflected in the fact they are made public once a formal decision on the appeal has been made. The main parties to the appeal are automatically sent a copy of the formal decision letter as well as those who had asked to be notified of the decision. A copy of the Inspector's Report can also be requested by any other parties.
6. Once the Welsh Ministers have made a formal decision in respect of a recovered appeal, a challenge to the decision can be made within 6 weeks by way of an appeal to the High Court under section 28 of the TCPA 1990.

Request and response

7. On 22 February 2013, the complainant wrote to the Welsh Government and requested information in the following terms:

"I would now wish to make a formal application under the Environmental Information Regulations 2004 for disclosure of the Inspector's Report in respect of the section 78 Appeal by Glamorgan Power Company Ltd: Site at Varteg Hill, Varteg"
8. The Welsh Government responded on 20 March 2013 and stated that the requested information was exempt under regulation 12(4)(e) of the EIR and the public interest favoured non-disclosure.
9. On 28 March 2013 the complainant requested an internal review of the Welsh Government's refusal to release the information requested.
10. The Welsh Government provided the outcome of its internal review on 30 April 2013 and upheld its decision that the requested information was exempt under regulation 12(4)(e).

Scope of the case

11. The complainant contacted the Commissioner on 10 June 2013 to complain about the way her request for information had been handled. She asked the Commissioner to consider whether the information requested should be disclosed.
12. The Commissioner considers this complaint to relate to whether the Welsh Government has correctly applied regulation 12(4)(e) to the requested information.

Reasons for decision

Regulation 12(4)(e) – internal communications

13. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. The Commissioner has recently published guidance¹ on regulation 12(4)(e), which includes a description of the types of information that may be classified as 'internal communications.'
14. The first factor that must be considered is whether the information in question can reasonably be described as a 'communication'. In his guidance on the exception, the Commissioner acknowledges that the concept of a 'communication' is broad and will encompass any information someone intends to communicate to others, or places on file so that others may read it.
15. The withheld information in this case is a report prepared by a Planning Inspector who was appointed by the Welsh Ministers to provide an assessment on a particular planning appeal under section 78 of the Town and Country Planning Act 1990 ('the Report'). The Commissioner is satisfied that the Report properly constitutes a 'communication' for the purposes of the exception. He has therefore next considered whether the Report is an 'internal' communication.

¹http://www.ico.org.uk/for_organisations/guidance_index/~//media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_internal_communications.ashx

16. There is no definition of what is meant by 'internal' contained in the EIR. Consequently, in the absence of one, a judgment on what is an internal communication must be made by considering the relationship between a sender and recipient, the particular circumstances of the case and the nature of the information in question. Typically, however, communications sent between officials within a single organisation are the clearest example of records that will be covered by the exception. However, the Commissioner's guidance on regulation 12(4)(e) states that and internal communication can:

"include communications between an executive agency and its parent department, as an executive agency is part of the parent department for the purposes of the EIR. Communications between executive agencies, or between an executive agency and another central government department, will therefore also be internal communications".

17. The Commissioner notes that the Planning Inspectorate is an executive agency of the Welsh Government and the Department for Communities and Local Government ('DCLG'). In view of this, the Commissioner is satisfied that the withheld information represents an internal communication and, as such, regulation 12(4)(e) is engaged. He has gone on to consider the relevant public interest arguments.

Public interest arguments in favour of disclosing the requested information

18. The Welsh Government has submitted limited arguments in favour of disclosing the requested information.
19. The Welsh Government acknowledges the presumption in favour of disclosure inherent in regulation 12(2) of the EIR. It also accepts that this is an inherent public interest in the openness and transparency of government and its decision making process.
20. The Welsh Government confirmed that, once a final decision is made on this particular planning appeal, the Report will be disclosed. It does not consider there to be any compelling public interest in the early release of the Report.
21. The complainant considers that, due to the significant local interest in this particular planning appeal the Report should be disclosed. In her internal review request, she also referred to the fact that the Welsh Ministers had issued a 'minded to approve' (planning permission) letter in relation to this particular planning appeal. She indicated that she understood that, in England, DCLG "release the Inspector's Decision letter at a 'minded to approve' stage as a matter of course".

22. The Welsh Government explained that the practice of the Welsh Ministers is to consider afresh in each case, where it is proposed to issue a 'minded to approve' or 'minded to refuse' (planning permission) letter, whether to disclose the Planning Inspector's report at the 'minded to' stage. The Welsh Government said that it is not uncommon for the Welsh Ministers to issue 'minded to' letters in cases where, for example, they have reached an initial conclusion on whether planning permission should be granted but, before a final decision is made they needed to provide the parties to the appeal/application an opportunity to submit further representations. It explained that the issuing of 'minded to' letters usually occurred in cases where the Welsh Ministers disagreed with the Inspector's conclusions on an issue relevant to the determination of an appeal or new evidence has come to light after the closure of the hearing/inquiry which could have a bearing on whether planning permission should be granted.
23. The Welsh Government confirmed that there was no legal requirement to disclose Inspector's reports with any "minded to" letters, although in some circumstances it may be necessary to do so. An example of this would be where "release of the report would enable the parties to the appeal/application to understand the reasoning of the Inspector behind the conclusion with which the Welsh Minister's disagree, which in turn would enable them to provide an informed response to the issue(s) raised in the 'minded to' letter".
24. In relation to the appeal which is the subject of this request, the Welsh Government stated that the 'minded to' letter was issued with the sole purpose of obtaining clarification from the appellants (the planning applicant) of the legal and technical provisions contained in the legal undertaking they had offered in respect of the restoration of the land should the proposed development go ahead. As the 'minded to' letter focused on a very specific issue, the view was taken that disclosing the Report would not assist the parties to consider the issues and it was not considered necessary to issue it with the letter. Although the clarification of the legal undertaking was sought from the appellants, the appeal procedures required that the 'minded to' letter was copied to all those who appeared at the Inquiry.

Public interest arguments in favour of maintaining the exemption

25. The Welsh Government considers that it is in the public interest to have an efficient and transparent planning system, which is fair for all. It argues that if the Report is disclosed before the Welsh Ministers have made a formal, final decision on the recovered appeal, there is a risk that this will undermine the efficiency, transparency and impartiality of

the planning process and delay the decision-making process. If the Report was disclosed, individuals might make further representations based on its content which, in the interests of fairness, the Welsh ministers might have to consider and possibly circulate to interested parties in the appeal. This might lead to challenges being made against the recommendations and conclusions of the Planning Inspector and/or a re-opening of the public inquiry and/or hearing or and a further report being made by the Planning Inspector. This would make it more difficult for the Welsh Ministers to bring the appeal to a conclusion, given that the appeal in question was live at the time of the request.

26. The Welsh Government considers the existing system and processes balance the need to facilitate public debate and participation in the planning process with the public interest in an efficient and effective planning process. The Welsh Government pointed out that the conclusions and recommendations of the Planning Inspector are not a formal determination of a recovered appeal – rather it constitutes internal advice for the Welsh Ministers to consider in order to inform their final decision on an appeal.
27. The Welsh Government confirmed that 'minded to' letters do not constitute a formal decision on an appeal as it does not discuss nor give the Welsh Minister's decision on the planning merits of an appeal. When considering whether to disclose the information requested in this case, the Welsh Government took into account the fact that the proposed development in this case has been very controversial locally. When the 'minded to' letter was issued it attracted media attention and generated a significant amount of correspondence to the Welsh Ministers containing post-inquiry representations and requesting a re-opening of the inquiry. In addition, a petition, containing representations on the appeal was also sent to Assembly Members. The Welsh Government consider that the reaction following the issuing of the 'minded to' letter suggests that if the Report were issued prior to a formal decision being made there would be further pressure to re-open the inquiry. This would significantly increase the timescale in determining this particular appeal as well as undermine the process for determining recovered appeals.

Balance of the public interest

28. The Commissioner recognises that, inherent in the exception provided by regulation 12(4)(e) is the argument that a public authority should be afforded private space for staff in which issues can be considered and debated, advice from colleagues be sought and freely given and ideas tested and explored to protect the integrity of the internal deliberation and decision making process. The Commissioner also recognises that public authorities often require a safe space in which to debate issues without the hindrance of external comment and to develop their policies

or opinions free from outside interference. However the Commissioner has to consider the specific information in dispute in this case in order to determine whether this safe space is still relevant and important, taking into account the timing of the request and the content and context of the particular information in question.

29. The Commissioner considers that the need for a safe space will be strongest when an issue is still "live". Once a public authority has made a decision, a safe space for deliberation will no longer be required and the Commissioner has previously adopted the approach that the public interest will sway more towards disclosure.
30. In this case, the Commissioner accepts that the Report constitutes internal advice to inform the Welsh Ministers consideration of recovered appeals in order to make a final decision whether or not planning permission should be granted. He also notes that prior to the request being submitted, a 'minded to' letter was issued indicating that the Welsh Ministers were minded to approve planning permission subject to clarification in relation to a section 106 Unilateral Undertaking. However, the Commissioner is satisfied that, at the time of the request, no formal decision had been made by the Welsh Ministers. As such, the issue of determination of the appeal was very much "on-going" at the time of the request and certainly could not be described as finished.
31. The Commissioner acknowledges that there is a general public interest in public authorities being as accountable and transparent as possible regarding their decision-making processes. He appreciates that this planning dispute/proposed development is complex and is the subject of considerable local interest and controversy. The Commissioner therefore accepts that there is significant public interest in the subject matter of the case ie the proposed development. However, he also recognises the strong public interest in affording a public authority safe space in which to deliberate over important issues, options and risks, and to make decisions accordingly. The Commissioner notes that, once a formal decision has been made, the Report will be published along with the decision on whether planning permission has granted. The decision can be challenged within 6 weeks by via an appeal to the High Court under Section 2288 of the TCPA 1990.
32. In reaching a decision on where the balance of the public interest lies in this case, the Commissioner has attached particular weight to the fact that no formal decision on the recovered appeal had been made at the time of the request, the need to avoid any fettering of the decision making process by premature disclosure of the requested information, and in particular the fact that the planning process allows for any formal decision, once made, to be challenged via appeal to the High Court. For the reasons set out above, the Commissioner considers that, in all the

circumstances of the case, the public interest in maintaining the exception set out in regulation 12(4)(e) outweighs the public interest in disclosure.

Right of appeal

33. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

34. 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.
35. 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

Anne Jones
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