

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 14 February 2019

Public Authority: Welsh Government

Address: freedom.ofinformation@gov.wales

Decision (including any steps ordered)

1. The complainant requested various copies of Cabinet/Board Meeting minutes in respect of the proposed Wylfa Newydd nuclear power station project on Anglesey. The Welsh Government initially refused the request in its entirety relying on regulation 12(4)(e) of the EIR on the basis that the information involves the disclosure of internal communications, however, it subsequently disclosed full copies of two of the Board minutes and redacted copies of the remaining minutes. The Commissioner has considered the Welsh Government's reliance on the exception cited and has concluded that it was entitled to rely on regulation 12(4)(e) of the EIR in respect of the remaining withheld information. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 21 September 2017, the complainant wrote to the Welsh Government and requested the following information:

"May I please request respective documents (and updates) on Wylfa Newydd, informing the following meetings of the Cabinet?"

20.09.2016: Item 5

21.03.2017 Item 5

31.03.2017 Item 1

26.05.17 Item 3

20.07.17 Item 5"

3. The Welsh Government responded on 17 November 2017. It stated that it was refusing to provide the requested information on the basis of regulation 12(5)(e) of the EIR.
4. Following an internal review the Welsh Government wrote to the complainant on 26 February 2018. It stated that it was satisfied that its original decision to refuse the request on the basis of regulation 12(4)(e) was correct.
5. During the course of the Commissioner's investigation, the Welsh Government took the opportunity to revisit the request and with the passage of time, disclosed redacted copies of the Board minutes for 31 March 2017, and full copies for the meetings of 26 May 2017 and 20 July 2017. It did however continue to rely on regulation 12(4)(e) in respect of the minutes of the Cabinet meetings of 20 September 2016 and 21 March 2017. However, following the Commissioner's intervention, the Welsh Government agreed to disclose redacted copies of the previously withheld cabinet minutes but stated that the remaining information contains particularly sensitive and complex information regarding the proposed project.

Scope of the case

6. The complainant contacted the Commissioner 24 May 2018 to complain about the way his request for information had been handled, and he remains dissatisfied that the exception cited is engaged, particularly as he has stated that the Welsh Government lacks direct legislative authority over the project with its role limited to, (in the Welsh Government's own words):

"...ensuring we use the planning process to minimise negative impacts and maximise economic benefits arising from the project."

7. The complainant has also argued that there is a considerable public interest in disclosure of this information and provided some background to the Wylfa Newydd project in support of this argument.
8. The proposed project represents a very large scale development proposal, potentially the largest in Wales, and would involve the construction and operation of twin nuclear reactors on the Isle of Anglesey. Additionally, the complainant has stated that the developer proposes to construct and operate the largest ever on-site facilities in Wales for the long term storage (up to 200 years) of all higher activity radioactive waste generated during the 60 years design operating life span of each proposed reactor.

9. The Welsh Government also provided some background information to the Commissioner confirming that Horizon Nuclear Power Ltd (owned by Hitachi Ltd, a Japanese based company) is responsible for building Wylfa Newydd. It will be (and has been) communicating with the Welsh Government on all aspects of the proposed build.
10. The Commissioner considers that the scope of her investigation is to determine whether, in all the circumstances of the case, the Welsh Government was entitled to rely on regulation 12(4)(e) of the EIR.

Reasons for decision

Is the information environmental?

11. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other 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;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);

and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural

sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);"

12. It is important to ensure that requests for information are handled under the correct access regime, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
13. The Commissioner has considered the withheld information in this case, which comprises of small sections of two Welsh Government Cabinet meetings and one Welsh Government Board meeting as specified in the request.
14. The Commissioner notes that the matters under discussion at the meetings are concerning the proposed Wlfa Newydd power station and their predominant purpose is environmental in nature. She is satisfied that the information is environmental within the definition at regulation 2(1)(c), since it is information on activities which would affect or be likely to affect the elements and factors referred to in regulation 2(1)(a) and/or 2(1)(b).
15. She is therefore satisfied the Welsh Government considered the request under the correct access regime, and has considered whether it applied the exception correctly.

Regulation 12(4)(e)

16. 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. Regulation 12(4)(e) is a class based exception so it is not necessary to demonstrate prejudice or harm to any particular interest in order for it to be engaged.
17. As the Commissioner notes in her guidance on the application of regulation 12(4)(e)¹, the term "*internal communications*" is not defined in the EIR and is normally interpreted in a broad sense. She has considered the meaning of "*internal*" and "*communications*" separately.
18. With regard to the term "*internal*", the Commissioner notes in her guidance that "*an 'internal' communication is a communication within*

¹ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

one public authority". She is satisfied in this case that the withheld information has been shared only between officers of the same public authority; that is, the Welsh Government.

19. With regard to "*communications*", the guidance notes that "*the concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file... It will therefore include not only letters, memos, and emails, but also notes of meetings or any other documents if these are circulated or filed so that they are available to others*". She is therefore satisfied that agendas, minutes and documents that are prepared for discussion at a meeting are captured by this.
20. The Commissioner has had sight of the withheld information and notes the minutes were circulated solely for consideration by the Welsh Government's Cabinet and Board members and therefore to a restricted number of individuals within the Welsh Government.
21. The Commissioner is satisfied in this case that the withheld information falls within the definition of "*internal communications*" and that the exception is engaged. She has therefore gone on to consider the balance of the public interest in the disclosure of the information. The Commissioner is aware that Hitachi Ltd has recently suspended its work on the project due to rising costs, however, the Commissioner's investigation is concerned with the situation at the time of the request.

Public interest arguments in favour of disclosing the information

22. The Welsh Government has acknowledged that regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure. This emphasis reflects the potential importance of environmental information to the public.
23. The Welsh Government accepts the general presumption in favour of disclosure of information held by public authorities as it promotes transparency and accountability in respect of how decisions are made and public resources are spent.
24. The Welsh Government has also acknowledged that there is a significant public interest in the disclosure of information relating to Wylfa Newydd due to the strength of feeling between those both for and against the project, and has drawn the Commissioner's attention to a group known as "*People Against Wylfa B*"
25. The complainant considers that there is undoubtedly huge public interest in this project, and finds it puzzling that it could be argued that the balance is weighted in favour of maintaining the exception. He has argued that the unquestionably controversial nature of the project

combined with its wide ranging cultural, social, economic and environmental implications means that the weight of public interest is balanced significantly in favour of disclosure.

26. For example, he has stated that the developer had already submitted requests for consent for site clearance works and pre-construction preparation, and environmental permits for making radioactive discharges into the atmosphere and the sea, as well as for storage and disposal of radioactive wastes at the proposed twin nuclear reactors comprising the Wylfa Newydd project.
27. He also considers that disclosure would facilitate enhanced public understanding of the Welsh Government's involvement in the Wylfa Newydd project and the interactions between the Welsh Government and the multinational developer in question and any other company.
28. In respect of the Welsh Government's arguments in relation to a safe space and chilling effect, detailed in paragraphs 31 to 33 of this notice, the complainant considers that disclosure ultimately makes for better advice, more rigorous and in-depth exploration of options, as well as for better governance.
29. The complainant has also stated that contrary to the Welsh Government's comments referred to in paragraph 34 of this notice, that it is routinely publishing information on its website in respect of the project, at the time of his request, the Welsh Government had published a most perfunctory of summaries on its website, which provided no identifiable, specific substantive public interest information, including environmental information. He has further stated that in respect of each report received at the meetings which are the subject of the request, the Welsh Government's relevant agenda webpage announced:

"Paper not published as it relates to several exemptions under the Freedom of Information Act."
30. The complainant has queried what is lacking in the multinational developer's commitments under the principal cultural, social and economic impact assessments, that the Welsh government should also need to inject scarce public resources into this project, particularly as the project is essentially a project on which it has seemingly scarce (if any) direct effective legal and political leverage. He has further asked whether contributions under the Welsh Government's plans include suitable provision for full cost recovery from the multinational developer, over for example, the term of any electricity price guarantee agreement secured by the developer from the UK Secretary of State.

Public interest arguments in favour of maintaining the exception

31. The Welsh Government considers that the remaining withheld information consists of advice by senior officials to Cabinet Ministers and the Welsh Government Board Members on matters which were very much current and relevant to a live negotiating position and considers the need for Senior Officials, Board and Cabinet Members to have a private thinking space to develop ideas, debate live issues and reach decisions away from external interference and distraction as a significant factor in favour of maintaining the exception.
32. It also considers that on a general level, it is important for good governance that officials are able to fully engage with each other and with Ministers to exchange and provide advice away from the public gaze and that there should be no disincentive in doing so. It further informed the Commissioner that if officials believed their advice or freely exchanged views would be made public, it is likely to inhibit the future provision of advice and exchange of views, leading to less rigorous exploration of options and impairment of the quality of decision making. It believes that unless officials are able to provide options and advice surrounding the possible offer of support to any company, the effectiveness of the possible support that could be offered and the process of reaching such a decision would be undermined, which would not be in the public interest.
33. The Welsh Government considers that in this case, the chilling effect is particularly important due to the long-term nature of the proposed development, with the Welsh Government Board and Cabinet receiving more Papers as matters progress. It informed the Commissioner that if Officials believed their advice or freely exchanged views would be made public, it is likely to inhibit the quality of Papers in the future, with contents being bland and less rigorous, which in turn will impair the quality of decision making. It has further argued that unless Officials are able to receive free and frank options and advice on matters being considered, the effectiveness of the subsequent advice, in order to ensure the impacts from the project are mitigated and the legacy opportunities maximised, would be undermined, which would not be in the public interest.
34. The Welsh Government also believes that the public interest in this project is satisfied by the amount of information already published. It has stated that on 5 June 2018, it outlined its latest position in a Written Statement and has committed to keep Assembly Members (and therefore the public) updated as matters progress. The statement confirmed that the UK Government had announced its commitment to

the project and the developer, Horizon Nuclear Power, and has submitted the Development Consent Order (DCO) application to the UK Planning Inspectorate on behalf of the UK Secretary of State. It has further informed the Commissioner that a public examination of the proposals would form an integral part of the process as it progressed.

35. Additionally, the Welsh Government has stated that the public had the opportunity to register as an interested party with the Planning Inspectorate up until 13 August 2018.
36. It has further argued that releasing the information into the public domain would result in the Welsh Government showing its negotiating hand to Horizon Nuclear Power and Hitachi Limited and potentially cost the public purse several million pounds which would not be in the public interest. In addition, disclosure of the disputed information would affect its negotiating position with the UK Government and the Government of Japan.
37. It has further stated to the Commissioner that disclosure of the disputed information would result in Officials spending their time and resources justifying their analysis of key data, or why an option was or was not being considered, and whether sufficient weight was being given to a particular option. The Welsh Government added that the matters raised in the Cabinet Papers, together with recommendations made, remain a 'work in progress' and will gather momentum as various stages of the project are reached.

The balance of the public interest test arguments

38. The Commissioner acknowledges the explicit public interest in disclosure under regulation 12(2) EIR and the general public interest in transparency and accountability.
39. She is also mindful of the controversial nature of the proposed Wylfa Newydd project and aware that it would have significant environmental, cultural, social and economic implications for the public particularly in Anglesey, the whole of Wales, and potentially, the UK. The Commissioner would also point out that the Welsh Government's arguments that this is mitigated by its publication of information referred to in paragraphs 34 of this notice, post-date the request, and she has not therefore accorded them much weight.
40. The Commissioner has also considered the Welsh Government's arguments in respect of the need to ensure that ministers have a safe space to discuss ideas and proposals, and officials are not deterred from providing comprehensive and rigorous advice, and whilst she is sympathetic to the complainant's view that disclosure ultimately makes for better advice, more rigorous and in-depth exploration of options, as

well as for better governance, she considers that the protection of a safe space is a strong factor in favour of maintaining the exception in this case where the issues are still live. Similarly, she has also placed considerable weight on the Welsh Government's arguments that disclosure of the remaining withheld information would reveal its negotiating position to Horizon Nuclear Power, Hitachi Limited, and the UK and Japanese governments, with the potential to cost the public purse several million pounds. She therefore considers that the balance of the public interest in all the circumstances of the case is weighted in favour of maintaining the exception and that the Welsh Government was entitled to rely on regulation 12(4)(e) to withhold the remaining information.

Right of appeal

41. 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

42. 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.
43. 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

**Catherine Dickenson
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