

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

Decision notice

Date: 28 August 2012

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

Decision (including any steps ordered)

1. The complainant requested legal advice in connection with the consideration of a request for an environment screening direction about a particular development and more general information about environmental impact assessments. The Welsh Assembly Government ('the Welsh Government') withheld some information under regulation 12(4)(e) of the EIR, and during the course of the Commissioner's investigation it also sought to rely on regulation 12(5)(b) in relation to this information. In relation to the second part of the request, the Welsh Government did not accept this as a valid request for information.
2. The Commissioner's decision is that the Welsh Government correctly applied regulation 12(5)(b) to part of the request. He also considers that the second part of the request is a valid request for information. The Commissioner requires the Welsh Government to comply with regulation 5 of the EIR and either disclose the requested information or issue a valid refusal notice in accordance with regulation 14.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 17 December 2011, the complainant wrote to the Welsh Government regarding a particular development and requested information in the following terms:

“As the Welsh Ministers have again refused to make a screening direction for the Glebelands development, I would be grateful if you could:

- (a) let me have sight of the legal advice received in connection with the consideration of the request for a screening direction – as well as the re-consideration of that request; and,
 - (b) let me know what measures are available to Welsh Ministers to remedy a failure to carry out an environmental impact assessment and hence satisfy Article 10 EC (Article 4(3) TEU)”.
5. The Welsh Government responded on 17 January 2012 and confirmed that it held information relating to part (a) of the request, but considered it to be exempt under regulation 12(4)(e) of the EIR. In respect of part (b) of the request, the Welsh Government considered this to be a request to provide the complainant with legal advice and stated it did not provide such a service.
6. On 17 February 2012 the complainant requested an internal review of the Welsh Government's handling of his request.
7. The Welsh Government provided the outcome of its internal review on 14 March 2012 and upheld its decision that information relevant to part (a) of the request was exempt under regulation 12(4)(e) and part (b) of the request constituted a request for it to provide legal advice.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation, the Welsh Government stated that it considered part (b) of the request to be a question and not a valid request for recorded information.
10. The Commissioner considers the scope of this complaint to be:
- Whether the information held relating to part (a) of the request should be disclosed.

- Whether part (b) of the request constitutes a valid request for information.

Reasons for decision

Background

11. Environmental Impact Assessment (EIA) is a key aspect of many large scale planning applications. The EIA process derives from European law. The European law basis is Directive 97/11/EC which amends the original Directive 85/337/EEC on 'The assessment of the effects of certain public and private projects on the environment', which came into effect in July 1988. The effect of the Directive is to require an EIA to be carried out, before development consent is granted, for certain types of major project which are judged likely to have significant environmental effects. The Directive is mainly implemented in UK legislation through the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 (SI 1999 No. 293) ('the EIA Regulations').
12. The request in this case, and in particular part (a) relates to a particular site/development in Newport, South Wales. In 2000, Newport City Council ('the Council') granted outline planning permission to develop a new primary school and housing on former industrial and recreation land. Objectors to the development raised a number of concerns about the development, including the health of the end users of the development, particularly the school children, and environmental issues.
13. The complainant, who is acting on behalf of a particular campaign group believes that the Council had a duty to screen the development for EIA each time the planning permission was amended, as well as when considering subsequent planning applications relating to variation or discharge of the attached planning conditions ('reserved matters' applications). The complainant states that, on each occasion, the Council did not screen the development for EIA.
14. In November 2008 the Council gave the developer permission to phase the development so that the primary school (phase 1) could be developed independently from the residential development (phase 2). The first of the phases was the Glan Usk Primary School which has been completed and was opened in January 2010. The second phase remains undeveloped as the housing layout that had received planning permission was submitted by a developer that subsequently ceased trading. As a result, further consents will be required from the Council before phase 2 can commence.

15. Since planning permission was granted there have been a number of requests for the National Assembly for Wales, and more recently Welsh Ministers to call-in the planning application and to revoke the planning consents. The revocation requests asked that the Welsh Ministers use their powers to revoke the planning permission for a number of reasons, for example doubts that the development had been dealt with in accordance with national planning policies and European Directives, including conformance with the EIA Directive, and the failure by the Council to carry out an EIA.
16. In September 2011 a request was made by the campaign group to the Welsh Ministers to make a screening direction that the development should be subjected to an EIA. The Welsh Government confirmed that Welsh Ministers had discretionary powers under regulation 4(7) of the 1999 Regulations to issue a screening direction. The Welsh Government explained that it considered it inappropriate to screen the development at that time primarily because no application for consent to proceed with the development was currently before the Council or Welsh Ministers.

Regulation 12(5)(b) – Legal professional privilege

17. Under this exception, a public authority can refuse to disclose information to the extent that disclosure would adversely affect “the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature”. The Commissioner accepts that the exception is designed to encompass information that would be covered by Legal Professional Privilege ('LPP').
18. The success, or not, of an application of regulation 12(5)(b) will turn on three principal questions –
 - (i) Is the information covered by LPP?
 - (ii) Would a disclosure of the information adversely affect the course of justice?
 - (iii) In all the circumstances, does the public interest favour the maintenance of the exception?

Is the information covered by LPP?

19. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both cases, the communications must be confidential,

made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

20. The Welsh Government argues that the information held relevant to part (a) of the request is exempt under regulation 12(5)(b) as the information attracts legal advice privilege and disclosure would adversely affect the course of justice.
21. Having viewed the withheld information, the Commissioner is satisfied that it records the seeking and giving of legal advice and is therefore subject to LPP.
22. Information will only be privileged so long as it is held confidentially. As far as the Commissioner can see, the legal advice was not publicly known at the time of the request and there is therefore no suggestion that privilege had been lost.

Would disclosure have an adverse effect on the course of justice?

23. The Welsh Government argues that disclosure would have an adverse effect on the course of justice because the principle of LPP would be weakened if information subject to LPP were to be disclosed on a regular basis. It also considered that disclosure of information subject to LPP would inhibit the Welsh Government from seeking legal advice in the future, and its legal advisors from providing open and frank legal advice.
24. It is the Commissioner's view that any disclosure of information subject to LPP will have an adverse effect on the course of justice simply through the weakening of the doctrine. This would, in turn, undermine a legal adviser's capacity to give full and frank legal advice and would have the effect of discouraging parties from seeking legal advice.
25. The Commissioner has therefore concluded that it is more probable than not that disclosure of the disputed information would have a prejudicial effect and that, as a result, regulation 12(5)(b) is engaged. He has therefore gone on to consider the public interest test.

The public interest test

26. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosing the information

27. The complainant is of the view that the development should have been subject to an EIA and failure to issue a screening direction is in breach of EU and UK Law. He has put forward the following specific arguments in favour of disclosure:

- There is a public interest in establishing why a screening decision has not been issued for the development. The making of a screening decision is not discretionary. If significant effects on the environment are likely, an EIA is required.
- The UK authorities had a legal obligation to issue a screening decision for the development, but have failed to do so. The EIA process fell at the first hurdle.
- If there is a legal basis for overriding EU law and UK law in respect of EIA legislation, it follows that there is a very strong public interest in knowing the circumstances under which the EIA Directives and the EIA Regulations can be so overridden

28. The Welsh Government accepts that there is an inherent public interest in ensuring that public authorities are transparent in the decisions they make in order to promote accountability.

29. The Welsh Government also acknowledges that there is a public interest in individuals being able to exercise their rights under the FOIA to enhance their understanding of the reasons for decision or actions taken by a public body.

Public interest arguments in favour of maintaining the exemption

30. In this case, in relation to the public interest in favour of maintaining the exception, the Welsh Government put forward the following arguments:

- It is in the public interest that decisions taken by the Welsh Government are made in a fully informed legal context. As such, it requires high quality, comprehensive legal advice for the effective conduct of its business.
- Legal advice needs to be given in context, with a full appreciation of all the relevant facts and a legal advisor needs to be able to present the full picture to his client. It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view, weighing up their relative merits. This means that legal advice obtained will often set out the perceived weaknesses of the client's position.
- Disclosure of legal advice has a significant potential to prejudice the Welsh Government's ability to defend its legal interests, both

directly by unfairly exposing its legal position to challenge and indirectly by “diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour”. This could result in serious consequential loss or a waste of resources in defending unnecessary challenges.

- Disclosure could lead to reluctance in the future to make a permanent record of legal advice. It is in the public interest that provision of legal advice is fully recorded in writing and the process of decision making is described accurately and fully; the legal advice must be part of that record.
- Disclosure could deter officials from seeking legal advice at all. This could lead to decisions being made that could potentially be legally flawed. In addition to undermining the quality of decision making, this could also lead to legal challenges, which could otherwise have been avoided. Even in areas where a legal challenge is unlikely the willingness to see frank legal advice is essential in upholding the rule of the law.
- There is a strong element of public interest inbuilt in the privilege itself and this has long been recognised by the courts.

Balance of the public interest arguments

31. The Commissioner has carefully considered the arguments presented in favour of maintaining the exception against the arguments favouring disclosure and, in doing so, he has taken account of the presumption in favour of disclosure as set down by regulation 12(2). Even in cases where an exception applies, the information must still be disclosed unless ‘in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information’. The threshold to justify non-disclosure is consequently high.
32. The Commissioner appreciates that there is a strong public interest in public authorities being as accountable as possible in relation to planning matters, particularly large scale developments affecting a significant amount of people. The Commissioner also believes there is a strong public interest in disclosing information that allows scrutiny of a public authority’s decisions. This, he believes, helps create a degree of accountability and enhances the transparency of the process through which such decisions are arrived at. He believes that this is especially the case where the public authority’s actions have a direct effect on the environment. A disclosure of the legal advice in this case would provide a degree of transparency and reassurance to interested parties that the Welsh Government’s actions were in the best interests of the community and may assist the public in understanding the legal basis for this actions and decisions taken by the Welsh Government.

33. The Commissioner considers that another factor in favour of disclosing information is the number of people who may be affected by the subject matter. In the case of *Mersey Tunnel Users Association v ICO & Mersey Travel (EA/2007/0052)* the Tribunal confirmed this point. In that case the Tribunal's decision was that the public interest favoured disclosing legal advice obtained by Mersey Travel and it ordered disclosure of the information requested. The Tribunal placed particular weight on the fact that the legal advice related to issues which affected a substantial number of people, approximately 80,000 people per weekday. In the current case the Commissioner notes that there has been strong opposition to the development from local residents living in communities near to the site in question. It is therefore clear that the subject matter of this request does have the potential to affect a reasonably significant number of people. Whilst the Commissioner accepts that the development which is the subject of this request has the potential to affect a reasonably significant number, he does not feel that this factor alone is enough to outweigh the factors in favour of maintaining the exception.
34. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. The Commissioner believes it is important that the Welsh Government should be able to consult freely and frankly with its lawyers in relation to such questions and that its ability to defend itself fairly in the future is not compromised. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.
35. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Welsh Government and its legal advisers and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
36. The Commissioner has given significant weight to the general public interest in preserving the principle of LPP, particularly the breaching of a trust between parties that may go on to undermine the possibility of frank and candid discussions.
37. Whilst the Commissioner considers that the arguments in favour of disclosure have significant weight he has determined that, in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exception under regulation 12(5)(b).

Is part (b) of the request a valid request for information?

38. Part (b) of the request stated "*let me know what measures are available to Welsh Ministers to remedy a failure to carry out an environmental impact assessment and hence satisfy Article 10 EC (Article 4(3) TEU)*". The Welsh Government's initial response stated that it considers this to be a request to provide the complainant with legal advice. It said that it did not provide legal advice and referred the complainant to the Law Society and Bar Council who provide guidance on how to obtain legal advice.

39. In his internal review request, the complainant clarified that his request was not case specific ie not directly related to the Glebelands development. He referred to a particular judgement – Commission of the European Communities v Ireland (C-215/06), which stated that:

"...under the principle of cooperation in good faith laid down in Article 10 EC [Article 4(3) TEU], Member States are required to nullify the unlawful consequences of a breach of Community law. The competent authorities are therefore obliged to take the measures necessary to remedy failure to carry out an environmental impact assessment, for example the revocation or suspension of a consent already granted in order to carry out such an assessment".

The complainant stated that, in view of this judgement, he considered the Welsh Government must have suitable measures in place to rectify a failure to carry out an EIA and he believed there was a considerable public interest in knowing what measures were available.

40. In its internal review, the Welsh Government upheld its position that part b of the request constituted a request for it to provide the complainant with specific legal advice.

41. The Commissioner asked the Welsh Government to clarify how it interpreted part (b) of the request and why it reached the view that it constituted a request for the Welsh Government to provide the complainant with legal advice, and whether the "legal advice" referred to related to creation of new legal advice or disclosure of existing legal advice that it held.

42. The Welsh Government advised the Commissioner that it did not interpret this as a request for recorded information because

"As the question is posed in general, objective terms ('remedy a failure to carry out an environmental impact assessment') and not linked to the screening direction in the Glebelands case that the first part of the request referred to, the Welsh Government interpreted this as a request

for a new explanation and/or advice and not a request for recorded information.”.

43. In this case the position of the Welsh Government is that part (b) of the request did not constitute a valid request for recorded information. The task for the Commissioner here is to decide if the complainant did make a valid information request. If the conclusion of the Commissioner is that the complainant did make a valid information request, this will indicate that the Welsh Government breached section 5 of the EIR by failing to respond to this request appropriately
44. The Commissioner has given this matter careful consideration. It is his view that any written question put to a public authority is capable of being an information request. This view is taken following the Information Tribunal hearing of *Richard Day v Information Commissioner & Department for Work and Pensions 9EA/2006/0069*).
45. The EIR only extends to requests for recorded information. It does not require public authorities to answer questions or provide explanations unless the answer to the question or the explanation requested is held in recorded information. It is the Commissioner's view that the relevant consideration when any question is put to a public authority is therefore whether it holds recorded information which answers the applicant's question.
46. The Commissioner is satisfied that, based on the wording of the request, it constitutes a valid request for recorded information. It is entirely possible that the Welsh Government could hold information that outlines the measures available to it to remedy a failure to carry out an EIA.
47. The Welsh Government confirmed to the Commissioner that the EIA Regulations include provisions for Welsh Ministers to make a screening direction requiring that a development is subject to EIA. However, the EIA Regulations do not employ terms such as “remedy a failure to carry out” an EIA and do not contain any reference to satisfying Article 10EC (Article 4(3) TEU).
48. The Welsh Government advised the Commissioner that it is not aware of any specific piece of information or document which identifies any measures available to Welsh Ministers in respect of a failure to comply with the EIA Regulations. It added that, should such a situation arise where Ministers are notified of a perceived failure to satisfy the EIA Regulations, and they were satisfied that there had been an actual, rather than perceived failure, officials would need to consider the matter, at that time and identify what options were available to Welsh Ministers.

49. In cases where there is any dispute about the amount of information held relevant to a request, the Commissioner normally considers the civil standard of the balance of probabilities. In this case, whilst the Commissioner notes that the Welsh Government suggests it does not hold the requested information, he does not have sufficient evidence to allow him to determine whether, on the balance of probabilities, any recorded information is held.
50. Regulation 12(4)(a) of the EIR states that a public authority can refuse to disclose information on the basis that it does not hold the information at the time the request is received. The Commissioner notes that the Welsh Government has commented that it did not hold any recorded information relevant to part (b) of the request. However, it has not specifically confirmed whether any recorded information is held either to the complainant or to the Commissioner. If the Welsh Government did not hold information relevant to the request at the time it was received it should have stated that it was relying on regulation 12(4)(a) in its initial response of 17 January 2012.
51. In view of the above, the Commissioner requires the Welsh Government to reconsider part (b) of the request as a valid request for information and either disclose any recorded information held, or issue a valid refusal notice in accordance with regulation 14 of the EIR.

Right of appeal

52. 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

53. 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.
54. 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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