

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 29 March 2019

Public Authority: Department for Business, Energy & Industrial Strategy

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested work plan information for the Government's decision whether or not to proceed with the Swansea Bay Tidal Lagoon project. Department for Business, Energy & Industrial Strategy (BEIS) withheld the requested information under Regulations 12(4)(d)(material in the course of completion) and 12(4)(e)(internal communications) of the Environmental Information Regulations 2004 (EIR). The Commissioner considers that all of the withheld information is exempt from disclosure under Regulation 12(4)(e) and that the balance of the public interest favours maintaining the exception. No steps are required by the public authority.

Background

2. The proposal for a 320MW lagoon off Swansea Bay, involving a 9.5km seawall embedded with 16 turbines, was developed by Tidal Lagoon Power (TLP)¹. First proposed in 2011, the lagoon won the backing of then Chancellor of the Exchequer, George Osborne, who used his 2015 budget to announce the Government was commencing negotiations with

¹ www.bbc.co.uk/news/uk-wales-40556756

TLP for the plan². The project was included in the Conservatives 2015 manifesto and was granted planning permissions by then Secretary of State for Department of Energy & Climate Change, Amber Rudd, that same year.

3. In February 2016, the Government commissioned an independent review into the feasibility and practicality of tidal lagoon energy in the UK. The review was led by the Rt Hon Charles Hendry³. The purpose of the review was to assess the following:
 - Whether, and in what circumstances, tidal lagoons could play a cost effective role as part of the UK energy mix;
 - The potential scale of opportunity in the UK and internationally, including supply chain opportunities;
 - A range of possible structures for financing tidal lagoons;
 - Different sizes of projects as the first of a kind;
 - Whether a competitive framework could be put in place for the delivery of tidal lagoon projects.
4. On 12 January 2017, Charles Hendry published his final report and over 30 recommendations *'to help a tidal lagoon programme bring an important and exciting new industry to the UK'*⁴. The Review concluded that *'moving ahead with a pathfinder lagoon is, I believe, a no-regrets policy. The Secretary of State for Business, Energy and Industrial Strategy, Greg Clark, has rightly spoken about the obligation on policy makers to plan for the longer-term. I don't believe there would be any debate in decades to come about whether this was the right thing to do'*.
5. After a period of time spent assessing the Review's recommendations and considering the issues which would arise from a broader lagoon programme, the Government announced on 25 June 2018 that they would not be proceeding with the proposed Swansea Bay Tidal Lagoon. Announcing the decision, Mr Clark stated that, *'the inescapable*

² www.theguardian.com/business/2018/jun/25/government-rejects-plan-for-tidal-lagoon-in-swansea

³ Former Conservative Minister of State for Energy and Climate Change between May 2010 and September 2012 in the Coalition Government.

⁴ <https://hendryreview.files.wordpress.com/2016/08/summary-of-recommendations.pdf>

conclusion of an extensive analysis is, however novel and appealing the proposal that has been made is, the cost that would be incurred by consumers and taxpayers would be so much higher than alternative sources of low-carbon power that it would be irresponsible to enter into a contract with the provider'.

Request and response

6. On 29 December 2017, the complainant wrote to Department for Business, Energy & Industrial Strategy (BEIS) and requested information in the following terms:

'Would you please make available, under the Freedom of Information Act, the relevant Department(s)'s work plan, with timings, for making the decision to go-ahead (or not) with the Swansea Bay Tidal Lagoon.

I would expect this to include references to the 'go-ahead with no regrets' recommendation and conclusions of the Hendry Review, government department and cabinet decision processes, dates for issuing of marine licences, issuing of any regulatory instruments, and the context of the scheme's pathfinding nature toward reducing unit energy costs for similar and larger scale tidal lagoon schemes being planned in a wider strategy'.

7. BEIS responded to the request on 31 January 2018 and advised that they had processed the request under the Environmental Information Regulations 2004 (EIR) as they considered that the information sought fell within the definition of 'environmental information'. The Department confirmed that they held information 'related to' the request and that this information was exempt from disclosure under Regulation 12(4)(d)(material in the course of completion) and Regulation 12(4)(e)(internal communications).
8. BEIS explained that, *'the purpose of engaging these exceptions is to allow public authorities a safe space to reach decisions in private and to avoid disclosing information which could lead to a misleading or inaccurate impression of the decision-making process being formed by members of the public'*. BEIS acknowledged that there is a public interest in greater transparency to assist the public's understanding of how government is developing policy and taking decisions, and more broadly, the working of government, thus making government more accountable to the electorate. However, the Department did not acknowledge or identify any particular public interest factors in favour of disclosing the specific information requested by the complainant.

9. The Department stated that they did not consider that the generic public interest in greater transparency would be served by disclosing the withheld information *'in advance of any Ministerial decision on the Swansea Bay Tidal Lagoon or the strategic case for tidal lagoons in the UK'*. BEIS advised that they considered that it was particularly important *'for the integrity of that decision making process'* that officials and Ministers are able to engage in free, frank and robust discussions *'absent external interference or distraction'*.
10. The Department contended that the ability of officials to engage effectively in such discussions and to reach their conclusions on a fully informed and properly considered basis would be hindered if the information in question was to be released at that stage. Consequently, BEIS considered that the public interest in maintaining the stated exceptions outweighed the public interest in disclosing the withheld information.
11. The complainant requested an internal review of the decision on 1 February 2018. He contended that the information requested was not environmental in nature, his rationale being that a timetable would not contain the details of the building of any such tidal lagoon. The complainant gave the example of a project plan for the building of an airport, which showed a list of interrelated activities on a calendar in the order in which they are planned to occur, and milestone dates that indicate progress and when key decisions are expected to be made, *'but there is nothing in it that determines how it is actually done'*.
12. The complainant noted that his understanding of the FOIA (or EIR in this case), was to enable the public to see that government is carrying out its work in a fit and proper way, *'that is to say, it is looking at the right kind of things in the course of its decision making, and indeed is thus seen to be making informed choices'*. The complainant stated that it *'simply beggars belief'* that BEIS considered that it was not in the public interest for the public to know what kinds of information the Government was considering in reaching this particular decision, until after it has been made. The complainant contended that his request provided an opportunity to show that the Government is taking a well-reasoned approach, whether he agreed with it or not. He noted that the Hendry Report had come out over a year ago and he questioned as to how long the public must wait to know if the Government intended to make its decision on the Swansea Bay Tidal Lagoon.
13. BEIS provided the complainant with their internal review on 1 March 2018. The review upheld the decision to process the request under the EIR rather than the FOIA and upheld the two exceptions applied. The review found that there was, on balance, *'a public interest in continuing to withhold the information to permit public authorities a safe space to*

reach decisions in private and to avoid disclosing information which could lead to a misleading or inaccurate impression of the decision making process being formed by members of the public'. The Department recognised that there was a 'general' public interest in the disclosure of the information held as this would promote greater transparency, but found that the public interest was not in favour of releasing the information in advance of any Ministerial decision.

Scope of the case

14. The complainant contacted the Commissioner on 15 March 2018 to complain about the way his request for information had been handled. His complaint was twofold, in that he did not consider that he had requested environmental information (ie that the request should not have been processed under the EIR), and that in any event he considered that the public interest in disclosure of the information requested outweighed that in maintaining the applied exceptions.
15. In submissions to the Commissioner, the Department noted that the complainant appeared to envisage that, as part of the decision-making process related to the Hendry Review and Swansea Bay Tidal Lagoon, there was some sort of 'master timetable' to which the Department would be working in making a decision. BEIS confirmed that whilst they had commissioned the Hendry Review, the Secretary of State for BEIS was under no statutory or other requirement to respond to the Review by a given date. Accordingly, the Department did not hold a formal work plan, timetabled to such a fixed date/process.
16. The Department explained that much of the direction of the work was derived from requests from ministers for material to help them develop and test their thinking on the issue. The nature and timetables of the work carried out was often driven by ministerial requests for briefing and papers which expanded on the options which they wished to explore at the time. BEIS advised that the nearest information to that which the complainant envisaged being held were indicative timelines for specific workstreams which BEIS officials produced to manage their day to day workload and meet self-imposed deadlines to produce advice on policy options and other materials. The Department explained that, *'as such, even these documents are intrinsically linked to ministers' thinking on policy'*. BEIS advised that these internal and planning documents were often then superseded and no longer used as the focus of policy development options changed.

17. The Department explained that:

'Much of the information held that may have constituted a work plan, as the complainant had envisaged existed, was ephemeral and had not been completed and was abandoned when the Secretary of State's exploration of potential policy options shifted focus or was not taken forward. Once these exploratory avenues had been exhausted to the Secretary of State's content, the final decision on whether or not to proceed was taken on the basis of a Value For Money Decision'.

18. The Department advised the Commissioner that on the above basis, they could have taken a narrow interpretation of the request and provided a not held response. However, in the interests of being transparent and helpful, BEIS advised that they interpreted the request more broadly and with a wider interpretation.

19. The Commissioner has had sight of the withheld information in this matter, which comprises emails/briefing papers for ministers and workstream tables. Whilst the Commissioner would agree with BEIS that the complainant was under a misapprehension (a quite understandable one since he was not to know exactly what information was held or in what format) as to the complexity of the information held, the wording of his request was wide enough to encompass the withheld information (referring as it did to *'government department and cabinet decision processes'*). Therefore, whilst the Commissioner accepts that the Department held no work plan, in the sense of a general *'plan of work, with timings'* which would lead to the Government's decision on the Swansea Bay Tidal Lagoon, she is satisfied that the information identified by the Department was within scope of the complainant's request. That is to say, it would not have been correct for BEIS to have provided a not held response to the request. It is also the case that those parts of the information which comprise briefings to Ministers, are, as one would expect, detailed and quite substantial.

20. The scope of the Commissioner's investigation has been to determine whether BEIS were correct to process the request under the EIR and, if so, whether they correctly withheld the relevant information under Regulations 12(4)(e) and 12(4)(d).

21. The Commissioner notes that whilst BEIS continued to maintain both exceptions to the withheld information, towards the end of the Commissioner's investigation they wrote to the complainant on 13 February 2019, and provided contextual information and links to

documents concerning the Government's rationale for deciding not to proceed with the Swansea Bay Tidal Lagoon.

22. In response to the BEIS information, the complainant wrote to the Commissioner with a rebuttal of the Government's case for deciding not to proceed with the Swansea Bay Tidal Lagoon. The complainant stated that, *'it does seem to me a bit rich for BEIS to have discounted the longer term financial analysis grounds of financial engineering over a 90 year period, when comparing to the nuclear option, because the nuclear option excludes the final disposal costs of nuclear waste, does it not?'* He also questioned why *'a one-off subsidy of some £200m as government support for the project seemingly inadmissible by BEIS, when the taxpayer is already subsidising wood chip pellets at Drax⁵ approaching £1 billion per year (Private Eye issue 1488, p5). A single year's annual subsidy of Drax is almost enough to build the Swansea Lagoon outright. By comparison, £200m is pocket-money'*.
23. Importantly, in his correspondence with the Commissioner, the complainant correctly noted that, *'Government policy on issues of the day, save provision of information, is not what you are concerned with; the technical and financial issues are for me and others to take up with elected representatives'*.

Reasons for decision

EIR or FOIA?

24. In his submissions to the Commissioner, the complainant stated that he was *'aghast'* at the BEIS conclusion that his *'request for a plan of work constitutes a request for environmental information'*. By way of example the complainant stated that a plan of his walk into town *'requires a consultation of the weather forecast (i.e. environmental information) to help me decide what coat to wear, and whether I should take an umbrella, or indeed not to walk but go by bus instead to stay dry. But the plan does not require me to know what the weather forecast is, does it?'*

⁵ The large biomass and coal-fired power station in North Yorkshire which supplies around 6% of the country's electricity needs and is the UK's single largest emitter of carbon dioxide.

25. The complainant explained that all he was basically asking for was a Gantt Chart⁶ *'with some annotation and a small narrative'*. By way of further analogy, he submitted that, *'just as a weekly school time table shows which subjects are to be taught when, and in which order during the week, there is nothing in the timetable to indicate the details of any of the subject matter'*.
26. The Commissioner's guidance, *'What is Environmental Information?'*⁷, makes clear that the test that public authorities should apply when determining whether information requested is environmental information is whether the information falls within the definitions in regulations 2(1)(a)-(f) of the Environmental Information Regulations 2004 (EIR), and **not** whether the information directly mentions the environment or any environmental matter.
27. Regulation 2(1)(c) of the EIR concerns *'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'*. This covers a broad range, and will include steps taken to ensure something happens and the methods, processes or instruments used to implement the measure. The likelihood of a plan actually coming to fruition is not a relevant consideration. Once it is established that there is an intention to initiate a plan or to develop a policy, then this is sufficient to bring information which will contribute to the preparation of that plan within regulation 2(1)(c).
28. The elements referred to in Regulation 2(1)(a) are 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'*. The factors referred to in Regulation 2(1)(b) include 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)'*.

⁶ A type of bar chart and widely used management tool that illustrates a project schedule, named after its inventor, Henry Gantt (1861-1919)

⁷ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

29. In submissions to the Commissioner, BEIS referred to the guidance on regulation 2(1)(c) and advised that:

'The proposed tidal lagoon would have placed a 12km sea wall within Swansea Bay, connected to land at two points. This would clearly have an effect on both the land and marine environments in which it was built. Furthermore, the sea wall would also contain turbine housings through which water would be directed with the rise and fall of the tides'.

30. The Department advised the Commissioner that the project had applied to Natural Resources Wales (NRW) for a marine licence, and as part of its consideration on the application NRW were considering the effects which the sea wall would have on the seabed. BEIS contended that the proposed tidal lagoon had the potential to make a material effect on the environment in which it would be located, and was therefore within scope of the EIR.
31. The Commissioner is entirely satisfied that the information requested by the complainant concerned a measure (the proposed tidal lagoon) likely to affect (if implemented) the elements and factors of the environment, specifically the Swansea Bay marine/coastal environment. Regulation 2(1)(c) is broad in scope and encompasses policies, plans and programmes. At the time of the complainant's request no decision had been made with regard to the proposed tidal lagoon, but in any case the implementation or otherwise of the plan/project is not a relevant consideration for regulation 2(1)(c).
32. In view of the above, the Commissioner considers that BEIS were correct to process the complainant's request under the EIR.

Regulation 12(4)(e)(internal communications)

33. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, so long as the requested information constitutes an internal communication then it will be exempt from disclosure. A wide range of internal documents are caught by the exception, although in practice the application of the exception is limited by the public interest test.
34. The EIR do not provide a definition of what constitutes an internal communication, but the underlying rationale behind the exception is that public authorities should have the necessary space to think in private. Although the exception has no direct equivalent in the Freedom of

Information Act 2000, many arguments about protecting a private thinking space are similar to those made under section 35 (formulation of government policy) and section 36 (prejudice to effective conduct of government affairs).

35. Regulation 12(8) of the EIR states that for the purposes of regulation 12(4)(e), internal communications includes communications between government departments.
36. All of the withheld information in this matter concerns internal communications (mainly emails and briefings for ministers). Most of these communications are between BEIS officials and ministers although some involve other central government departments. The Commissioner is therefore satisfied that all of the information falls within the scope of regulation 12(4)(e) of the EIR.

Public interest test

37. As with all EIR exceptions, regulation 12(4)(e) is subject to the public interest test contained at regulation 12(1)(b). Therefore, the Commissioner must determine whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the information.
38. Public interest arguments for this exception are focussed on protecting the public authority's private thinking space. Other arguments are not relevant to this exception. There is no automatic or inherent public interest in withholding an internal communication. Arguments must relate to the particular circumstances of the case and the content and sensitivity of the specific information in question.
39. In her guide to the EIR⁸, the Commissioner advises that in addition to the general public interest in transparency and accountability, there is a further public interest in disclosing environmental information because it supports the right of everyone to live in an adequate environment, and ultimately contributes to a better environment. The importance of openness in relation to environmental information is evidenced by regulation 12(2), which requires a public authority to apply a presumption in favour of disclosure.

⁸ <https://ico.org.uk/media/for-organisations/guide-to-the-environmental-information-regulations-2-2.pdf>

Public interest in disclosure of the withheld information

40. As noted, in their responses to the request, whilst BEIS acknowledged that there is a public interest in greater transparency to assist the public's understanding of how Government is developing policy and taking decisions, they did not identify or acknowledge any public interest factors in favour of the *specific* information requested by the complainant.
41. In submissions to the Commissioner, BEIS agreed that the complainant was correct in contending that the public have an interest in ensuring that the Government has come to a reasonable decision on the Swansea Bay Tidal Lagoon. However, BEIS stated that the information which the complainant was seeking, *'effectively a project management timetable for the decision making process'*, does not exist in the form envisaged by the complainant. BEIS contended that the analogous information held by the Department which would effectively be caught by the wording of the request *'does not provide insight into the quality of the decision making process or the robustness of the subsequent decision, given that it is largely personal time management and administrative information (much of which was superseded by the passage of events)'*. As such, BEIS were of the view that the disclosure of the withheld information would not materially further the public interest.
42. In his submissions to the Commissioner, the complainant explained that a key factor in his making a request for a work plan for the Department's response to the Hendry Review was to satisfy himself, and the public at large, that Ministers and officials *'are indeed looking at sufficient information to inform their decision'*. The complainant advised the Commissioner that what had prompted his request was a response which he had received from then Parliamentary Under-Secretary of State for Industry and Energy, Richard Harrington MP, stating that *'the issues considered by the Hendry Review into tidal lagoons are complex as they relate to untried technology in the marine environment'*. The complainant provided a number of examples of previous marine based technological innovations, such as tidal-powered mills in use in Dartmouth in the 1600s, and the La Rance Tidal Power Station in Brittany, France, which has been operating since the 1960s.
43. The complainant acknowledged that the technologies are undergoing continual improvement, but contended that the sea is not an unknown to an island nation such as the UK. He contended that:

'It is surely in the public interest that we, the public, should be confident that decisions are seen to be being taken through a competent decision

process, and to know that sufficient relevant factors (environmental and other) have been taken into account in making a series of decisions (and when they are made) in reaching the concluding decision. With a null response to my FOI request, we are simply to be informed what the decision is, and will be left to wonder why the decision, when it comes, will be so right or so wrong'.

44. The complainant acknowledged that the public expect Ministers and officials to discuss matters between themselves, unfettered by unnecessary interference, but contended that, equally, there is role for commentators and lobbyists to report and inform public opinion on the way to making decisions, so as to enable voters to be able to cast an informed vote at the next general election. The complainant contended that, *'tens of thousands of jobs⁹ and peoples' livelihoods hang on these kind of decisions, so I can't imagine I'm alone in wanting this decision, and the need to know it will be a well-informed decision'.*
45. The complainant contended that the generation and security of the UK's electricity supply is a strategic issue for the country and a matter of huge public interest. In respect of alternative ways of generating electricity (following the closing down of coal fired power stations and nuclear power stations reaching the end of their lives), the complainant described tidal range power as *'the elephant in the room'*. He noted that the Severn Estuary area has the second largest tidal range in the world and that *'the potential for power generation is huge'*.
46. The complainant advised the Commissioner that:
- 'The Swansea Bay Tidal Lagoon has been put forward as a pathfinder project to prove the latest technologies in the various branches of engineering encompassed. As with all prototype projects, it will not be the cheapest solution of its type. This is well known. Yet it will pave the way for a number of projects at greater scale, for example in Cardiff and Bridgewater Bays, at much reduced cost. Together, the so-called 'fleet' of lagoons would be developed that provide a significant contribution to the UK electricity supply on a par with production from several nuclear powered stations, and is predicated by its proponents to be much cheaper than nuclear and on a par with the cheapest wind power installations. This would considerably bolster security of the UK's renewable electricity supplies'.*

⁹ In submissions to the Commissioner, BEIS advised that the number of potential jobs claimed (by others and not the complainant) did not hold up to scrutiny.

47. The complainant contended that BEIS would need to wrestle with the issue of how to compare costs and benefits of tidal lagoon power with other types, such as cheaper 'proven' technologies such as off-shore wind, which were relatively expensive to start with, solar power, and the subsidies it received on start up, and new but expensive nuclear power stations such as Hinkley Point C. The complainant noted that there were *'some environmental issues to wrestle with too'*, as the tidal lagoon required a marine development licence, and there remained unknowns on the impact on marine life, though studies were ongoing or under analysis.
48. In light of the above, the complainant stated that it was always going to be interesting as to how BEIS were going about their analyses, and how the Department was going to properly inform their understanding of all the elements. The complainant questioned, *'How will we know of the completeness and relevance of its analyses?'* He contended that, *'by not allowing the slightest inkling of how they were going about it, the public have been denied the opportunity to inform or influence the decision making'*. He further contended that, *'it cannot be right for only big businesses to lobby during policy development'*, and stated that this *'flies in the face of our democracy, and dilutes the credibility of BEIS' decision making processes'*.
49. The complainant stated that the lack of transparency about the decision making process enabled BEIS to later make sweeping unchallengeable statements of apparent fact which may not be correct. He contended that it is, *'surely not better that potentially poor decisions or choices are picked up during policy formulation rather than afterwards'*.

Public interest in maintaining the exception

50. In submissions to the Commissioner, BEIS advised that, prior to the decision concerning the Swansea Bay Tidal Lagoon being announced, there had already been *'considerable public debate on this issue'*. The Department explained that the Hendry Review had an open call for submissions as part of its research. This had resulted in a large number of responses from a very wide range of respondents, including interested members of the public, community groups, tidal energy developers, potential supply chain companies, NGOs and environmental organisations, local Chambers of Commerce, public authorities, academics, affected companies, the angling community, Wildlife Trusts and others. The Department advised that the issue had been the subject of numerous oral and written Parliamentary Questions and debates in Parliament and ministers had responded to many individual letters from members of the public, including the complainant.

51. BEIS confirmed that it was correct that during the process of bilateral negotiation with the developer of the proposed lagoon and while ministers were making their decisions on whether or not to proceed with the project, there was much commercially confidential information which could not be disclosed by the Department. However, during that period the Department had sought to ensure that the public had ample opportunities to make their opinions, for and against the project, known and to maintain whatever level of transparency they could.
52. In addition, BEIS advised that since the Secretary of State's announcement to Parliament on the Swansea Bay Tidal Lagoon (25 June 2018), and the evidence given by Claire Perry MP, Minister of State for Business, Energy and Industrial Strategy, to the Joint Welsh Affairs and BEIS Select Committees on the same date¹⁰, the Department had placed significant amounts of substantive information in the public domain which provide detail on the nature of the proposals on the Swansea Bay Tidal Lagoon. These details included its costs and the method by which any Government decision on whether to offer a Contract for Difference to the project and how any Value For Money determination would be made. BEIS submitted that this *'provides the full evidence base on which the public can take a view on the validity of the Government's decision'*.
53. In submissions to the Commissioner, BEIS confirmed that at the time of the complainant's request the policy with regards to the Swansea Bay Tidal Lagoon was still very much in development. The material comprising the withheld information (emails, workstreams and briefings to ministers) was created as part of the process of developing policy and the process was not yet complete. The Department advised that various proposals were being considered, most of which were subsequently abandoned, and had they disclosed the information at that stage, *'it would have been irresponsible and confusing given the changing state of affairs'*.
54. BEIS explained that:
- 'The issue at hand was a controversial issue that many people were emotive about. The Department therefore acted with care as to what information was in the public domain so as to maintain the public's focus on the relevant debate and safely manage expectations. In our view, it*

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<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/business-energy-and-industrial-strategy-committee/the-swanea-bay-tidal-lagoon/oral/86100.pdf>

would have been reckless to disclose information about proposals that were very likely subject to change and be abandoned, even if disclosed with the caveat that it was subject to change. The Department fully accepts the duty to be open with the public about environmental information alongside a responsibility to ensure that it is giving the public correct information. We have demonstrated this by releasing information, to the public and to the complainant, about how the decision was taken, at an appropriate time: after the decision was announced'.

55. The Department accepted that there *'may be arguments for informing public debate on related environmental issues'*. They contended that had the withheld information been disclosed, then *'it was very likely to have prompted public debate on potentially unviable policy proposals and it was considered that to disclose the information could have been harmful because the policy was in development'*. The Department also advised the Commissioner that they had been concerned that if the information had been disclosed, *'there was a risk that members of the public may have taken action in reliance of it, which could have possibly led to wasted costs or efforts by those people'*.
56. In submissions to the Commissioner, BEIS explained that the documents falling within scope of the request (emails, workstreams and briefings to ministers) *'were intrinsically linked to ministers' developing thinking on policy and their titles and content would betray those thought processes'*. The Department stated that *'even the title and content of a speculative implementation plan produced as part of a policy option paper for the Secretary of State would cast a strong light on his thought process and the manner in which he had developed his understanding of the policies'*.
57. BEIS explained that on balance they considered that the public interest in withholding the information outweighed the public interest in disclosing the information, *'primarily due to the controversial nature of the decision'*. The Department advised that there were a limited number of options being discussed and *'it was imperative that the Secretary of State was able to really think about the consequences of each option to ensure good quality decision making'*. The Department contended that if the options had not been considered properly and evenly, it may have resulted in the wrong decision being taken, *'which could have meant energy bills of consumers increasing unnecessarily or the UK missing out on a potentially competitive source of renewable energy generation'*.
58. In addition, BEIS contended that had they disclosed the withheld information at the time of the request, then this *'may have deviated the Secretary of State's attention when considering the matter at hand as it would have been likely to result in questions being put to the*

Department on matters that were not central to the debate'. The Department emphasised that it was crucial that the Secretary of State was allowed the space to properly and carefully consider the evidence at hand when considering the options and making the decision.

59. The Department stated that it was hard to see how the public interest test would be satisfied by the disclosure of the withheld information, as it would not provide additional clarity on how the decision was made, given that the Value For Money assessment followed the methodologies set out in the 2015 Engagement Documents.

Balance of the public interest

60. The Commissioner acknowledges and recognises that the Government has disclosed considerable and significant information into the public domain, following its decision, announced on 25 June 2018, not to proceed with the proposed Swansea Bay Tidal Lagoon.
61. However, it is important to be clear that the Commissioner's consideration of the response provided by BEIS in this matter is limited to the facts and circumstances that existed at the time of the request (29 December 2017) and cannot be influenced by later events. That is to say, at the time of the complainant's request, the Government had yet to make a decision in respect of the Swansea Bay Tidal Lagoon, and was still considering its response to the recommendations of the Hendry Review.
62. The Commissioner considers that there is a strong and important public interest in the Government's policy with regard to the Swansea Bay Tidal Lagoon, and its approach to tidal power more generally. That public interest is particularly compelling given the unequivocal support to the case for a Tidal Lagoon Programme by the Hendry Review.
63. The Hendry review concluded that marine energy technologies '*offer an energy opportunity where the UK can reasonably aspire to be the global leader*', and that '*the potential impact on consumer bills of large scale tidal lagoons appears attractive, particularly when compared to nuclear projects over a long time period*'. The review concluded that a tidal lagoon programme could play a competitive role as part of the UK's energy mix alongside low carbon energy from nuclear and offshore wind.
64. The Review explained that '*this is not therefore just about how we decarbonise the power sector in the most cost effective way now; it is also about very long-term, cheap indigenous power, the creation of an industry and the economic regeneration that it can bring in its wake*'.
65. Overall, the Review found that a tidal lagoon programme offered a significant economic opportunity for Wales and the UK more generally,

noting that, *'there are few other energy sectors where the UK can realistically aspire to have such a significant supply chain, where the skills already exist for a 'pathfinder' project, or where there is such commitment to large scale manufacturing in the UK from the world's largest firms in this sector'*.

66. Charles Hendry concluded that moving ahead with a pathfinder lagoon was, he believed, *'a no-regrets policy'*, and after years of debating, stated that he believed that the evidence was clear that tidal lagoons can play a cost-effective part of the UK's energy mix. The Review advised that large scale tidal lagoons, delivered with the advantages created by a pathfinder, *'are likely to be able to play a valuable and cost competitive role in the electricity system of the future'*. Charles Hendry stated that he did not believe *'there would be any debate in decades to come about whether this was the right thing to do'*.
67. In submissions to the Commissioner, BEIS noted that whilst the Hendry Review had concluded that *'there is some overseas potential for tidal lagoons'*, the Review had also stated that it required *'an additional leap of faith to believe that the UK would be the main industrial beneficiary'* of such a global programme. The Commissioner acknowledges this point, but in the context of a Review which was unequivocal in its support for a tidal lagoon programme being part of the UK's energy mix. The Commissioner is similarly unequivocal in stating that there are *certainly* (rather than *'may be'*) public interest arguments for informing public debate on environmental issues, including this one.
68. The Commissioner recognises that the Swansea Bay Tidal Lagoon is clearly a matter of considerable and significant public interest, with implications both at the regional (in terms of job creation in Wales and environmental impact) and national (with the Lagoon being a potential pathfinder for other lagoon projects) level. The complainant has correctly noted that the UK faces a daunting challenge in terms of securing and maintaining its electricity supply, and that is an extremely important strategic issue for the country.
69. However, central to the determination of the public interest balance in cases of this nature is the timing of the request and at what stage the particular government policy or policies had reached at the time.
70. With regard to the safe space arguments advanced by BEIS, the Commissioner recognises and accepts that significant weight should be given to such public interest arguments; the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction, where the policy making process is live and the requested information relates to that policy making. This safe space is well established, with the

Information Tribunal ruling that *'Ministers and officials are entitled to time and space to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy'*.¹¹

71. In the circumstances of this case the Commissioner recognises and accepts that at the time of the complainant's request in December 2017, the Government was reviewing the recommendations made by the Hendry Review as part of its policy formulation and development with regard to tidal lagoons and the Swansea Bay Tidal Lagoon in particular. BEIS have contended that that policy was *'still very much in development'* and this is reflected in the withheld information seen by the Commissioner.
72. The Commissioner accepts that premature disclosure of the withheld information, at a time when the policy development process was changing, would not have responsibly managed public expectations and may have led to members of the public placing undue reliance on the information. The Commissioner also agrees that there is a high degree of likelihood that it would have significantly distracted and diverted the Secretary of State's attention, and that of ministers and officials, from the policy development and consideration process. This would not have been in the public interest.
73. Whilst there was a strong and significant public interest in the Swansea Bay Tidal Lagoon, particularly given its potential role as a pathfinder for further tidal lagoons in the UK, it was not the case, as contended by the complainant, that the public had been *'denied the opportunity to inform or influence the decision making'*. As BEIS has noted, the Hendry Review had an open call for submissions as part of its research, including interested members of the public. Indeed, many of the legitimate and informed arguments made by the complainant in favour of tidal range power in his information request, would doubtless have been considered by the Review, the findings and recommendations of which were then considered by the Government in turn.
74. Clearly, there would be a strong and compelling public interest in transparency and accountability of the Government's eventual decision (which was not to proceed with the project), but the Commissioner considers that the appropriate and responsible time for that public

¹¹ Department for Education and Skills (DES) v Information Commissioner and Evening Standard EA/2006/0006

interest to be met, was when the policy development process was complete, and the Secretary of State had announced his decision.

75. The complainant has been strongly critical of the Government's decision, and he is certainly not alone. The Commissioner notes that it was reported that Charles Hendry considered that the Government had failed to recognise the longer lifetime of tidal lagoons compared to alternatives. He stated that, *'the offshore wind turbines will have to have been replaced three or four times during the lifetime of a lagoon; a nuclear plant would only last half as long'*.¹²
76. However, the complainant's arguments for disclosure of the requested information were predicated on a concern that the public could not be assured that Government had access to or awareness of, all the relevant information during the policy development process and in reaching its decision. There is no evidence to suggest that this was the case, although the Government's rationale for reaching the decision which it did, is of course open to strong disagreement and debate.
77. The Commissioner would also note that if BEIS had held a work plan, in the form envisaged and requested by the complainant, this would have been unlikely to contain the level of detail required to adequately inform the public of the *'completeness and relevance of its analyses'*. As it is, those parts of the withheld information that comprise emails and workstreams do not, as the Department has correctly contended, provide insight into the quality of the decision making process or the robustness of the subsequent decision, given that they are mainly personal time management and administrative information. The Commissioner considers that the same cannot be said of the information contained in the briefings to Ministers, which would provide significant detail and insight into the decision making process.
78. However, the Commissioner has concluded that at the time of the request, the public interest in disclosure of the withheld information was outweighed by the stronger public interest in maintaining the important and necessary safe space to enable to the Department to reach a carefully considered and robust decision, albeit one which has proven controversial, and which clearly has profound implications for tidal lagoon energy in the UK.

¹² <https://www.theguardian.com/business/2018/jun/25/government-rejects-plan-for-tidal-lagoon-in-swansea>

79. The Commissioner would note that whilst she is satisfied that all of the withheld information is exempt under regulation 12(4)(e)(internal communications), and that BEIS were correct to apply this exception to the request, she considers that most, if not all, of the withheld information would also likely be exempt from disclosure under regulation 12(4)(d)(material in the course of completion).

Right of appeal

80. 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

81. 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.
82. 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

Gerrard Tracey
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Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF