

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

Date: 24 February 2022

Public Authority: Swansea Council

Address: Data.protection@swansea.gov.uk

Decision (including any steps ordered)

1. The complainant requested communications between the Council and the Chinese Government or state owned linked entities in respect of the tidal lagoon project and a visit to China in 2017. The Council provided some information however the complainant believes the Council holds more information than it has disclosed. The Commissioner's decision is that Swansea Council has complied with the requirements of regulation 5 of the EIR. The Commissioner does not require the Council to take any steps.

Request and response

2. On 20 February 2021 the complainant wrote to Swansea Council and requested the following information:

"Copies of all communications between Council member and the Chinese government or any state owned/linked Chinese entity, with a focus on discussion around the tidal lagoon project.

And with a focus on any communication that regards the councils 2017 trip to China that was 'paid for largely by the Chinese authorities' according to local and national press."

3. Swansea Council responded on 15 March 2021. It informed the complainant that no communication had been found which mentioned any discussion around the tidal lagoon project. In respect of costs it disclosed to the complainant an email to the Council dated 11 September 2017 with the subject 'Visit to Wuhan' which confirmed that there was no cost for the conference. The response also confirmed that the application form for the conference stated that the hosts would

cover the expenses of local transportation and accommodation in Wuhan for the Mayor or Leader of the City Council and one delegate, while the expenses for other delegates should be borne by the city of Swansea. The Council confirmed that it paid for the flights, consul and visa fee and accommodation in Beijing for the Leader and one delegate.

4. The complainant contacted the Council on 24 March 2021 and stated that a single email reply with no surrounding emails or context was provided. He further stated that it looked like part of an email chain that the Council could easily have screenshot, but chose not to.
5. Following an internal review Swansea Council wrote to the complainant on 26 March 2021. It stated that a search had been made of the record systems of Cabinet Support officers in compiling the original response and confirmed that it held no information within the scope of the request. It added that further information of the type he described may exist within the email account of an elected member, however did not consider it fell within the scope of FOIA because it would be contained in their personal correspondence.

Scope of the case

6. The complainant contacted the Commissioner on 5 April 2021 to complain about the way his request for information had been handled. He stated that he received a single email response with no surrounding context, yet the response is clearly a reply to something in a wider email conversation. The complainant is also dissatisfied that the Council informed him that it may hold other information, but that as it is held in a private email account it is not required to send it.
7. The scope of the Commissioner's investigation is to consider whether Swansea Council has complied with its obligations under regulation 5 of the EIR.

Reasons for decision

The appropriate legislation

8. The Council appears to have dealt with the request under the FOIA. However, the Commissioner considers that the information, (if held) is likely to be environmental as defined by regulation 2 of the EIR.

9. Regulation 2(1) of the EIR defines 'environmental information' . The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is any information in any material form on:

"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..."

10. The Commissioner considers that as the information relates to a proposed tidal lagoon and represents a 'measure' on the elements, that the information would fall within the definition of environmental information and so it is correct to consider the complainant's request under the EIR.

Regulation 5 – General right of access to information held

11. Under regulation 5 of the EIR, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.
12. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
13. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner

expects the public authority to conduct a reasonable and proportionate search in all cases.

14. In this particular case the Council stated that it held one email and informed the complainant with its internal review that elected members are not individually subject to FOIA adding that it does not apply to their own correspondence in their own email inboxes.
15. It further stated that information of the type the complainant described may exist within the email account of an elected member, but that it did not fall within the scope of FOIA as it would be contained in their personal correspondence.
16. The Commissioner contacted the Council pointing out that there were two distinct issues based on its internal review which needed clarification:
 - Correspondence of an elected official for the purposes of FOIA or EIR, and
 - whether correspondence in non-corporate communication channels such as personal email accounts is information held for the purposes of FOIA or the EIR.
17. The Commissioner took the opportunity to remind the Council that there is a distinction between the party political work a Councillor undertakes as an elected representative, and their work involving Council business. The Commissioner added, that whilst their party political work as an elected representative is not subject to FOIA and the EIR, where the information relates to Council business than it will be considered held for the purposes of both FOIA and the EIR.
18. With regard to information held in non-corporate communication channels, the Commissioner reminded the Council that section 84 FOIA includes the definition of 'information' under FOIA and states that:

“information...means information recorded in any form”

which means that official information held on a public authority's behalf could be held on various non-corporate channels including:

- Private email accounts such as Gmail
- Private messaging accounts such as WhatsApp
- Direct messages sent on apps such as Twitter or via Facebook Messenger

- On private mobile devices including text messages or mobile phones and voice recordings.
19. The Commissioner confirmed that although this relates to FOIA, the concepts apply equally to the EIR.
 20. The Commissioner therefore asked the Council to reconsider the request in the light of the above comments to establish whether any additional information relevant to the request is held, and should it determine that it holds no additional information, to provide details and evidence of its search.
 21. The Council provided some background information to the project and the visit before outlining the details of its original and subsequent searches.
 22. It explained that the Tidal Lagoon project was a national infrastructure project proposed by a private company and one which was highly dependent (until recently at least) on UK and Welsh Government support.
 23. The Council added that the project is not sponsored or promoted by Swansea Council beyond an expression of support for the economic regeneration it would bring to the City. It added that Capital projects of this type are well beyond the Council's budget and when grant-aided, are supported by larger agencies of UK and/or the Welsh Government. Therefore there would have been no expectation on the Leader of the Council to try to raise Chinese investment in the project while he was in China, or seek companies to bid for contracts.
 24. The Council further stated that whilst it was highly supportive of the earlier Tidal Lagoon proposal because of the positive economic impact it offered (and continues to be so in its current iteration) it does not believe that the Council was, or is in the position of being able to formally seek out overseas partners while attending such an event.
 25. In terms of the visit the Council explained that Cllr Rob Stewart visited the two cities of Beijing and Wuhan giving an in-depth presentation about Swansea's planned regeneration. The tidal lagoon project was one of a large number of other initiatives that was discussed.
 26. The aim of the visit was to develop a memorandum of understanding to pave the way to work together on themes like education and economic development. It was anticipated that the visit would help build even stronger links with China that the Council had worked hard to develop in recent years.

27. It was hoped that with a sister city relationship already in place with nearby Nantong, its friendship agreement with Wuhan may develop into a similar status.
28. It also appears that the Cllr Phillip Downing (the then Lord Mayor of Swansea) visited Nantong to celebrate the 30th anniversary of its sister relationship.
29. It further informed the Commissioner that the trade conference was organised by a city authority in China and based on this background, the Council did not believe an exchange would have been likely to have occurred to the extent that a formal record would have been created, or any approach made about funding. The tidal lagoon project may have been discussed as part of the vision for the city of the future.
30. Based on the above, the Council interpreted "communication between council **member**" to refer to elected members of Swansea Council as the invitation was made to the Leader of the Council, not to the Chief Executive. Additionally, matters relating to municipal friendships and town twinning are the preserve of Councillors. Therefore, in practice, only Swansea Council's Cabinet members would discuss an invitation to an overseas municipal conference such as referred to in the request.
31. The Council confirmed that its original search did include the Leader's email inbox as well as the records of the Cabinet Support officers. It also included a verbal exchange with the Leader who had assured him that he had no recollection of lobbying or advocacy on behalf of the Tidal Lagoon project during his trip to Wuhan.
32. The Council further confirmed that although the comments regarding the possibility of other information residing in councillors' inboxes in its internal review suggests that it did not understand the multiple roles of Councillors, it assured the Commissioner that the officer dealing with the original request did.
33. As part of the Council's subsequent search, the Chief Legal Officer was approached for his recollection of the conference. He stated the Tidal Lagoon project would only have featured incidentally in his presentation to the conference as one of the ways in which the City was planning to meet the challenges of the 21 century. He re-iterated comments above that it was a private project seeking UK Government aid with no role for the local authority to seek overseas investment in the project or discuss the award of contracts to Chinese companies.
34. The Council confirmed that the search included the mailboxes of all Swansea Cabinet elected members, and that it was confined to networked resources and emails which were accessible by Cabinet

Support officers, since they do not have access to the non-networked drives on laptops used by elected members.

35. The Leader of the Council was however asked to search the home drives on his laptop, and confirmed that he had not found any relevant information from his search. Additionally, when asked if a copy of his presentation to the conference (on economic regeneration of the City) was still available, he explained that his generic presentation on Swansea is constantly updated, so it does not exist in the form it would have in 2017.
36. The Council further confirmed that the search terms used were Wuhan and China and that the Council Cabinet Office does not hold any manual records as it works in a paperless environment.
37. The Commissioner considers that whilst it is perfectly reasonable that one might initially anticipate the existence of relevant information, on taking the Council's explanation into consideration, it appears far less likely. Additionally, the Commissioner considers that the searches undertaken by the Council were both reasonable and proportionate. Therefore he has concluded based on the balance of probabilities, that the Council holds no information within the scope of the request, and that it has complied with its obligations under regulation 5 of the EIR.

Right of appeal

38. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

39. 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.

40. 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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