

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

**Date:** 21 March 2023

**Public Authority:** Department for Energy Security & Net Zero  
**Address:** 1 Victoria Street  
London  
SW1H 0ET

**Decision (including any steps ordered)**

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1. The complainant has requested information regarding the development consent application for Wylfa Newydd Nuclear Power Station in Anglesey.
2. The Commissioner's decision is that the department formerly known as the Department for Business, Energy and Industrial Strategy ("BEIS") is not entitled to rely on the exception at regulation 12(4)(d) – material in the course of completion. He considers that the exception at regulation 12(4)(e) – internal communication - is engaged, however the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information as set out in the confidential annex.
4. 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 FOIA and may be dealt with as a contempt of court.

**Request and response**

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5. On 8 March 2021 the complainant wrote to BEIS<sup>1</sup> and requested information in the following terms:

"Perhaps I may be permitted to enquire as to possible sight of the following:

1. options at different points in time: namely, DCO deadlines set 30 September 2020, 31 December 2020 and 30 April 2021, respectively;
2. provisional advice and assessment for the Secretary of State; and,
3. the Secretary of State's respective view (albeit, incomplete)."

6. BEIS responded on 12 April 2021 explaining that it held information in respect of points 1 & 2 but this was withheld in reliance of regulations 12(4)(e) – internal communications and 12(4)(d) – material in the course of completion. Regarding the third point BEIS stated that the Secretary of State's view was:

"...that one or more parties should be given the opportunity to provide further information which would be needed ahead of taking a decision on the development consent application itself."

7. Following an internal review BEIS wrote to the complainant on 22 June 2021. It stated that its initial response was upheld.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 20 September 2021 to complain about the way their request for information had been handled.
9. The complainant provided very comprehensive commentary and reasoning on BEIS' responses. The following points are taken from that content:

"Is the Department correct in extending the exemption under regulation 12(4)(d) to capture bespoke historical matters that seemingly,

- a. are no longer "live";

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<sup>1</sup> Although the complainant originally submitted their request to BEIS, on 8 March 2021, BEIS was dissolved on 7 February 2023 when four new departments were created. This decision notice is therefore served on the Department for Energy Security & Net Zero.

- b. were specifically compiled and prepared during the course of and for the purpose of determining a final stage statutory decision on development consent for Wylfa Newydd, prior to the project's permanent cancellation;
- c. had been forcibly aborted amid-stream and abandoned; and,
- d. remain, to all intents and purposes, effectively permanently frozen in incomplete and unfinished state as of 27.01.2021?

As the consent application has not been revived (whether in its original or revised form), there exists no real prospect of any unfinished document in question ever proceeding to any recognisable state of completion.

Furthermore, any such data could not materially, properly or reasonably be held relevant to consideration of any future discrete nuclear power development application, whether on the same location as the cancelled Wylfa Newydd or more generally anywhere in the UK.

...taken in the round, disclosure of any incomplete material and data, as well as any unfinished documents under the Requested Information, is unlikely to give rise to meaningful harm in this particular instance. It would not appear reasonable to continue withholding the information in question beyond 27.01.2021, aborted as it was amid-stream and as it lays permanently frozen in whatever state short of completion.

...taken together in the context of the particular circumstances in this case, is the Department correct in stretching the ambit of regulation 12(4)(e) to capture important and relevant additional matters concealed from Interested Parties during the post-Examination final stage processes into consent determination? The fact that the Secretary of State was prevented from determining a final decision is arguably irrelevant in the face of principles of fairness, transparency, legitimate expectation and trust in the planning system. Refuge under the "private space" umbrella, in order to conceal matters material to a statutory decision, would appear arguably very questionable."

10. The Commissioner considers the scope of his investigation to be the application of regulations 12(4)(d) and 12(4)(e) to withhold the requested information.

## **Background**

11. BEIS had, at the time of the request, responsibility for consenting planning permissions for Nationally Significant Infrastructure Projects (NSIPs). In any such case the Planning Inspectorate is responsible for appointing an Examining Authority to conduct the Examination of the Application and then submit a Recommendation Report to the relevant government department (in this case BEIS) for consideration ahead of the Secretary of State making a formal decision. All materials received by the Planning Inspectorate during the course of the Examination process are published by it on the relevant project page of the National Infrastructure Project and are consequently publicly available. The Recommendation Report is not published until the decision letter is issued when the Secretary of State makes the formal determination of the application.
12. BEIS explained that as a matter of accepted practice, internal submissions by officials to the Secretary of State either during consideration or at the point of determination are not published. On occasion they have been disclosed to parties bringing a judicial review against a decision by the Secretary of State under the duty of candour, but only where they are relevant to specific points of legal challenge: however, the uses to which any party receiving the submissions can put them is limited by the Civil Procedure Rules to use in the judicial review and they cannot be circulated more widely.
13. BEIS explained that in the interest of transparency, the Examining Authority's Recommendation Report was published on the project webpage once the application was withdrawn. This was a decision of the Planning Inspectorate and there was no legal obligation to do so in these circumstances. The Report of the Examining Authority's findings and conclusions in respect of the application was complete and had been submitted to the Secretary of State under section 74 of the Planning Act 2008. It therefore was in final form and could not be changed.

## **Reasons for decision**

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### **Regulation 12(4)(d) – material in the course of completion**

14. Regulation 12(4)(d) of the EIR provides that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents, or to incomplete data.
15. The exception is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three categories, then the exception is engaged. It is not

necessary to show that disclosure would have any particular adverse effect in order to engage the exception.

16. If engaged, regulation 12(4)(d) is a qualified exception, so the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
17. The exception sets out three distinct categories, or limbs, and the information must fall within one of these for the exception to be engaged.
18. The Commissioner has considered whether the withheld information comprises material in the course of completion. The ICO's published guidance on this exception<sup>2</sup> explains that, in some cases, information which is being gathered in the process of a public authority formulating its policy, or deciding how to proceed in relation to a particular matter, can be said to form part of that overall, larger, "end product" which is in itself still in the course of completion.
19. A document may be unfinished because the authority is still working on it at the time of the request or because work on it ceased before it was finalised and there is no intention to finalise it.
20. BEIS explained that the Horizon Wylfa Newydd application was never formally determined, officials did not reach a final conclusion on the application because Horizon formally withdrew the application on 27 January 2021. BEIS advised that the various documents being prepared to support a decision were not finalised which means that those options considered to address issues identified by the Examining Authority's Recommendation Report were not finalised. Submissions were sent to Ministers in September and December 2020 however the application was withdrawn before the formal decision by the Secretary of State.
21. BEIS considers that the documents held in the scope of the request represent part of the "thinking space" for the consideration of the Wylfa Newydd application and that the final decision by the Secretary of State would represent the completion of the piece of work. BEIS argues that the Secretary of State may have raised further concerns or questions that may have resulted in consultations or in updates to the documents.

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1637/eir\\_material\\_in\\_the\\_course\\_of\\_completion.pdf](https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf)

Furthermore it states that this would not be an unusual situation in such circumstances and is not a theoretical possibility.

22. The complainant explained his view that as the application has not been revived either in its original or revised form "there exists no real prospect of any unfinished document in question ever proceeding to any recognisable state of completion." They explained:

"Plainly, as a matter of course, data relating to different development proposals invariably differs in characteristics, impacts, benefits and disbenefits (for example).

- Development consent data intrinsically tends to be finance specific, project specific, site specific, socio-economic specific, and technology specific, amongst a multitude of other granular specificities.

Any incomplete data for the aborted Wylfa Newydd consent determination is unlikely to be readily transferrable or relevant in the main to any other discrete consent application for nuclear development, whether on the same location or more generally anywhere in the UK.

- The site specific data for Wylfa Newydd could not meaningfully be assigned to any other discrete development proposal in future, even if located on the same "site". Further granular variables between different proposals include construction, operation and decommissioning parameters; ecological, environmental and nuisance assessments and footprints; water resources and land take areas (terrestrial and marine); orientation and physical size; screening and landscaping; local socio-economic characteristics; supply chain metrics; etc."

23. The Commissioner has reviewed the withheld information which comprises four emails each with numerous attachments. The attachments include information which was already in the public domain at the time of the request, such as the Examining Authority's Report: a Horizon news release and a Hitachi Ltd press release. In addition to this material, other documents, for example Decision Submissions prepared by officials for consideration by the Minister and Secretary of State are included. The Commissioner notes that the holder of the role of Secretary of State at the time of the request was Kwasi Kwarteng however the previous holder, Alok Sharma had held the post from 13 February 2020 to 8 January 2021 during the time relevant to the request.
24. The Commissioner has considered the complainant's comments above at paragraph 22 and would explain that if a document is unfinished at the time of the request and there is no prospect of completion that in itself does not provide an argument for disclosure. It provides for the engagement of the exception. Disclosure may result following the public interest consideration.

25. In this case the Commissioner accepts that the Secretary of State did not make a formal decision on the Application and therefore when viewed as a project remains incomplete. However, the Commissioner considers that the withheld information comprises documents which are complete. The attachments to emails as described above were presented to the Secretary of State to inform his decision making and are not unfinished. The Secretary of State cannot base his opinion on unfinished information. He may seek further information but that is a separate matter. The only unfinished or incomplete element is the Secretary of State's decision.
26. On this basis the Commissioner finds that in these particular circumstances the exception is not engaged. He has therefore not considered the public interest.

### **Regulation 12(4)(e) – internal communications**

27. Regulation 12(4)(e) states that information is exempt from disclosure if it 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, as long as the requested information constitutes an internal communication then it will be exempt from disclosure.
28. The Commissioner has considered the information withheld by BEIS, as set out above in paragraph 23, on the basis of this exception and he is satisfied that it constitutes internal communications and therefore regulation 12(4)(e) is engaged.

### **Public interest test**

29. As with the other exceptions under the EIR, when regulation 12(4)(e) is engaged, the public authority must still carry out the public interest test in order to decide whether the information should be withheld. Under regulation 12(1)(b), the public authority can only withhold the information if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, under regulation 12(2), it must apply a presumption in favour of disclosure.
30. BEIS explained that it had particular regard to the fact that the Wylfa Newydd application was a matter of significant public interest. In regard to the need for transparency, BEIS advised that the Examining Authority's Recommendation Report, which was in the public domain at



the time of the request<sup>3</sup>, presents a detailed analysis of the issues that were considered during the course of the Examination along with the Examining Authority's conclusions in relation to each of those issues and the recommendations that the Examining Authority made to the Secretary of State. BEIS considers that the information within this Report already provides a significant level of transparency into the consideration of the Wylfa Newydd application.

31. BEIS explained that the Wylfa Newydd application raised a number of complex issues which may arise in any future application on the site. It considers that any thinking by officials about how to resolve these issues is not made public, particularly those involving internal considerations about compliance with legal requirements. BEIS considers that, on this basis, a safe space was required during the consideration of the scheme which remained the same after the Application was withdrawn in January 2021 and remains the position at the date of this notice. It added that any future developer would have to comply with the same legal requirements and "that is for them to identify the appropriate ways to do so".
32. The Commissioner asked BEIS to explain how the requested information could influence or be relevant to a fresh application and thereby prejudice the consideration of such an application. BEIS advised:

"In order to secure a development consent for a Nationally Significant Infrastructure Project the onus is on the Applicant to submit an application that satisfies all legal and policy tests. It was clear during the Examination of the Wylfa Newydd application that significant concerns existed in relation to various elements of the project which were not satisfactorily resolved by the end of the Examination.

Before reaching the final recommendation on whether an individual application should be consented officials have to consider a range of information that has been collected by the Examination process or during any further consultations conducted by the Secretary of State following the receipt of the Examining Authority's Recommendation Report. Such deliberations may include information that officials consider is necessary to satisfy various legal and policy requirements as well as the possible recommendations that could be made based on the information that is held.

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<sup>3</sup> BEIS confirmed that at the time of the Commissioner's investigation the Planning Inspectorate had deleted the project page and therefore it is no longer available online. BEIS advised that it would provide a copy of the document to the complainant if they required one.



As a matter of public policy, and to reflect the quasi-judicial role of the Department, it is not appropriate for officials to advise and assist applicants on the level of detail required as this is the responsibility of the Applicant when preparing the application. We consider that revealing internal discussions about how work on these issues was going, and any preliminary conclusions, including possible decision options, would contravene this policy by providing assistance to any future applicant by providing precisely such information on how to design a fresh project in a manner that would address these concerns. It is important to note that the detailed work-up of options may include, for instance, options to either approve or refuse an application: in the event that one outcome was selected the other would never be published.

Any new application for development consent at this site will be considered as an entirely new application. While that application may rely on elements of previous application, such application will be made by a different developer and therefore rely on wholly different design and technology types. It will be for the applicant to show that the application meets the required standards and that the benefits of their proposal outweigh any harmful impacts. The release of internal advice to Ministers in relation to a different application which has now been withdrawn has the potential to be misused by parties seeking to argue about the suitability or otherwise of the site, or any particular impacts of development at it, but being incomplete would also have the potential to mislead parties to any future planning process as to what the Secretary of State's approach might be, including the Examining Authority whose job will be to consider that new application in an independent and impartial manner."

33. BEIS advised the Commissioner that a key public interest argument in favour of maintaining the exception is that the Government continues to consider the site as a viable site for the development of a future nuclear power station.

34. BEIS stressed that the publication of detailed evidence submitted during the course of the Examination as well as the Examining Authority's Report of the Horizon Application provides ample opportunity to understand the issues which arose during the Examination. It added:

"It would not therefore significantly enhance the public interest to add to this with the internal BEIS documents. ... the information that is being withheld will not be made available to any future application for development consent at Wylfa Newydd."

35. BEIS explained that the breadth of options for determination considered by officials requires that the options can be written in internal communications, including advice to Ministers, confident that the communications will not be disclosed. BEIS considers this particularly

important with regard to options prepared that did not reflect the final decision.

“Officials consider that the impact on the ability of officers to prepare advice, including setting out the comparative risks of different options for resolving issues and of the final decision, both for the Wylfa Newydd application and other projects, is such that this significant weight should be accorded against releasing the information sought.”

36. The complainant provided very detailed submissions on their view that the public interest favoured disclosure. It is not appropriate for the Commissioner to reproduce all those submissions, however, he notes the following comments:

“How real is the risk of disclosure of Requested Information affecting any continuing interest from developers? To state the obvious, there is no certainty of any interest progressing through to any actual development consent application. It would be wrong to presume the trajectory of any interest is cast in stone. Any actual future proposal would necessarily be contingent on a discrete development consent application, with discrete benefits and impacts. Each future application is highly likely to constitute a different discrete development proposal. The same could be said for any future consent applications for nuclear generating projects generally anywhere in the UK. In that context, disclosure is unlikely to affect meaningfully (adversely or otherwise) any interest from developers.

... it does not necessarily follow that disclosure of Requested Information could *ipso facto* influence any continuing or future interest in the potential for developing the Wylfa Newydd site, to such an extent as to materially compromise the Secretary of State’s future determinations into discrete consent applications.

... The fear that disclosure may encourage potential developers to tweak proposals to maximise favourable determinations and/or minimise negative outcomes, is hardly capable of constraining meaningfully the Secretary of State’s freedom to consider and determine development consents afresh. Any remote theoretical risk simply means the Secretary of State would need to sharpen up accordingly.

... In the final analysis, regardless of the nature of any influence on an application, development consent is surely subject to rigorous and robust case by case merit scrutiny, including assessment of benefits and impacts, under statutory Examination procedures.

... Any speculation by any party as to “what may or may not have been the Secretary of State’s final decision and reasoning” is neither here nor there. What matters is fair and transparent final stage decision

determination processes untainted with any degree or element of predetermination.

... is the Department correct in stretching the ambit of regulation 12(4)(e) to capture important and relevant additional matters concealed from Interested Parties during the post-Examination final stage processes into consent determination? The fact that the Secretary of State was prevented from determining a final decision is arguably irrelevant in the face of principles of fairness, transparency, legitimate expectation and trust in the planning system. Refuge under the "private space" umbrella, in order to conceal matters material to a statutory decision, would appear arguably very questionable."

### **Balance of the public interest**

37. The Commissioner considers that the underlying rationale for the exception at regulation 12(4)(e) is to protect a public authority's need for a private thinking space. He considers that the extent to which disclosure would have a detrimental impact on internal processes will be influenced by the particular information in question and the specific circumstances of the request.
38. The Commissioner has considered the arguments provided by both parties. He recognises the legitimate public interest in disclosing information that would inform the public about decisions concerning activities that may have an impact (whether positive or negative) on the environment. He is mindful that access rights under the EIR are designed to support public access to environmental information and public participation in decision making.
39. The Commissioner notes BEIS' acknowledgement of the significant public interest in the Wylfa Newydd application and the importance of openness and transparency regarding the project. He accepts that a considerable amount of information was placed in the public domain by the Planning Inspectorate, albeit no longer accessible, which enabled the public's knowledge. The Commissioner notes that the Examining Authority's Recommendation Report was published despite there being no obligation to do so. Nevertheless the complainant's request is for further information not covered by that transparency.
40. The Commissioner considers that the complainant has made valid points in his submissions. In particular his questioning of the impact of disclosure on any future applications for planning consent.
41. BEIS explained at paragraph 12 that internal submissions by officials to the Secretary of State are not usually disclosed. The Commissioner accepts that this may be the case, however, he also notes that the request for information in this case was submitted post both any consideration of those internal submissions and the point of any

determination being made. The Commissioner also notes that if a determination, or final decision, had been made by the Secretary of State it would have been placed in the public domain in a reasoned decision letter. Such a letter would have resulted from consideration of the internal submissions, alongside the Examining Authority's report. BEIS made clear that the Secretary of State is free to, and sometimes does, disagree with any recommendation proposed by officials and will often ask for further information.

42. When asked by the Commissioner, BEIS indicated that the information withheld in this case represents a stage in the consideration of a particular application:

"...and cannot therefore involve any pre-determination of any future application. Officials are required to consider any future application only on the basis of information that has been made publicly available in accordance with the procedural rules in place at the time of the application and applicable legislation."

43. BEIS went on to advise that no party to a future application at the Wylfa Newydd site would be disadvantaged by the requested information being withheld. It stated that if the information was disclosed selectively, those parties who had not seen it would be disadvantaged whilst those having seen it would be advantaged in any future application on the site. The Commissioner acknowledges this but would point out that disclosure under the EIR is disclosure to the world at large and therefore would not create an unfair situation.

44. As quoted in paragraph 32 BEIS referenced its quasi-judicial role and an associated inability to advise or assist applicants interested in development consent. It expressed concern that disclosure of the requested information may impact that role as it may serve as:

"an effective proxy to advice from officials to applicants which would otherwise be prohibited and may have the effect of misleading those considering any new application as to the approach the Secretary of State may take."

45. The Commissioner understands BEIS' comments regarding its role, however he considers that such a role is not a bar to disclosure under the exception at regulation 12(4)(e) and there can be no resultant restriction on the circulation of information disclosed under the EIR. The Commissioner is not persuaded that the disclosure of information relating to one specific application can be considered to act as advice or assistance in a different application. He has also been made aware that any new application for development consent will be considered as an entirely new application with the applicant being responsible for demonstrating that the application meets the requires standards. The

Commissioner is not convinced that it would be a negative situation if an applicant was able to provide a more detailed application addressing the required standards as a result of information in the public domain. As Secretaries of State frequently change, in this case Alok Sharma was replaced by Kwasi Kwarteng on 8 January 2021, applicants should be aware that any particular incumbent will differ in their requirements and therefore it would be foolhardy to interpret any disclosed information as a permanent position. It therefore seems unlikely that any disclosure would mislead an applicant. As the complainant has commented any new application for development consent would be discrete and would be scrutinised by the Secretary of State in post at the time. The Horizon application did not reach the point of the Secretary of State's decision it is not possible to know what decision the incumbent at the time would have reached or what role the officials' submissions would have had in that decision. The Commissioner would expect any new application to be considered by all in an independent and impartial manner.

46. The Commissioner is mindful that a public authority is required to apply a presumption in favour of disclosure, and in any event the public interest in maintaining an exception must outweigh the public interest in disclosure. If the public interest is balanced then the information in question must be disclosed.
47. The Commissioner accepts that the material in the public domain at the time of the request provided significant detail on Horizon's application and this weighs in favour of maintaining the exception. The information requested by the complainant provides a conclusion to the project albeit a project which was not concluded by a decision of the Secretary of State. Disclosure of the material identified in the confidential annex allows the public to understand the final steps considered by government before the withdrawal of the application.
48. The Commissioner is satisfied that there is a public interest in protecting BEIS' ability to communicate internally, as set out in paragraph 35, in a "safe space". However, the Commissioner's opinion is that the need for a safe space is strongest when the issue is still live. In the circumstances of this case the Application was withdrawn by the time of the request and any potential future applications would result in other internal communications bespoke to those applications. He therefore does not accept that officers responsible for providing advice to the Secretary of State would be significantly impacted by disclosure in this case.
49. The Commissioner's view is that there is a compelling argument for the disclosure of government's considerations on decision making in regard to planning permission for a Nationally Significant Infrastructure Project such as a nuclear power station. Such a project has an immense impact on both people and the environment in so many respects as

demonstrated and covered by the Examining Authority's Report. The Commissioner considers that disclosure of the requested information allows for scrutiny by an informed public.

50. Consequently, although a close call, the Commissioner finds that the public interest in maintaining the exception at regulation 12(4)(e) does not outweigh or balance the strong public interest in disclosing the withheld information.
51. The Commissioner's decision is that the information as set out in the confidential annex should be disclosed.

## Right of appeal

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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: 0203 936 8963  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

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 .....**

**Susan Hughes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**