

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

Date: 3 August 2018

Public Authority: Natural Resources Wales

Address:

accesstoinformationteam@naturalresourceswales.gov.uk

Decision (including any steps ordered)

1. The complainant has requested information, including legal advice, from Natural Resources Wales concerning the Bat Protocol currently in force for a specified building at the Rhydymwyn Valley Site. Natural Resources Wales provided some information but refused the legal advice in reliance on regulation 12(5)(b) of the EIR. The Commissioner's decision is that Natural Resources Wales has complied with its obligations under regulation 5 of the EIR and it has correctly relied on regulation 12(5)(b) to refuse this information. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 7 July 2017, the complainant wrote to Natural Resources Wales (NRW) and requested the following information:
"...all information including documentation relating to legal advice sought and received concerning Bat Protocol currently in force for Building (45 (P6) at the Rhydymwyn Valley site This information should include all relevant minutes, memos, emails, reports, etc."
3. NRW responded on 7 August 2017. It provided some of the information but stated that:
"We regret to inform you that we are unable to provide you with the legal advice as it falls under the exception (12.5.b) of the Environmental Information Regulations 2004..."

4. Following an internal review NRW wrote to the complainant on 9 October 2017, and informed him that it was upholding its original decision to refuse the request on the basis of regulation 12(5)(b) of the EIR. It also confirmed that with the exception of the documents withheld under regulation 12(5)(b) that all relevant information had been disclosed.

Scope of the case

5. The complainant contacted the Commissioner 25 October 2017 to complain about the way his request for information had been handled. He stated that he had received unsatisfactory replies to his request for information, and in particular he was not satisfied that NRW had provided all information falling within the scope of the request other than the legal advice, or with NRW's reliance on regulation 12(5)(b).
6. During the course of the Commissioner's investigation, NRW identified additional information falling within the scope of the request, some of which it provided to the complainant, with the remainder being withheld in reliance on regulation 12(5)(b) EIR.
7. The Commissioner considers that the scope of her investigation is to determine whether NRW has complied with its obligations under regulation 5(1) of the EIR by providing all information falling within the scope of the request notwithstanding that withheld on the basis of regulation 12(5)(b). She will also consider whether NRW correctly relied on regulation 12(5)(b) in respect of the withheld information.

Reasons for decision

Regulation 5 – duty to make environmental information available on request

8. Regulation 5(1) of the EIR provides a general right of access to environmental information held by public authorities. In cases where a dispute arises over the extent of the recorded information held by a public authority at the time of the request, the Commissioner is mindful of the former Information Tribunal's ruling in EA/2006/0072¹ (Bromley) that there can seldom be absolute certainty that information relevant to

¹ http://www.bailii.org/uk/cases/UKIT/2007/EA_2006_0072.pdf

the request does not remain undiscovered somewhere within the public authority's records.

9. Therefore, when considering whether a public authority does hold any additional relevant information, the normal standard of proof to apply is the civil standard of the balance of probabilities.
10. For clarity, the Commissioner is not expected to provide categorically whether or not further relevant information is held. She is only required to make a judgement based on the civil standard of the balance of probabilities as to the likelihood of whether additional information is held.
11. 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.
12. The Commissioner would point out that a public authority is not required to create new information in response to a request.
13. The Commissioner asked NRW to clarify its process of determining what information fell within the scope of the request and why it was satisfied that it had identified all relevant information captured by the request.
14. NRW informed the Commissioner that it contacted its Senior Species Officer from its Development Planning and Advice Services Team for North and Mid Wales which provided in excess of 200 emails for consideration by the Access to Information Team.
15. The Access to Information Team reviewed and sifted all emails to exclude any duplicate items, those which did not fall within the scope of the request, and any material which would attract Legal Professional Privilege. NRW further informed the Commissioner that the collated material was subsequently reviewed by the team and its Legal Services Department. It added that, given the location of the site, it was confident it had contacted all relevant colleagues who may hold relevant information.
16. The Commissioner asked NRW to provide some background information regarding why it only asked one individual and to clarify the significance of her statement '*given the location*'.
17. NRW confirmed the one individual was contacted as the site manager. It also confirmed that the location in question fell within its boundary for Flintshire therefore it was confident it had contacted the appropriate Senior Species Officer.

18. Nonetheless, it decided to undertake a further internal search to include other potentially relevant colleagues who may hold records of associated internal deliberation relating to the original request. The Commissioner notes that this wider search yielded additional information as referred to in paragraph 6 of this notice.
19. Based on the explanation provided by the public authority, and its wider search, the Commissioner considers that, based on the balance of probabilities, NRW has now complied with its obligations under regulation 5 of the EIR and no further information is held.

Regulation 12(5)(b) – the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature

20. Regulation 12(5)(b) of the FOIA states that information is exempt if disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature. Regulation 12(5)(b) is a broad exception with the course of justice including, but not restricted to information attracting Legal Professional Privilege (LPP). The purpose of the exception is to ensure that there should be no disruption to the administration of justice.
21. In this case, NRW has withheld information under regulation 12(5)(b) on the basis that the information is covered by LPP.
22. The Tribunal in *Woodford v IC* (EA/2009/0098)² confirmed that the test for adversely affect in relation to LPP would be met by the general harm which would be caused to the principle of LPP, without needing to demonstrate that specific harm would be caused in relation to the matter covered by the information.

"There can be no doubt that disclosure of information otherwise subject to legal professional privilege would have an adverse effect on the course of justice."

23. Consideration of the specific circumstances is however required when addressing the public interest test.

² http://www.bailii.org/uk/cases/UKFTT/GRC/2010/2009_0098.pdf

24. Regulation 12(5)(b) will be engaged if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
25. There are two types of privilege - litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
26. NRW is relying on advice privilege and has confirmed that the sole or dominant purpose of the information was to provide legal advice, that the advice was created by a NRW lawyer for a NRW officer. It has further confirmed that the information remains confidential and has only been distributed on a restricted basis.
27. The Commissioner has viewed the withheld information and is satisfied the information represents confidential communications between a client and legal advisor acting in their professional capacity, and made for the sole purpose of obtaining legal advice. The Commissioner is therefore satisfied that regulation 12(5)(b) is engaged in respect of this information and has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the information

28. The EIR clearly state under regulation 12(2) that when considering exceptions to the duty to disclose environmental information, a public authority must apply a presumption in favour of disclosure and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request.
29. NRW has acknowledged the presumption in favour of openness, transparency, enhancing public understanding of decisions and accountability in relation to its activities.
30. The Commissioner would also point out that disclosure may allow individuals to better understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions and in this particular case in relation to legal advice in respect of bat protocol.

Public interest arguments in favour of maintaining the exception

31. NRW has stated that it requires certain information to remain confidential in order to be effective and considers there is a strong public interest in NRW being able to effectively carry out its legal obligations. It has further stated that strong weight is given to LPP, and it is generally in the public interest for legal advice to remain confidential, otherwise it may be deterred from seeking legal advice.
32. NRW has further stated that it is important that staff are able to seek and receive legal advice in a free and frank manner without the advice being disclosed into the public domain to ensure that it can carry out its function properly in relation to its remit and ensuring that it complies with the Wildlife & Countryside Act 1981 (as amended), the Conservation of Habitats and Species Regulations 2010 (now the Conservation of Habitats and Species Regulations 2017) and by virtue of Regulation 9, the Habitats Directive.
33. NRW has on the one hand stated that the issue is historic and no longer a matter of contention, but has also stated that the complainant is a member of Rhydymwyn Valley History Society (RVHS) which has stated it may Judicially Review both NRW and Defra in the future and based on this statement, NRW is of the opinion that this represents a further factor in favour of maintaining the exception.
34. The Commissioner sought clarification of this apparent contradiction with NRW confirming that although discussions with RVHS have progressed since the legal advice was provided, the wider issue of which the advice relates in part remains live. It has added that the questions of whether or not the RVHS can be granted a licence to enable it to access the building 45 remains on-going. It states that should RVHS disagree with any final determination, the legal advice will form part of any potential wider proceedings it may choose to pursue.

The balance of public interest test

35. As stated in paragraphs 28 to 30 of this notice, the Commissioner acknowledges the explicit presumption in favour of disclosure of the information provided for under regulation 12(2) of the EIR, and appreciates the general public interest in transparency and accountability in relation to the decisions made by public authorities.
36. However, the Commissioner also acknowledges the general public interest in maintaining legal advice will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between a client and lawyer to ensure full and frank

legal advice, which in turn is fundamental to the administration of justice.

37. This is consistent with the former Information Tribunal's ruling in the case of *Bellamy v the IC* (EA/2005/0023)³ that there is a strong element of public interest inbuilt into the privilege itself. Indeed, it is worth noting that the Tribunal considers that there should be at least equally strong countervailing considerations to override that inbuilt interest.
38. This was further reinforced in the case of *DCLG v Information Commissioner & WR* [2012] UKUT (103 AAC)⁴ (28 March 2012) which concluded that the risk of the disclosure of legally privileged information leading to a weakening of confidence in the general principle of legal professional privilege is a public interest factor of very considerable weight in favour of maintaining the exception and there would have to be special or unusual factors in a particular case to justify not giving it this weight.
39. The Commissioner notes that factors which might suggest equally strong countervailing arguments include whether there is a large amount of money involved or a large number of people affected, lack of transparency in the public authority's actions, misrepresentation of advice given, or the selective disclosure of only part of that advice. The Commissioner notes that there is no evidence of any of these factors involved in this particular case.
40. The Commissioner is also mindful that at the time of the request, the advice was recent, the wider issue remains live and disclosure of this information would mean that NRW would not have a level playing field in the event of wider legal proceedings.
41. The Commissioner has therefore concluded that the balance of public interest is weighted in favour of maintaining the exception and consequently, that NRW was justified in its reliance on regulation 12(5)(b) of the EIR.

³ http://www.bailii.org/uk/cases/UKIT/2006/EA_2005_0023.pdf

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<http://administrativeappeals.decisions.tribunals.gov.uk/judgmentfiles/j3477/%5B2012%5D%20AACR%2043bv.doc>

Right of appeal

42. 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

43. 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.
44. 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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