

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 15 May 2024

**Public Authority:** Brecon Beacons National Park Authority  
**Address:** Plas Y Ffynnon  
Cambrian Way  
Brecon  
LD3 7HP

#### **Decision (including any steps ordered)**

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1. The complainant requested various correspondence between any officer of the Brecon Beacons National Park Authority ('the Authority') and external individuals for the period from 1 January 2023 to 11 June 2023, and specifically in relation to Gilestone Farm, Green Man and the Green Man Festival. The Authority provided some information and refused other information in reliance on section 40 (personal information) and section 41 (information given in confidence) of the Freedom of Information Act ('the FOIA'). However, during the course of the Commissioner's investigation, the Authority re-considered the request under the EIR. It stated that it was relying on regulation 12(5)(e) (confidentiality of commercial information) to withhold the draft minutes and regulation 12(5)(f) (the interests of the person who provided the information) to withhold the email correspondence.
2. The Commissioner's decision is that the Authority was not entitled to rely on regulation 12(5)(e) to refuse to withhold the draft minutes, but that it was entitled to rely on regulation 12(5)(f) to withhold the remaining correspondence. The Authority's failure to issue a refusal notice within the required timescales also represents a breach of regulation 14(2) of the EIR. The Commissioner requires the Authority to take the following steps to ensure compliance with the legislation.
  - Disclose a copy of the draft minutes to the complainant.

3. The Authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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4. On 11 June 2023, the complainant wrote to the Authority and requested the following information:
  - “1. All correspondence (whether by email, letter or other) between any officer of the Park Authority including the Chief Executive and the following people connected with Talybont-on-Usk Community Council, for the period from 1<sup>st</sup> January 2023 to 11 June 2023:
    - a. The Clerk to the Council using [specified email address 1]
    - b. The acting clerk to the Council using [specified email address 2] or [specified email address 3]
    - c. The Chair of the Community Council using [specified email address 4]
    - d. The County Councillor for the Talybont-on-Usk Community Council area [named Councillor] using [specified email address 5]
  2. In order to assist you in your search, I require all correspondence but in particular that relating to Gilestone Farm, Green Man, Green Man festival, [named individual 1], [named individual 2] of the Welsh Government and the Usk Valley Conservation Group and in addition any correspondence which includes the words ‘bullying’, ‘nest of vipers’, or similar.”
5. The Authority responded on 24 October 2023. It confirmed that it held information relevant to the request and provided some information. It also attached a schedule of all documents covered by the request with a description of each document that the Authority holds. The Authority refused the remainder of the request, citing section 40 and section 41 of the FOIA.
6. The complainant contacted the Authority on 31 October 2023 to complain about the documents numbered, 1, 4, 14, 23 and 34 of the schedule being withheld under section 41 of the FOIA.
7. Following an internal review the Authority wrote to the complainant on 21 November 2023. It upheld its original response.

## Scope of the case

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8. The complainant contacted the Commissioner on 28 November 2023 to complain about the way their request for information had been handled.
9. They consider that because the request relates to land use/planning, as opposed to medical or legal/client confidentiality, that the information should be disclosed. The complainant has further stated that elected representatives may be correspondents, and they should be held to account for their views.
10. The complainant did not express any dissatisfaction with the Authority's refusal of personal information either in their request for an internal review, or to the Commissioner. This does not therefore form part of the scope of this investigation.
11. As stated previously, during the course of the Commissioner's investigation, the Authority reconsidered the request under the EIR, and cited regulation 12(5)(e) in respect of the draft minutes, and regulation 12(5)(f) to withhold the remaining correspondence.
12. The scope of the Commissioner's investigation is therefore to consider the Authority's reliance on the exceptions cited.

## Reasons for decision

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### Is the requested information environmental?

13. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
  - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
  - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
14. The information requested relates to possible changes ('measures') as described in (c) to the use of the land (a). The Commissioner therefore considers that the requested information falls within the definition of environmental information outlined above, and that the appropriate legislation to consider this request is the EIR.

## Reasons for decision

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### **Regulation 12(5)(e) – confidentiality of commercial or industrial information**

15. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
16. The Authority is relying on regulation 12(5)(e) to withhold the information in respect of items 1 and 4 of the schedule of records provided to the complainant as part of the Authority's original response. Although their titles vary in that item 1 is referred to as 'draft minutes of meeting of 17 March 2023...' and item 4 is referred to as 'draft meeting note of stakeholder meeting on 17 March 2023', they are the same document.
17. In his assessment of whether regulation 12(5)(e) is engaged, the Commissioner will consider the following questions:
- Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?

- Is the confidentiality required to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?
18. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive because if the information was disclosed under the EIR, it would cease to be confidential.

Is the information commercial or industrial in nature?

19. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
20. The Authority has stated that the information referred to the operation of Gilestone Farm which is commercial in nature as it referred to further commercial use and a farming business tenancy.
21. The Commissioner has considered the information withheld under this exception and whilst he accepts that it may contain a small amount of commercial information, he does not accept that the minutes in their entirety are commercial in nature.

Is the information subject to confidentiality provided by law

22. The Commissioner considered the draft minutes against the minutes published on the Welsh Government's website on 27 April 23 (pre request), and notes that the substantive content is identical. The only difference between them is that the names of the attendees has been removed from the final published minutes in favour of the number of attendees from each organisation present at the meeting. As such, he does not accept that the Authority can claim that the information was subject to confidentiality provided by law, at the time of the request given that the information was already essentially in the public domain.
23. The Commissioner contacted the Authority in this regard and asked if they were the actual draft minutes or if there were earlier drafts. The Park Authority confirmed that:
- "The draft and final minutes contain non-substantive changes and as such on reflection, I do not think they have an impact on the confidentiality of the material and can be released."
24. However, to date, and despite various requests from the Commissioner, the Authority has failed to disclose the draft minutes to the complainant.

25. It is clear from the above discussion that the Commissioner cannot conclude that the second condition is met. As all four parts of the test set out at paragraph 17 are not met, the exception provided by regulation 12(5)(e) of the EIR is not engaged.
26. That being the case, the Commissioner's decision is, therefore, that the Authority was not entitled to rely on regulation 12(5)(e) of the EIR to refuse the requested draft minutes.

**Regulation 12(5)(f) – interests of the information provider**

27. Regulation 12(5)(f) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

“(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure.”

28. The Commissioner's published guidance on this exception<sup>1</sup> explains that its purpose is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds it.
29. Where the four stages of the test are satisfied, the exception will be engaged. The public interest test will then determine whether or not the information should be disclosed.

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1638/eir\\_voluntary\\_supply\\_of\\_information\\_regulation.pdf](https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf)

Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?

30. The information consists of emails from third party organisations and the Authority has confirmed that the individuals who supplied the information were not under, or could not have been put under any legal obligation to supply the information.

Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it other than under the EIR?

31. The Authority has confirmed that the information was not supplied in circumstances where it would be entitled to disclose it apart from under the EIR. The Authority has confirmed that the information was made available in good faith, by the individuals with an expectation that their comments remained confidential.
32. Having had regard to the context in which the Authority holds the information, the Commissioner recognises that the information represents correspondence between various individuals regarding the final draft of the minutes of the meeting of 17 March 2023. It is evident to the Commissioner that the individuals copied the Authority into this correspondence and the Commissioner accepts that it is not entitled to disclose it other than under the EIR .

Has the person supplying the information consented to its disclosure?

33. The Authority has stated that it consulted with the third parties and they have not consented to disclosure of the information under the EIR as the correspondence was supplied on the understanding that it would be confidential. The individuals further stated that they would not have participated in such a manner within emails marked confidential, if they had anticipated that the information would subsequently be disclosed to the public.

Would disclosure adversely affect the interests of the person who provided the information to the public authority?

34. In considering whether there would be an adverse effect on the interests of the person who voluntarily provided the information, the Authority needs to identify harm to the person's interests which is real, actual and of substance, and to explain why disclosure would, on the balance of probabilities, directly cause harm.
35. There is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test (ie, once the

application of the exception has been established). However, a public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.

36. The Authority acknowledged that the threshold necessary to justify non-disclosure because of adverse effect, is a high one. It informed the Commissioner that it considers the adverse effect is to the confider's interests.
37. The Authority provided some context to the correspondence, informing the Commissioner that the Welsh Government acquired Gilestone Farm in March 2022 and subsequently entered into confidential negotiations with Green Man (operators of the Green Man Festival) regarding the possible use of the site by the festival. At the time of the request, the issue was highly contentious both locally and nationally in Wales.
38. The Authority further informed the Commissioner that disclosure would cause distress to the individuals, not least because they would be identifiable from that information. It further stated that disclosure may cause bad feeling between any persons that submitted complaints/information to the respective organisations regarding Gilestone Farm.
39. The Authority further commented that the correspondence refers to complaints of bullying and harassment received by parties to the correspondence and this is echoed in the Welsh Government written statement published 29 January 2024. In these situations, reprisals might be feared by anyone under the circumstances, regardless of who or what they complained about. The fear which would result due to disclosure of the information would be against their interests, which the Authority considers is a strong argument against disclosure.
40. Having seen the withheld information, the Commissioner considers it clear that its disclosure would identify the information providers even if the names of individuals were redacted.
41. Having considered the arguments provided by the Authority, the Commissioner is also satisfied that disclosure of the information would cause distress to the individuals, as specified in in paragraphs 38 and 39 of this notice. The Commissioner considers that in the circumstances of this case, the fear itself would constitute an adverse effect on the information providers, regardless of whether the bad feeling would



actually be likely to occur. This constitutes harm which is real, actual and of substance (ie more than trivial).

42. In these circumstances, the distress this would generate regardless of who or what was said, is a significant factor in favour of the exception being engaged.
43. Having considered the above, the Commissioner is satisfied that the disclosure of the information would adversely affect the interests of the individuals who provided the information. He has therefore gone on to consider the public interest test.

### **Public interest test**

#### Factors in favour of disclosure

44. The Commissioner is mindful of the provisions of regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.
45. The Authority has acknowledged the general public interest in openness, transparency and accountability.
46. The Authority has also recognised that there is a public interest in disclosure of information regarding the development of Gilestone Farm.

#### Factors in favour of maintaining the exception

47. The Authority considers that the public interest in the disclosure of information in respect of Gilestone Farm will be met by a detailed consultation process and an ongoing planning process as the need arises, which will be published by the relevant parties in due course.
48. In this particular case, the Commissioner notes that the Authority has disclosed some information relevant to the request, latterly including the draft copy of the minutes of the meeting the correspondence relates too.
49. The Commissioner is also mindful that disclosure of the requested correspondence may harm the relationship between the Authority and the external organisations who provided the information.
50. In the Commissioner's view, the relatively weak public interest in the disclosure of this information is outweighed by the public interest in the harm/distress caused to the third party providers. The Commissioner therefore considers, that when combined with the potential harm to the relationship between the Authority and the external organisations who provided the information, that in all the circumstances of the case, the balance of the public interest test favours maintaining the exception.

51. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

“If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...” and “the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).

52. As covered above, the Commissioner has concluded that the public interest in maintaining the exception at regulation 12(5)(f) outweighs the public interest in disclosure of the information. This means that the Commissioner’s decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(f) was applied correctly.

### **Procedural matters**

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53. Regulation 14 of the EIR requires a public authority wishing to withhold information to issue a refusal notice within 20 working days.
54. The Commissioner notes that although the request was received on 11 June 2023, the Authority did not issue its response until 24 October 2023 which is clearly in breach of regulation 14(2).
55. In addition, as set out above, in the circumstances of this case the Commissioner has found that although the Authority originally considered this request under FOIA, it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that the Authority will have failed to comply with the provisions of the EIR even if it had issued the refusal notice within the required timescale.

## **Right of appeal**

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56. 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)

57. 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.
58. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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