



Llywodraeth Cymru
Welsh Government

Ein Cyf/Our ref: ATISN 15312
Eich Cyf/Your ref:
Dyddiad/Date: 5 August 2021

Dear

ATISN 15312 – PLANNING APPEAL APP/K6920/A/19/3226294

Thank you for your request which I received on 8 July 2021. You asked for:

- A copy of the advice given to Minister for Housing and Local Government Julie James in relation to her decision on October 21, 2020, to reject the Planning Appeal APP/K6920/A/19/3226294.

The information caught by your request constitutes environmental information so has been considered for disclosure under the Environmental Information Regulations 2004 (EIRs). I have decided some of the information described in the enclosed list is exempt from disclosure under Regulations 12(4)(d), 12(4)(e) and 12(5)(b) of the EIRs. The reasons for applying these exemptions are set out in full at Annex 1 to this letter.

Next steps

If you are dissatisfied with the Welsh Government's handling of your request, you can ask for an internal review within 40 working days of the date of this response. Requests for an internal review should be addressed to the Welsh Government's Freedom of Information Officer at:

Information Rights Unit,
Welsh Government,
Cathays Park,
Cardiff,
CF10 3NQ

or Email: Freedom.ofinformation@gov.wales

Please remember to quote the ATISN reference number above.

You also have the right to complain to the Information Commissioner. The Information Commissioner can be contacted at:

Information Commissioner's Office,
Wycliffe House,
Water Lane,
Wilmslow,
Cheshire,
SK9 5AF.

However, please note that the Commissioner will not normally investigate a complaint until it has been through our own internal review process.

Yours sincerely

Nick Iles
Decisions Branch
Planning Directorate

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Yours sincerely

Regulation 12(4)(d) – Material is still in course of completion, unfinished documents or incomplete data

Regulation 12(4)(d) states:

*...a public authority may refuse to disclose information to the extent that—
(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.*

These terms are not defined in EIRs but ICO guidance is that material which is still in the course of completion can include information created as part of the process of formulating and developing policy, where the process is not complete.

Regulation 12(4)(e) states:

*... a public authority may refuse to disclose information to the extent that—
(e) the request involves the disclosure of internal communications.*

Guidance from the Information Commissioner has confirmed that this exception is drafted broadly and is a class based exception which covers *all* internal communications, not just those that are sensitive or actually reflect internal thinking. The concept of 'internal communications' covers a wide range of information and includes any information intended to be communicated to others or saved in a file where it may be consulted by others. I can confirm that the information held by the Welsh Government which is captured by your request amounts to internal communications.

Public Interest Test

In order to satisfy the public interest test in relation to the exemption(s), it is necessary to conclude that the public interest arguments in favour of withholding the information are sufficient to *outweigh* the public interest arguments in favour of release.

Public interest arguments in favour of disclosure

The Welsh Government acknowledges the presumption in favour of disclosure under Regulation 12(2) and we acknowledge there is a public interest in openness and transparency within Government. There is a public interest in understanding how the Welsh Ministers determine planning application or appeals submitted to them for determination. Disclosure would increase public trust in, and engagement with, the Welsh Government.

Public interest arguments in favour of withholding

Disclosure would harm the interests of the Welsh Government by leading to the loss of frankness and candour between Welsh Ministers and their officials and would be likely to damage any future deliberations around decision making. The Ministers decision letter issued on 21 October 2020, is the final version which was sent to all the interest parties. A draft decision letter is clearly incomplete.

Balance of public interest test

We believe that disclosing drafts of unfinished and incomplete decision letters would undermine the planning system. Communications between departments and Ministers include draft decision letters which are clearly 'material still in the course of completion, unfinished document, the publication of such letters would undermine the transparency and impartiality of the planning system which, in our view, would not be in the wider public benefit and is therefore being withheld. This is especially true due to the final Ministerial decision letter being issued and publically available.

Regulation 12(4)(e) – Disclosure of internal communications

Regulation 12(4)(e) of the EIRs sets out an exception from the right to know for information contained within documents considered to be internal communications. The information requested relates to internal advice to and from the former Minister for Housing and Local Government and officials. This is clearly "internal communications", and, as such, falls within the scope of the exception.

This exception is subject to the public interest test, and I must determine whether the public interest favours releasing or withholding this document. This Annex sets out our subsequent consideration of the Public Interest Test.

Public interest arguments in favour of disclosure

We recognise there is a general public interest in openness of information and transparency in the working of government.

We recognise the release of the advice provided to the Minister prior to her reaching her decision is conducive to the effective conduct of public affairs in providing openness of information and transparency in the planning process. We also recognise the release of advice following the issuing of the decision could be conducive to providing transparency.

Public interest arguments in favour of withholding

Where an official prepares advice for the Welsh Ministers into a call-in request an application or a planning appeal, the advice sets out officials' conclusions on the main issues and makes a recommendation to the Welsh Ministers. The Welsh Ministers consider those recommendations, which they may choose to accept or reject.

Once the decision has been taken, the main parties to the application/appeal receive a copy of the decision letter and other parties may request a copy. Thereafter a challenge to a decision can be made within 6 weeks by way of an appeal to the High Court under Section 288 of the Town and Country Planning Act 1990. The decision by the Minister in this case was subject to challenge in the Courts. As the High Court challenge proved successful and the decision was quashed, therefore, the decision no longer exists. The advice will, therefore, continue to form part of internal advice, until the final decision is on the recovered appeal has been issued.

The advice provided to the Minister is conducive to the public interest which is to have an efficient and transparent planning system, which is fair to all. If the conclusions and recommendations of the officials contained within this advice are released, there is a risk it will undermine the efficiency, transparency and impartiality of the planning process.

Balance of public interest test

Internal correspondence between departments and Ministers to provide briefings on issues raised is clearly 'internal communications, the publication of such advice would undermine the transparency and impartiality of the advice given which, in our view, would not be in the wider public benefit and is therefore being withheld.

Regulation 12(5)(b) - Course of justice, fair trial, criminal or disciplinary inquiry

Regulation 12(5)(b) provides an exception to the general duty to disclose environmental information where a 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 enquiry of a criminal or disciplinary nature.

The course of justice is very wide in its coverage, and the other points may be viewed as subsets of that element. In *Rudd v the Information Commissioner & the Verderers of the New Forest* (EA/2008/0020, 29 September 2008), the Information Tribunal commented that 'the course of justice' does not refer to a specific course of action but is "a more generic concept somewhat akin to 'the smooth running of the wheels of justice'".

Advice subject to Legal Professional Privilege (LPP) falls within that general concept of the "course of justice" and, as such, may be exempt under regulation 12(5)(b), subject to the presumption in favour of disclosure and the public interest test.

For regulation 12(5)(b) to apply to legally privileged information, the public authority must demonstrate that disclosure of the requested information would have an adverse effect on the course of justice.

The Welsh Government believes that release of correspondence between Government Legal Department, Legal Services and Planning Directorate that relates to the seeking and provision of legal advice and, as such, is subject to LPP, should be exempt from disclosure as we believe disclosure would likely result in harm.

First, the Welsh Government is of the firm view that it is highly important to maintain LPP and that, in the absence of at least equally strong countervailing considerations, any attempt to undermine the principle of LPP would result in substantial harm to the ability of the Welsh Government to obtain fulsome advice from its legal advisors.

In the ICO Decision Notice FER0220864 (dated March 31 2010), the Commissioner clearly states:

"Legal professional privilege (LPP) is not defined by the Act or in any other legislation. It is a common law concept shaped by the courts over time. It is intended to provide confidentiality between professional legal advisers and clients to ensure openness between them and safeguard access to fully informed, realistic, candid and frank legal advice, including potential weaknesses and counter arguments. LPP belongs to the client and material protected by LPP cannot ordinarily be revealed without the consent of the client, even to a court".

We also note the case of *Bellamy v the Information Commissioner and the DTI* [EA/2005/0023] in which the Tribunal, on the subject of LPP, said:

"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt

interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...’.

We believe that disclosure of the information would more likely than not adversely affect the course of justice. This is because it would involve public access to privileged information between Government Ministers and officials.

Release would undermine the general principles of legal professional privilege and of the administration of justice within government.

The exemption is therefore considered to have met the qualification, and the release of information is considered under the public interest test. This will consider the balance of the public interest in maintaining the exception over disclosing the information.

Public interest arguments in favour of disclosure

We recognise that there is a general public interest in openness of information and transparency in the working of government. The release of advice provided prior to reaching the decision is conducive to the effective conduct of public affairs in providing openness of information and transparency in the planning process.

We believe there is a general public interest in the disclosure of information as greater transparency makes Government more accountable and there is a public interest in being able to assess the quality of information and advice which is used in decision making. We recognise the increased public interest in decisions which impact upon the places in which people live and work.

Finally, we appreciate that in order for the public to be appropriately equipped to challenge the decisions and activities of public authorities and demand greater accountability, they need to be properly informed. The disclosure of information can go a long way to helping promote this empowerment

In this particular case, it involves the decision taken by a Welsh Minister and subsequent action taken in the High Court against the Ministers decision. An understanding of the legal basis of the assessment process undertaken would allow them to come to their own view as to why the Minister decided to submit to judgment and subsequent quashing of her decision.

Public interest arguments in favour of withholding

There is a strong public interest in the protection of the principle of LPP which allows Government to consult their lawyers in confidence, to be able to share information fully and frankly and to seek and obtain advice with the knowledge that such advice is privileged. Government needs to take decisions in a fully informed legal context and it is necessary for its lawyers to be able to fully explore the relevant arguments. To ensure that lawyers, officials and Ministers are free to fully examine the various alternatives, their deliberations, and the legal advice that underpins those deliberations, should be protected.

The public need to have trust that discussions they may have with their legal advisors can be properly protected. Any erosion, therefore, of the principle of confidentiality of LPP, particularly where they relate to ongoing, live, matters, is not in the wider public interest.

Balance of public interest test

While we acknowledge the public interest arguments in favour of disclosure as discussed above, we consider that the public interest balance in this case falls on the side of not disclosing the legal advice the Directorate has sought and received.