

4 April 2024

Dear

ATISN 20301 – Request for information

Thank you for your request which was received on 4 March 2024. You asked for the following information:

- 1. A copy of the Inspector's Report in relation to the called-in Cardiff Parkway application (21/00076/MJR), (Qa1463200).*
- 2. Any correspondence directed to Jeremy Miles in relation to the Wentlooge Solar DNS application (CAS-01772-Z5P5D2).*

Our Response

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.

Where an official prepares advice for the Welsh Ministers into a planning decision, including an appointed planning Inspector they offer conclusions on the main issues and make a recommendation to the Welsh Ministers. The Welsh Ministers consider those recommendations, which they may choose to accept or reject. Until the Welsh Ministers make a decision, especially as an application for the same form of development, a solar farm on the Wentlooge Levels on the same site, remains undetermined and the conclusions and recommendation by the appointed planning Inspector for the Business Park, remain undetermined, the advice provided forms part of internal advice, and, as such, falls within the scope of the exception.

The decision by the Minister in the solar farm on the Wentlooge Levels, and the Inspector's report into the called-in Cardiff Parkway are part of a wider consideration, yet to be decided. The advice caught by this request will, therefore, continue to form part of internal advice.

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

Public interest arguments in favour of disclosure

The proposals for the construction of a Business Park (up to 90,000m² - use classes b1, b2 and b8), ancillary uses and infrastructure associated with; biodiversity; landscape; drainage; walking, cycling and other transport modes. together with the construction of a new transport hub facility, comprising railway station buildings (up to 2,500m² – use class sui generis) including ancillary uses; 4 no. platforms; surface car park (up to 650 no. spaces) and associated infrastructure works, at land to the south of St Mellons Business Park and a solar

farm in the Wentlooge Levels, are controversial with a strong public campaign against the proposals and a strong public and media interest in the proposals. Disclosure would allow the public to better understand the government's internal decision making process and the steps taken by government in considering such proposals, taking account of both short and long term potential benefits and negative impacts to the local communities and the local environment, in order to make decisions in the best interests of Wales.

Public interest arguments in favour of withholding

The fact that this exception exists shows there is an inherent public interest in maintaining that free space where officials can freely discuss matters away from the public gaze, particularly where the discussions and deliberations are ongoing.

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 before a final decision is issued, there is a risk it will undermine the efficiency, transparency and impartiality of the planning process.

It is in the wider public interest that officials and Ministers fully weigh up the competing cases and for Ministers to reach a considered decision. Disclosure during such deliberations would only serve to encourage both proponents and those against the proposal to delay the decision making by re-submitting their case.

Balance of public interest test

On balance I have found that the public interest lies in withholding the information.

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 Legal Services, Government Legal Department 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 and their legal advisors.

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

The exception 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 solar farm on the Wentlooge Levels, which many residents living around the site consider could harm their surrounding environment. An understanding of the legal basis of the assessment process undertaken would allow them to come to their own view about whether the safety of the environment has been properly safeguarded.

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.

Regulation 13– Personal data

Regulation 13(1) together with the conditions in Regulation 13(2)(a)(i) and 13(2)(a)(ii) provides an absolute exemption if disclosure of the personal data would breach any of the data protection principles.

‘Personal data’ is defined in sections 3(2) and (3) of the Data Protection Act 2018 (‘the DPA 2018’) and means any information relating to an identified or identifiable living individual. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

We have concluded that, in this instance, the information requested contains third party personal data.

Under Regulation 13(1) of the EIRs, personal data is exempt from release if disclosure would breach one of the data protection principles set out in Article 5 of the GDPR. We consider the principle being most relevant in this instance as being the first. This states that personal data must be:

“processed lawfully, fairly and in a transparent manner in relation to the data subject”

The lawful basis that is most relevant in relation to a request for information under the FOIA is Article 6(1)(f). This states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”.

In considering the application of Article 6(1)(f) in the context of a request for information under FOIA it is necessary to consider the following three-part test:

- **The Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- **The Necessity test:** Whether disclosure of the information/confirmation or denial that it is held is necessary to meet the legitimate interest in question;
- **The Balancing test:** Whether the above interests override the interests, fundamental rights and freedoms of the data subject.

1. Legitimate interests

We have been unable to identify a legitimate interest the requester may have in accessing the personal data of those mentioned in the advice to the Minister nor the personal data of the parties named in the draft letter.

2. Necessity test

We do not believe it is necessary to release the personal data for the advice to the Minister to be understood, nor the content of the draft letter.

3. Balancing test

As we don't believe there is neither a legitimate interest nor is it necessary to release the personal data, we are of the view that disclosure would breach the GDPRs and, as such, should be withheld under Reg 13.

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 e-mail: 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

Telephone: 0303 123 1113

Website: www.ico.org.uk

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

Yours sincerely