

20 January 2025

Dear

ATISN 23209

Information requested

Thank you for your request which I received on Wednesday 18 December 2024.

You asked for a specific document: *ministerial advice cleared by Ed Sherriff to Julie James MS, then Minister for Climate Change, and dated 27 October 2021, reference: MA_JJ_3550_21, subject: "Coal Authority Licence Approval for Aberpergwm coal mine"*. Your request advised that redactions applied as exemptions under Part II of the Freedom of Information Act considered excessive will be robustly challenged.

Our response

The Welsh government does hold information within the scope of your request, and this information is enclosed. We have concluded that some of the information is exempt from disclosure under regulations 12(5)(b) and 13 of the Environmental Information Regulations (EIRs) and is therefore withheld:

- The document contains Legal professional privilege (LPP) redactions which apply to *legal advice from a qualified legal advisor*, in this case, Welsh Government legal services and King's Counsel. These exceptions are outlined in the EIR 2004, Regulation 12(5)(b).
- The personal information of Welsh Government officials included on the copy list associated with this document, except for those categorised as Senior Civil Service, is withheld under EIR regulation 13.

The reason for applying these exemptions is set out in full at Annex A 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

Annex A

Application of exemptions/exceptions

I have decided to withhold the following information:

- Legal advice between Welsh Government Officials and Ministers regarding the availability of Section 26A of the Coal Industry Act 1994 in relation to removing conditions from Aberpergwm Colliery coal mining operations licence.
- Personal data included in the briefing.

This Annex sets out the reasons for the engagement of Regulation 12(5)(b) and Regulation 13 of the Environmental Information Regulations 2004.

Engagement of Regulation 12(5)(b) of the Environmental Information Regulations 2004

The exemption states:

‘For the purposes of paragraph 1(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect – ...

(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 inquiry of a criminal or disciplinary nature;

Legal professional privilege (LPP) covers both confidential communications between lawyers and their clients made for the main purpose of seeking or giving legal advice (“advice privilege”), and confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation (“litigation privilege”).

The information in question is legal advice, provided by a qualified legal advisor, which was provided to Julie James MS, Minister for Climate Change. We believe that advice privilege covers this information and that a claim to LPP could be maintained in legal proceedings in respect of it.

The Regulation 12(5)(b) exemption is qualified, which means that it is subject to a public interest test.

Public Interest in favour of disclosing

The Welsh Government recognises that there is a public interest in the openness and accountability of government, and that releasing the requested information would help the public gain a better understanding of the basis upon which the Minister reached her view.

Public interest in favour of withholding

That there is a public interest served in public authorities being able to access advice which benefits from legal professional privilege was noted in the judgment of Bellamy

v the Information Commissioner and 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...".

The Welsh Government agrees with this view that it is important to maintain legal professional privilege and considers that, in the absence of at least equally strong countervailing considerations, any disclosure of information covered by legal professional privilege would be likely to result in substantial harm.

Legal advisers need to be able to present the full picture to their clients which includes legal arguments in support of a position and any relevant counterarguments. This is what underpins the long-established principle of legal professional privilege.

It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view. If recipients or providers of legal advice believe that it is likely that the legal advice would be published, especially in respect of an ongoing matter, then this would have an adverse effect on whether such advice is commissioned or provided and how comprehensive it is. This would be likely to result in substantial harm to the quality of decision-making since it would not be fully informed.

Moreover, disclosure of its legal advice has a significant potential to prejudice the Government's ability to defend its legal interests - both directly by unfairly exposing legal arguments to others who may seek to challenge the Government's action or position, and indirectly by diminishing the reliance it can place on the advice having been properly considered and presented without fear or favour.

Balance of the Public Interest

Although there is a public interest in understanding why the Welsh Ministers determined Section 26A of the Coal Industry Act 1994 was not engaged in this case (the content of the requested document), it is not necessary that the legal advice be made known to answer that question. Those sections of the disclosed document that are not redacted to maintain LPP outline the advice provided to the Ministers on why Section 26A was not engaged in this case.

The question of legislative competence, in this case whether Section 26A was engaged, was considered in a judicial review hearing and subsequent appeal hearing (Coal Action Network) v (1) Welsh Ministers and (2) Coal Authority (Case No: CO/1168/2022) (19 May 2023 and 23 February 2024).

The final judgement is available on the Judiciary UK website.

[Coal Action Network -v- Welsh Ministers](#)

For the reasons set out above, there is a strong public interest in maintaining legal professional privilege in respect of legal advice on this matter provided in confidence to the Minister.

Engagement of Regulation 13 of the Environmental Information Regulations 2004

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 personal data, including the personal data of officials copied in only in an administrative capacity, and where those officials are not senior or in public facing roles.

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"

Our consideration of these tests is set out below:

1. Legitimate interests

There is a clear legitimate interest in the contents of the briefing you have requested, as it contains information regarding the decision. There is also a legitimate interest in knowing who has made any decisions regarding the matter.

2. Is disclosure necessary?

It is not necessary to release all names to meet the legitimate interest identified above. Where the officials are junior and acting in an administrative capacity, and where they do not have public facing roles, the release of their information is not required to meet the legitimate interest you have in the requested information.

3. The balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

As disclosure of this personal data is not necessary to meet the legitimate interest in the requested information, there is no need to further consider the balance of interests, and the information is withheld.