

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

Decision notice

Date: 25 January 2019

Public Authority: Welsh Government

Address: freedom.ofinformation@gov.wales

Decision (including any steps ordered)

1. The complainant has requested various items of information in respect of the Welsh Government's direct engagement with Horizon Nuclear Power Limited and Hitachi Limited commencing September 2014 to date and concerning the proposed Wylfa Newydd development. The Welsh Government refused the request by virtue of section 12 FOIA and regulation 12(4)(b) EIR.
2. The Commissioner's decision is that the Welsh Government was entitled to rely on section 12 in respect of the non-environmental information and regulation 12(4)(b) in relation to the environmental information. However, in failing to provide appropriate advice and assistance the Welsh Government breached section 16 FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Liaise with the requestor to develop a cost breakdown of the individual parts to the request, to enable him to choose any items which may be provided within the appropriate limit.
4. The public authority must take these steps within 35 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

5. On 13 November 2017, the complainant wrote to the Welsh Government and requested the following information in respect of its direct engagement with Horizon Nuclear Power Limited and Hitachi limited commencing September 2014 to date and concerning the proposed Wylfa Newydd development:
 - 1 Communications and notes of meetings (whether electronic, physical and tele/video conference);*
 - 2 content (including presentations) and outcome of all seminars and workshops;*
 - 3 all memorandums of understanding*
 - 4 all other agreements and commitments*
 - 5 all action plans, including joint actions;*
 - 6 advice and guidance issued by the Welsh Government;*
 - 7 specific assistance and facilitation by the Welsh Government, and,*
 - 8 all proposed, or potential, further assistance and facilitation."*
6. The Welsh Government responded on 11 December 2017. It stated that complying with the request would exceed the appropriate limit and refused the environmental information under regulation 12(4)(b) EIR and the non-environmental information under section 12 FOIA.
7. Following an internal review the Welsh Government wrote to the complainant on 26 February 2018. It stated that was upholding its original decision to refuse the request on the basis of section 12 FOIA and regulation 12(4)(b) EIR.

Scope of the case

8. The complainant contacted the Commissioner 24 May 2018 to complain about the way his request for information had been handled as he was not satisfied with the Welsh Government's response to his request.
9. During the course of the Commissioner's investigation, the Welsh Government confirmed that it was also relying on section 14(1) of the request in respect of the non-environmental information on the basis

that the amount of time required to review and prepare the information would impose a grossly oppressive burden.

10. The Commissioner considers that the scope of her investigation is firstly to consider whether the Welsh Government has considered the request under the appropriate legislation and then to determine whether the Welsh Government was entitled to rely on section 12 FOIA and regulation 12(4)(b) EIR. She has also considered whether the Welsh Government has complied with its obligations under section 16 FOIA. As she has determined that section 12 FOIA was engaged in respect of the non-environmental information, she has not gone on to consider the Welsh Government's late reliance on section 14(1).

Reasons for decision

The appropriate legislation

11. The Commissioner notes that the Welsh Government has considered this request under both the EIR and FOIA.
12. Regulation 2(1) of the EIR defines 'environmental information'. The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is any information in any material form 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) and (b) as well as measures or activities designed to protect those elements...'*
13. The Welsh Government has confirmed that the proposed project has huge implications for most, if not all of its departments. Inevitably, a project of this nature will have significant environmental, planning and energy implications which all fall within the definition of environmental information outlined above. For example, the direct implications of a

nuclear energy plant will fall within the definition of regulation 2(1)(a), whilst other matters such as planning etc will fall within regulation 2(1)(c).

14. However, the Commissioner considers that not all of the information will fall within this definition as the implications for the Welsh language and finance are more likely to be considered under the FOIA. She is therefore satisfied that the Welsh Government was correct to consider the request under both the EIR and FOIA.

Section 12 – cost of compliance exceeds the appropriate limit

15. Section 12 of the FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

16. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Regulations') sets the appropriate limit at £600 for the public authority in question. Under these Regulations, a public authority can charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 24 hours work in accordance with the appropriate limit set out above.
17. A public authority is only required to provide a reasonable estimate or breakdown of costs; and in putting together its estimate it can take the following processes into consideration:
 - (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it.
18. The Welsh Government considers that to comply with the request would exceed the appropriate limit. It informed the complainant that it holds a substantial volume of correspondence regarding the proposed Wylfa Newydd development stored on its electronic records management system, iShare and within Outlook accounts for individual officials. It further informed the complainant that its iShare system does not lend itself to being easily interrogated for generic requests as it uses naming conventions appropriate to the effective recording of information for its own purposes.
19. It further informed the complainant that in terms of the non-environmental information that a general iShare search for the three

year timeframe specified using the following search terms, 'Wylfa', 'Hitachi and Nuclear' or 'Horizon and Nuclear' yielded several thousand results. It estimated that it would take one minute per result to check whether it was relevant to the request, and extracting the relevant information would take an official at least a full working week.

20. It further informed the complainant that it estimated that at least 100 members of staff across the Welsh Government have had links with the project over the last three years and it would require those members of staff to locate, retrieve and extract the necessary information from those several thousand documents stored on iShare. Additionally, it further stated that there would be several hundred additional items of more recent correspondence within their individual Outlook email accounts and concluded that compliance with the request would *'far exceed 24 working hours..'*
21. The Welsh Government provided some background information to the Commissioner confirming that Horizon Nuclear Power Ltd (owned by Hitachi Ltd) is responsible for building Wylfa Newydd. It will be (and has been) communicating with the Welsh Government on all aspects of the proposed build. It further informed the Commissioner that Horizon will need to consider numerous areas including infrastructure, worker accommodation, education, skills, transport, the local community, environmental and planning matters and the Welsh language. Several Welsh Government departments are/will be communicating directly with Horizon Nuclear Power.
22. Additionally, the Welsh Government further explained that the relationship between Hitachi Ltd and Horizon Nuclear Power Ltd is complex, with many of Hitachi's staff working closely with Horizon's HQ. The Welsh Government's communications have been/will be with both organisations simultaneously, or with one or the other depending on the topic.
23. The Commissioner would wish to highlight that at the time of writing, Hitachi Ltd has recently suspended its work on the project, due to rising costs.
24. The Welsh Government further informed the Commissioner that the complainant's request for an internal review asked if a list could be provided of what information it holds under each of the headings by year, and to provide an accurate precis of that information. The Welsh Government added that there is no single place which records all of its communications with Hitachi or Horizon Nuclear Power Ltd.
25. A generic search using key words revealed the following results;
 - Wlfa and Newydd - +22,000 documents

- Horizon and Nuclear +24,000 documents
 - Hitachi and Nuclear +6000 documents.
26. The Welsh Government estimated that it would take approximately one minute per item to open each document on iShare, to determine whether it is relevant to the request and extract the information. It therefore considered that, based on the volume of documents its iShare system had generated, this was so far in excess of the 24 hour working hour threshold to engage section 12.
27. The Welsh Government further stated that the only feasible method of determining what information is held would be to ask individual departments to search for the information in order to provide a definitive list. As confirmed to the complainant, it was estimated it would be necessary to consult with at least 100 members of staff in order to obtain an accurate overview and then organise the results into a comprehensive list with an accurate precis of content and dates. Again, it has stated that this would be an enormous undertaking.
28. The Commissioner was further informed that the views of the Welsh Government's iShare team were also sought as to how a more focused search could be undertaken. It suggested undertaking a search by holding folder where the folder contains the name 'Wylfa Newydd'. The Welsh Government further stated that such a search would not return all of the documents falling within the scope of the request as it does not follow that every document will have been saved in a folder which included the name Wylfa Newydd and given the wide scope of the request, it could offer no other suitable alternative.
29. The Commissioner also visited the Welsh Government to see the iShare system for herself and get a better understanding of its search function. Whilst there, the Commissioner queried whether the search suggested by the iShare team could be done within the appropriate limit even if it does not generate all relevant information, adding that it could be explained to the complainant that it is not possible to guarantee that the search generated all information falling within the scope of the request. However, the Welsh Government confirmed that even this search was likely to generate such huge numbers to render it outside of the appropriate limit.
30. The Commissioner was further informed that those responsible for the estimate had undergone iShare training on 5 November and they had used this particular request as part of the training. The Welsh Government demonstrated an advanced search of its iShare system using the terms 'Wylfa Newydd' as suggested by the iShare team. The Commissioner can confirm that the search yielded multiple documents and it was not clear from the titles of each of these whether or not they

would fall within the scope of the request. It would therefore be necessary to view numerous items individually to determine whether it was relevant to the request. The Welsh Government subsequently provided the Commissioner with screen shots of the advanced search undertaken during her visit.

31. The Commissioner is satisfied that due to the broad nature of the request, the Welsh Government's original estimate is far in excess of the appropriate limit to engage section 12 FOIA. She is also satisfied that a more advanced search under the term Wylfa Newydd would also necessitate a search in excess of the appropriate limit.

Section 16 – duty to provide advice and assistance

32. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request, so far as it would be reasonable to do so. Paragraph 14 of the section 45 Code of Practice takes this further and explicitly states that where a public authority is relying on section 12 of the FOIA that it:
 33. *"...should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focusing their request, information may be able to be supplied for a lower, or no fee."*
34. The Commissioner notes that part of the complainant's concerns contained within his request for an internal review included that there was no indication that the individual itemised headings in his multipart request were given careful consideration on what might be disclosable within the cost limit. He further stated that the Welsh Government's initial request for him to provide a more focussed request was devoid of the basic information necessary to enable him to do so.
35. He further considered that the Welsh Government's arguments appear tantamount to blaming the requester for the manner in which it has chosen to structure and store its information.
36. In particular, the complainant referred to items 3 and 4 of his request which he considers go to the heart of the relationship between the Welsh Government and Hitachi and Horizon respectively.
37. Whilst the Commissioner has accepted that the Welsh Government was entitled to rely on section 12 in relation to the request as a whole, she is mindful that requesters will not be familiar with a public authority's record keeping and cannot be expected to know what documents it holds in relation to a particular topic. She would therefore have expected that, as part of its obligations under section 16 FOIA, the Welsh Government would have looked at each of the eight items

comprising the request to see if any could be complied with within the cost limit, particularly given the scale and controversial nature of the proposed project. Indeed the Commissioner has discussed this point with the Welsh Government which has accepted that item three for example (memorandums of understanding) could potentially be provided within the cost limit.

38. However, she also notes that in its attempts to comply with section 16 FOIA, the Welsh Government did suggest to the complainant that he could refine his search to particular topics such as in relation to roads leading up to and around Wylfa Newydd, housing matters or skills and training. It also suggested other possible methods of refining would be in respect of meetings with Horizon Nuclear Power or Hitachi Ltd on particular topics.
39. The Commissioner notes the complainant offered no clarification of the particular topics which may or may not be of particular interest.
40. Whilst it is clear that the Welsh Government clearly attempted to comply with its obligations under section 16 FOIA, its failure to look at the individual items to see what might be considered within the cost limit, represents a breach of section 16 FOIA.

Regulation 12(4)(b) – manifestly unreasonable

41. Regulation 12(4)(b) of the EIR states that a public authority may refuse to disclose environmental information if the request is manifestly unreasonable. There is no definition of 'manifestly unreasonable' under the EIR, but the Commissioner's opinion is that 'manifestly' implies that a request should be obviously or clearly unreasonable.
42. In this case, the Welsh Government considers that the request is 'manifestly unreasonable' due to the time and cost of complying with the request. It has argued that complying with the request would place an unreasonable burden on its resources in terms of expense.
43. Unlike the FOIA however, the EIR do not have a provision where a request can be refused if the estimated cost of compliance would exceed a particular cost limit. Nevertheless, the Commissioner considers that if a public authority is able to demonstrate that the time and cost of complying with the request is obviously unreasonable, regulation 12(4)(b) will be engaged.
44. This is also consistent with the position of the Upper Tribunal case of *Craven v The Information Commissioner and the Department of Energy and Climate Change* [2012] UKUT442 (AAC).

"Taking the position under the EIR first, it must be right that a public authority is entitled to refuse a single extremely burdensome request under regulation 12(4)(b) as "manifestly unreasonable", purely on the basis that the cost of compliance would be too great (assuming, of course, it is also satisfied that the public interest test favours maintaining the exception). The absence of any provision in the EIR equivalent to section 12 of FOIA makes such a conclusion inescapable."

45. In addition to the Welsh Government's arguments in support of section 12 for the non-environmental information, the Welsh Government has also stated that it may be valid for it take into account the cost of separating out the environmental information from the non-environmental information, when considering if the request is manifestly unreasonable on the basis of burden on the authority. However, the Commissioner would point out that this can only be taken into account if the request is solely for environmental information. As the Commissioner has already accepted that the request spans both access regimes, it cannot include the cost of separating out the environmental information from the non-environmental in its estimate of costs.
46. In reaching a decision as to whether the request is manifestly unreasonable in this case, the Commissioner has therefore taken into account the same factors identified in her consideration of section 12 FOIA under paragraphs 15 to 31 of this notice, and for the same reasons with section 12 FOIA, is satisfied that the Welsh Government was entitled to rely on regulation 12(4)(b) to refuse the environmental information.
47. However, unlike section 12 FOIA, regulation 12(4)(b) is a qualified exception and therefore subject to the public interest test at regulation 12(1)(b) which states that information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest test in disclosure.

Public interest test factors in favour of disclosure

48. The Commissioner would highlight that 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.
49. The Welsh Government has acknowledged that there is an inherent public interest in the transparency and accountability of public authorities in relation to decision making and public expenditure.

50. The Welsh Government also acknowledged the significant public interest in disclosure based on the scale of the proposed project which will be the single largest investment project in Wales since devolution and will impact either directly or indirectly on the majority of functions exercised by the Welsh Government. It has also acknowledged that the public has an interest in how their money is to be used and expects the Government to ensure it gets the best value from the public purse in respect of the project.
51. The Welsh Government has also acknowledged the particular public interest as the issue of nuclear power is controversial generating strong diverging views.
52. The complainant does not accept the Welsh Government's argument (discussed in more detail under the factors in favour of maintaining the exception) that it has and is, routinely publishing information in relation to the proposed project which should help provide answers to his queries. He considered that such a view implies that the public should be content with what the Welsh Government has elected to disclose to date, which he considers as reminiscent of a mindset pre-dating the FOIA. Additionally, in his request for an internal review, he stated that the request stemmed from apparently sparse and nebulous information in the public domain on the full extent and range of Welsh Government support for the project, that the amount of information in the public domain was minimal or that it was appropriate to suggest he might obtain the information directly from Hitachi Ltd or Horizon Nuclear Power Ltd.
53. More specifically, the complainant considers that neither the information published on the Energy and Environment pages, or the transcript of the debate in the Senedd held on 18 October 2017 (referred to in paragraph 62 in respect of the North Wales economy, conveys any information on the relationship arrangements between the Welsh Government and either Hitachi or Horizon relevant to the request.
54. He further stated in his request for an internal review that:

"there isn't at present a one stop dedicated webpage on Wylfa Newydd, on the Welsh Government's website for the public benefit... No-one outside the Welsh Government, beside Hitachi and Horizon, know precisely what the Welsh Government is up to under panoply of action plans, agreements... Further, there is no evidence of prior public consultation on the nature and scale of the Government's facilitation and support for Hitachi and Horizon and the Wylfa Newydd project."
55. The complainant considers that a dedicated webpage could eliminate the complexity of redirecting citizens to numerous different webpages which themselves provide only limited information.

56. He further argued that the intentions, plans, lobbying and influence of Hitachi and Horizon are all live public interest issues, and citizens should be enabled to examine communication exchanges between the companies and the Welsh Government.
57. Finally, the complainant argued that in the contemporary era, disclosure of public interest information could occur at any moment and both Hitachi Ltd and Horizon Nuclear Power Ltd could themselves be required to disclose public interest information. Additionally, elevated public interest in the Welsh Government's engagement with the both companies over the project is naturally to be expected.

Public interest test factors in favour of maintaining the exception

58. The Welsh Government views the number of hours which would need to be devoted to determine what information it holds and then extract the information is not in the public interest. Particularly so, as it considers that unnecessarily expending overstretched public resources in searching for such voluminous information, would not necessarily inform the public debate or increase peoples understanding of the issues under consideration.
59. It further considers that as it is likely some of the information would not be appropriate for disclosure into the public domain, that the additional resources required to determine whether any exceptions apply to the voluminous information would necessitate a further diversion of limited resources away from its core functions which would not be in the public interest.
60. The Welsh Government is of the view that the public interest is satisfied by the amount of information already in the public domain, or which is committed to being published regarding its support and related activities.
61. The Welsh Government has further argued that as the project progresses, it will be publishing information to keep the public updated on key developments.
62. It has further confirmed that it has already published some information for example, on the Energy and Environment pages of its Trade and Invest web page and a study into Wales' nuclear supply chain capability. Additionally, Ministers have responded to Oral and Written Assembly Questions, which are also published on its website. Further, the North Wales economy was debated in the Chamber on 18 October 2017, with the transcript of the debate on the its website.
63. The Welsh Government acknowledged to the Commissioner that the web links provided to the complainant in its original response did not provide

the particular information he may be looking for. It further informed the Commissioner that it continues to publish as much information as possible as matters progress and referred to information it has published in the summer and autumn of 2018.

64. The Commissioner notes the Welsh Government has further argued that since the request, information has been published as part of the Development Consent Order (DCO), in response to subsequent FOIA requests and that much of the information is available from Horizon itself on its webpages and via surgeries for the public.
65. The Commissioner would however point out, that her consideration of the public interest test is concerned with the situation at the time of the request as opposed to what the Welsh Government has subsequently published, and regardless of whether or not much of the information is available via Horizon, this does not absolve the Welsh Government from its duties under the EIR.

Balance of public interest test arguments

66. The Commissioner is mindful of the presumption in favour of disclosure under regulation 12(2) of the EIR. She also fully acknowledges the inherent public interest in transparency and accountability of public authorities in relation to decision making and expenditure. The Commissioner also recognises the strong public interest in transparency and accountability in relation to a large and significant project such as this, particularly given the divergent views regarding nuclear power and the fact that the issue was and remains live. As previously stated, she does not accept the arguments put forward by the Welsh Government in respect of information it has published since the request as she must base her decision on what was available at the time of the request.
67. However, she is sympathetic to the arguments around the time and costs that would be required to comply with the request. Whilst the Commissioner recognises that the appropriate limit is not a barrier to the disclosure of information under the EIR, she considers that the appropriate limit is a useful benchmark for assessing the costs involved in responding to requests for information and she is mindful that the estimate provided in this case significantly exceeds the appropriate limit.
68. The Commissioner considers that there is a strong public interest in the Welsh Government being able to carry out its core functions without the disruption that would be caused by the cost of compliance as public authorities need to be able to carry out their wider obligations fully and effectively so that the needs of the communities they serve are met.
69. The Commissioner has therefore concluded that in all the circumstance of the case, there is a greater weight in favour of maintaining the

exception than disclosure of the information and that consequently, the Welsh Government was entitled to rely on regulation 12(4)(b) in respect of this request.

Right of appeal

70. 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

71. 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.

72. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**