



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref ATISN 13168

01/08/2019

Dear

ATISN 13168 – REQUEST FOR INFORMATION IN RESPECT OF DECISIONS ON BEHALF OF THE MINISTER REGARDING AN EIA FOR BIOMASS PLANT, BARRY DOCK IN 2009.

Thank you for your request, which we agreed on 23 June 2019 to be asking for:

- (a) All information about internal discussion and representations from the developer (and their agents), Natural Resources Wales and Vale of Glamorgan Council about how to respond to your 9 July 2018 request to confirm that 2017/01080/FUL is EIA Schedule 1
- (b) All information about internal discussion and advice to Ministers underpinning the Cabinet Written Statement issued on the 15 May 2019
- (c) Information on representations from the developer (and their agents), Natural Resources Wales and Vale of Glamorgan Council which were taken into account in drafting the' advice to Ministers to issue the Cabinet Written Statement issued on the 15 May 2019.

A copy of the information we hold is enclosed.

I have decided that some of the information described in the enclosed list (Annex A) is exempt from disclosure under regulations 12(4)(e) and 12(5)(b) of the Environmental Information Regulations 2004 and is therefore withheld. The reasons for applying these exemptions and exceptions are set out in full at Annex A to this letter.

In addition to the recorded information held, and being released, please note the following which I hope puts the information into context.

The publication of the Written Statement was in part an update on the response to your correspondence of the 9 July 2018. Although I have labelled items with the prefix 'B' in the enclosed list (Annex A) to identify they were related specifically to consideration of whether or not to issue a Written Statement (request part (b)), the items are also form part of the response to (a). In turn, the items with the prefix 'A'

underpin that consideration and therefore could be said to fall within the scope of part (b) of your request.

For part (c), the Written Statement provides an update on the consideration of 2017/01080/FUL the advice on whether or not to issue it did not contain the full background or consideration to the case. The Written Statement explains the intention to compile and consult on an environmental statement. Therefore the representation 'taken into account' drafting this specific advice was the developer's letter of 18 April 2019 offering to compile environmental information.

No representations have been made by Natural Resources Wales, and representations made by representatives of Vale of Glamorgan Council will be given full consideration within future advice going forward. In the meantime, the advice on issuing the written statement refers to the Council's decisions in relation to previous planning decisions rather than representations.

The advice sets out the background to the case, and refers to the developer's representations of 2009. These were previously released as part of request for information ATISN 13080, which can be found on the Welsh Government website: <https://gov.wales/atisn13080>

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 B

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, 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 the advice forms part of internal advice, and, as such, falls within the scope of the exception.

The decision by the Deputy Minister in this case is 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 this document. This Annex sets out our subsequent consideration of the Public Interest Test.

Public interest arguments in favour of disclosure

The proposal for a biomass plant at Barry Docks is controversial with a strong public campaign against the proposal and a strong public and media interest in the proposal. There is also a strong public interest in ensuring that waste is properly and safely disposed of.

Disclosure would allow the public to better understand the proposals, the competing arguments both for and against, and the steps taken by those submitting the proposal to manage any potential risks.

Disclosure would show the steps taken by government in considering such proposals, in considering both short and long term potential benefits and negative impacts to the local communities and local environment.

Disclosure would show that the fears and concerns of the local community were listened to and were taken into account with the gravity they deserved.

Disclosure would have the effect of increasing the wider public's trust in the government's decision making process and that the decisions taken were done so 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 internal advice provided to the Deputy 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 decision is final, 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 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 construction of an energy generating station fuelled by waste wood, 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.