

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

Decision Notice

Date: 25 June 2021

Public Authority: Welsh Government
Address: Cathays Park
Cardiff
CF10 2NQ

Decision (including any steps ordered)

1. The complainant has requested information relating to occasions when the Welsh Government has sought Prince's Consent for legislation. The Welsh Government provided some information but refused the remainder under sections 37(1)(a) and 37(1)(aa) of FOIA (communications with the Sovereign and heir to the Throne).
2. The Commissioner's decision is that the requested information is environmental information within the meaning of regulation 2(1)(c) of the EIR. Therefore the request ought to have been handled under the EIR rather than the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Reconsider the request under the provisions of the EIR and issue a fresh response to the complainant.
 - To the extent that the public authority withholds any of the requested information it should issue a refusal notice that complies with regulation 14 of the EIR.
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 FOIA and may be dealt with as a contempt of court.

Background

5. The requested information that is the subject of this decision notice relates to "Prince's Consent".¹ Prince's Consent is required from HRH The Prince of Wales (who is also Duke of Cornwall) for legislative provisions that explicitly mention the Duchy of Cornwall or otherwise have a special application to it.
6. Prince's Consent is not generally required if consent is also sought from HM The Queen, since Queen's Consent is taken to include consent on behalf of the Prince of Wales.
7. Accordingly, the Welsh Government sends Bills to the Queen and/or the Prince of Wales after they are introduced to the Senedd when necessary to fulfil a requirement under section 111 of the Government of Wales Act 2006 and Standing Order 26.67 of the Senedd. These provide that Queen's Consent and Prince's Consent is required when a Bill, a provision of a Bill or an amendment to a Bill would affect the prerogative of the Crown, the Duchy of Lancaster or the Duchy of Cornwall.²

Request and response

8. On 28 July 2019 the complainant submitted the following request for information to the Welsh Government:
 1. *Does The Welsh Government hold documentation which lists those occasions when it has sought Prince's Consent for particular Government Bills. I am interested in all Bills irrespective of whether they eventually made it onto the statute book or not.*
 2. *If the answer is yes can you please list those occasions during the relevant period when The Welsh Government has sought Prince's Consent for particular Government Bills.*

In the case of each occasion can you provide the following information. Please include information about all Bills irrespective of whether they made it onto the statute book or not.

1

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/742221/Queen s and prince s consent pamphlet September 2018_accessible_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/742221/Queen_s_and_prince_s_consent_pamphlet_September_2018_accessible_.pdf)

2 <https://gov.wales/sites/default/files/publications/2019-05/legislation-handbook-on-assembly-bills.pdf>

- a. *Can you provide the name of the Bill and the sponsoring Minister(s).*
 - b. *Can you state on what date Prince's consent was sought?*
 - c. *Can you state who sought Prince's consent. Was it the First Minister or staff in his/her private office? Was it an individual Minister(s) or staff in his/her private office. Can you identify the relevant Minister and the department? Was it another employee or representative of The Welsh Government? Please specify. Please feel free to redact the names of any civil servants whose identities you would normally not disclose under FOI/EIR.*
 - d. *Who did The Welsh Government and or its representatives contact? Was it The Duke of Cornwall or his private office? Was it the Duke in his capacity as Prince of Wales? Was it the Prince's private office? Was it The Duchy of Cornwall estate? Was it the Duchy's legal advisers? Was it any other? Please specify.*
 - e. *Can you specify whether Prince's consent was granted or not? Can you state on what date Prince's consent was granted? Can you state on what date Prince's consent was announced to The Welsh Assembly?*
9. The complainant specified the relevant period as 1 January 2014 to 1 January 2016.
 10. The Welsh Government issued a refusal notice on 13 August 2019 citing the exemption at section 21(1) of FOIA and providing a number of web links to relevant information. It also explained the procedure when such consent was required, and provided details of three Bills which had been submitted during the specified time period:
 - Planning (Wales) Bill
 - Historic Environment (Wales) Bill
 - Environment (Wales) Bill
 11. The Welsh Government also stated that communications in respect of the Prince of Wales were exempt under section 37(1)(a) and section 37(1)(aa). These provisions of FOIA provide an exemption for information relating to communications with Her Majesty and the heir to the Throne.
 12. The complainant requested an internal review on 15 August 2019 and in particular asked the Welsh Government to consider whether any of the requested information was environmental information. Following the internal review the Welsh Government wrote to the complainant on 11 September 2019. It maintained its reliance on sections 37(1)(a) and

(aa). The Welsh Government confirmed its view that none of the requested information was environmental information.

Scope of the case

13. The complainant contacted the Commissioner on 4 December 2019 to complain about the handling of his request. The complainant asked the Commissioner to consider whether any of the information withheld under section 27 was environmental information within the meaning of the EIR.
14. The scope of the case is to determine whether any of the requested information was environmental information within the meaning of the EIR. If the information is not environmental the Commissioner would then consider the Welsh Government's reliance on the exemptions at sections 37(1)(a) and 37(1)(aa).
15. If any of the information is environmental information then the Commissioner's decision will be limited to requiring that the Welsh Government issue a response under the EIR. In this case the Commissioner would be unable to make a decision as to whether or not the information should be disclosed since the Welsh Government has not at any point adopted a position in respect of the EIR.

Reasons for decision

Regulation 2: environmental information

16. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other 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;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);”

17. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition there are some procedural differences affecting how requests should be handled.
18. The Commissioner recognises that it can sometimes be difficult to identify environmental information, and has produced guidance to assist public authorities and applicants.³ The Commissioner’s well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
19. Further, the Commissioner considers that interpretation of the phrase ‘any information... on’ will usually include information concerning, about, or relating to the measure, activity, factor etc., in question. It is not necessary for the information itself to have a direct effect on the elements of the environment, or to record or discuss such an effect. Rather, with regard to regulation 2(c) it is the measure or activity that must be likely to affect the elements or factors as set out in regulation 2(a) and (b).
20. Unfortunately the Commissioner’s investigation was postponed because the Welsh Government needed to redeploy staff in response to the Covid-19 pandemic. Consequently the Commissioner did not write to the

³ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

Welsh Government until 17 September 2020 to request a copy of the withheld information.

21. Similarly the Welsh Government's response was delayed and the Welsh Government did not respond to the Commissioner until 19 March 2021. The Welsh Government provided a copy of the withheld information and maintained its position that the information fell to be considered under FOIA rather than the EIR.
22. The Welsh Government set out that the withheld information related to "the mechanics of the seeking and provision of the consent of the Duke of Cornwall". The Welsh Government accepted that the actual decisions might be regarded as environmental information, but pointed out that it had already disclosed that information to the complainant.
23. Having examined the withheld information the Commissioner formed the view that it was in fact environmental information within the meaning of regulation 2(1)(c) of the EIR. The "measure" in this case would be the draft legislation, since the Bills as described at paragraph 10 above would clearly be likely to affect the elements and factors of the environment.
24. The key question for the Commissioner was therefore the extent to which the requested information is "on" the measure identified, ie the legislation. The Commissioner acknowledged that the requested information concerns the process of seeking consent from The Queen or The Prince of Wales, rather than having a direct effect on the environment. However, the process of seeking consent is required in order for a bill to pass.
25. Consequently, and taking into account the Court of Appeal's findings in *DECC v IC and Henney* [2015] UKUT 0671 (AAC)⁴, the Commissioner advised the Welsh Government of her view that information relating to the process of seeking consent is sufficiently closely connected to the measure, ie the legislation, to constitute environmental information within the meaning of regulation 2(1)(c) of the EIR.
26. The Commissioner asked the Welsh Government to reconsider the requested information under the EIR and issue a fresh response to the complainant. Disappointingly the Commissioner did not receive a response to this correspondence. Therefore the Commissioner has issued this decision notice to record her findings and formally to require the Welsh Government to take remedial steps.

⁴ www.bailii.org/uk/cases/UKUT/AAC/2015/671.html

Regulation 14: refusal notice

27. Regulation 5(1) of the EIR states that a public authority which holds environmental information shall make it available on request, subject to certain conditions. If the public authority wishes to refuse the request it must issue a valid refusal notice under regulation 14 of the EIR. Regulation 14(3) states that a refusal notice must include details of any exception relied on, as well as the relevant public interest considerations.
28. Since in this case the Welsh Government failed to identify the requested information as environmental information, it follows that the Welsh Government failed to comply with regulation 14 by issuing a refusal notice citing FOIA exemptions.

Right of appeal

29. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

30. 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.
31. 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

Sarah O’Cathain
Senior Case Officer
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SK9 5AF