

EPGBTWB 27 - Tystiolaeth gan: Cymdeithas Saethu a Chadwraeth PrydainSwyddfa'r Comisiynydd Gwybodaeth | Evidence from: Information Commissioner's Office

Senedd Cymru | Welsh Parliament

Pwyllgor Newid Hinsawdd, yr Amgylchedd a Seilwaith | Climate Change, Environment, and Infrastructure Committee

Bil yr Amgylchedd (Egwyddorion, Llywodraethiant a Thargedau Bioamrywiaeth) (Cymru) | Environment (Principles, Governance and Biodiversity Targets) (Wales) Bill

1. What are your views on the general principles of the Bill, and is there a need for legislation to deliver the stated policy intention?

2. What are your views on the Bill's provisions (set out according to Parts below), in particular are they workable and will they deliver the stated policy intention?

- **Part 1 - Environmental objective and principles (sections 1 to 7)**

3. What are your views on the Bill's provisions (set out according to Parts below), in particular are they workable and will they deliver the stated policy intention?

- **Part 2 - The Office of Environmental Governance Wales (sections 8 to 32 and Schedules 1, 2 and 3)**

Background to ICO comments

As noted in the Explanatory Memorandum to the Bill, the Environmental Information Regulations are rooted in the Aarhus Convention, to which the UK is a signatory. The principle behind the law is that giving the public access to environmental information will encourage greater awareness of issues that affect the environment. Greater awareness helps increase public participation in decision-making; it makes public bodies more accountable and transparent, and

it builds public confidence and trust in them.

Interaction between the proposed Bill and legislation regulated by ICO

In relation to the confidentiality requirements of proposed sections 25 and 26 of the Bill, the ICO notes that both are subject (in proposed sections 25(3)(g) and 26(2)(h)) to exclusions for “a disclosure made in accordance with an enactment requiring or permitting the disclosure”. This should allow for EIR disclosure, but we would draw the Committee’s attention to the fact that Freedom of Information Act (FOIA) disclosures for those types of information will likely be prohibited by virtue of section 44 of FOIA.

Given the nature of that information, it is not particularly unusual to see restrictions on disclosure. However, when the Bill’s proposed section 27 is overlaid onto proposed sections 25 and 26, the exception at EIR 12(5)(d) comes into play.

Regulation 12(5)(d) states:

“(5) a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;”

Accordingly, not only is the information listed in proposed sections 25 and 26 excluded from disclosure under FOIA, but the exception in regulation 12(5)(d) must also be considered. This does not, however, act as a complete bar to disclosure under the EIR – as that exception is still subject to the public interest test. Therefore, in order to withhold the information, in all the circumstances of the case, the public interest in maintaining the exception must outweigh the public interest in disclosure. There is also, under the EIR, a presumption in favour of disclosure.

Having considered the procedures that proposed section 27 applies to, we can see an argument that such proceedings would be entitled to rely on regulation 12(5)(d). While the provision in proposed section 27 seems unusual, we can see value in it clarifying the legal basis for the confidentiality of those proceedings.

Promoting transparency and balancing the public interest

There is always a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of trust between confider and confidant, regardless of whether the obligation is based on statute or common law.

There is also always a general public interest in public bodies being transparent and accountable. The weight of this general public interest argument is significant because it relates to the purpose of the Directive and the Aarhus Convention. There may also be more specific arguments for disclosure depending on the circumstances. For example, there is a need to ensure that proceedings such as investigations are carried out fully and rigorously. More transparency is likely to increase public confidence in these regulatory mechanisms.

If proceedings are covered by an obligation of confidence, the information the public would normally have about them is likely to be limited. There may be a strong public interest in transparency if there has been a suspicion of wrongdoing or maladministration – however, this is only likely to be the case if such suspicions are credible and supported by evidence.

[ANSWER CONTINUED IN 13 BELOW AS FORM NOT ACCEPTING MORE TEXT]

4. What are your views on the Bill's provisions (set out according to Parts below), in particular are they workable and will they deliver the stated policy intention?

- **Part 3 - Biodiversity targets, etc (sections 33 to 38)**

[ANSWER 12 CONTINUED FROM ABOVE BOX]

Issue for the Senedd Committee

While it is not unusual for certain information to receive an enhanced level of protection from disclosure over and above that provided for in FOIA and the EIR themselves, we would submit that care should be taken in determining what information should benefit from such provisions.

In relation to proposed sections 25 and 26, while some of the information listed may be considered suitable for enhanced protection from disclosure, the Commissioner asks the Committee to carefully consider all of the categories of information listed. In particular, having regard to the value of transparency,

especially in the environmental sphere, he would ask the Committee to consider whether “information notices” and “compliance notices” and correspondence relating to them should receive that degree of confidentiality. He appreciates that there is an argument for greater protection of information obtained by OEGW through an information notice, and that drafts/preparation of a particular improvement report might justify greater protection.

5. What are your views on the Bill’s provisions (set out according to Parts below), in particular are they workable and will they deliver the stated policy intention?

- **Part 4 - General (sections 39 to 45 and Schedule 4)**

6. What are the potential barriers to the implementation of the Bill’s provisions and how does the Bill take account of them?

7. How appropriate are the powers in the Bill for Welsh Ministers to make subordinate legislation (as set out in Chapter 5 of Part 1 of the Explanatory Memorandum)

8. Are any unintended consequences likely to arise from the Bill?

9. What are your views on the Welsh Government’s assessment of the financial implications of the Bill as set out in Part 2 of the Explanatory Memorandum?

10. Are there any other issues that you would like to raise about the Bill and the accompanying Explanatory Memorandum or any related matters?

As the details of devolution are outside ICO's area of expertise, the Commissioner would welcome the Committee considering whether powers now enable Wales to add OEGW to Schedule 1 of the Freedom of Information Act, by inclusion in this Bill? If this is the case, it would aid immediate transparency.