

Yr Is-adran Dŵr, Gwastraff, Effeithlonrwydd Adnoddau a Llifogydd  
Water, Waste, Resource Efficiency and Flood Division  
Adran yr Amgylchedd a Materion Gwledig  
Department for Environment & Rural Affairs



Llywodraeth Cymru  
Welsh Government

Ein cyf/Our ref ATISN 11909

13 March 2018

Dear ,

Thank you for your request which I received on 17 January 2018 about Bottle Return Schemes.

A copy of the information I have decided to release is enclosed at Annexes 2, 3, 3a and 4.

I have decided that some of the information described in the enclosed list is exempt from disclosure under Regulation 12(4)(d), Regulation 12(4)(e) and Regulation 13) of the Environmental Information Regulations and is therefore withheld. The reasons for applying these exceptions are set out in full at Annex 4 to this letter.

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: [FreedomOfInformationOfficer@wales.gsi.gov.uk](mailto:FreedomOfInformationOfficer@wales.gsi.gov.uk)

Please remember to quote the ATISN reference number above.

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Welsh Government  
Cathays Park, Cardiff  
CF10 3NQ

Canolfan Cyswllt Cyntaf / First Point of Contact Centre  
0300 0604400

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 1

I have decided to withhold the following information:

<b>Information being withheld</b>	<b>Section number and exemption name of the Environmental Information Regulations 2004</b>
Correspondence sent by Welsh Government Ministers, officials and Special Advisers to Defra, Scottish Government or Zero Waste Scotland regarding Deposit Return Schemes	Regulation 12(4)(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data
Correspondence sent by Welsh Government Ministers, officials and Special Advisers to officers of the consultancy Eunomia regarding research on Extended Producer Responsibility for food and drink packaging	Regulation 12(4)(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data
Internal correspondence between Welsh Government Ministers, officials and Special Advisers regarding Deposit Return Schemes	Regulation 12(4)(e) the request involves the disclosure of internal communications.
Names and addresses of: <ul style="list-style-type: none"><li>• all members of the public, including constituents whose correspondence was forwarded by an AM or MP</li><li>• non public facing civil servants</li><li>• non public facing officers of external organisations</li><li>• retired officers of organisations or people who have since left the organisation</li></ul>	Regulation (13) the information requested includes personal data of which the applicant is not the data subject

This Annex sets out the reasons for the engagement of Regulation 12(4)(d), Regulation 12(4)(e) and Regulation (13) of the Environmental Information Regulations 2004 and our subsequent consideration of the Public Interest Test.

### **Engagement of Regulations 12(4)(d) and 12(4)(e) of the Environmental Information Regulations 2004**

Regulation 12(4)(d) states:

*...a public authority may refuse to disclose information to the extent that—  
(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.*

These terms are not defined in EIRs but ICO guidance is that material which is still in the course of completion can include information created as part of the process of formulating and developing policy, where the process is not complete.

Regulation 12(4)(e) states:

*... a public authority may refuse to disclose information to the extent that—  
(e) the request involves the disclosure of internal communications.*

Guidance from the Information Commissioner has confirmed that this exception is drafted broadly and is a class based exception which covers *all* internal communications, not just those that are sensitive or actually reflect internal thinking. The concept of 'internal communications' covers a wide range of information and includes any information intended to be communicated to others or saved in a file where it may be consulted by others. I can confirm that the information held by the Welsh Government which is captured by your request amounts to internal communications.

### **Public Interest Test**

In order to satisfy the public interest test in relation to the exemption(s), it is necessary to conclude that the public interest arguments in favour of withholding the information are sufficient to *outweigh* the public interest arguments in favour of release.

### **Public interest arguments in favour of disclosure**

The Welsh Government acknowledges the presumption in favour of disclosure under Regulation 12(2) and we acknowledge there is a public interest in openness and transparency within Government. There is a public interest in understanding how the Welsh Government is developing policy related to DRS. Disclosure would increase public trust in, and engagement with, the Welsh Government.

### **Public interest arguments in favour of withholding**

Disclosure would harm the interests of the Welsh Government by leading to the loss of frankness and candour with other government administrations and would be likely to damage any future deliberations around developing our policy. It is important for good governance that officials are able to fully engage and exchange sensitive information and advice away from the public gaze and that there should be no disincentive in doing so. The Welsh Government believes correspondence sent by Welsh Government Ministers, officials and Special Advisers to officers of the consultancy Eunomia regarding research on Extended Producer Responsibility for food and drink packaging should be exempt from disclosure. The policy in this area is currently in development and incomplete and the Welsh Government will need to review all available evidence and policy options in a balanced way to develop this policy and to ensure the accuracy of the information contained in the report.

The Welsh Government believes correspondence sent by Welsh Government Ministers, officials and Special Advisers to Defra, Scottish Government or Zero Waste Scotland regarding Deposit Return Schemes should be exempt from disclosure. The Welsh Government has entered into a free and frank exchange of views with other UK government administrations and agencies which will inform our policy making on Deposit Return Schemes and could form the basis of collaborative policy development with them. Disclosure would likely lead to the loss of frankness and candour with these stakeholders and likely damage any future deliberations.

The Welsh Government believes internal correspondence between Welsh Government Ministers, officials and Special Advisers regarding Deposit Return Schemes should be exempt from disclosure. The policy in this area is currently in development and incomplete and the Welsh Government will need to review all available evidence and policy options in a balanced way to develop this policy and to ensure the accuracy of the information contained in the report.

### **Balance of public interest test**

We believe that disclosing all correspondence sent by Ministers, officials, or Special Advisers to Assembly Members, Members of Parliament, members of the public or other stakeholders such as businesses or third sector organisations is in the public interest as it will increase public trust in and engagement with the Welsh Government. We also believe the public interest in avoiding loss of frankness and candour with stakeholders and creating confusion about Welsh Government policy which is still in development, outweigh the benefits of disclosing all correspondence with other government administrations, agencies and the consultancy which is working on advice on Extended Producer Responsibility for food and drink packaging. The Welsh Government believes the balance of public interest to withhold some of the information outweighs the public interest to release it for the reasons outlined above. The information has therefore been withheld under Regulation 12(4)(d) and 12(4)(e) of the EIRs.

### **Engagement of (Regulation 13) of the Environmental Information Regulations 2004**

Regulation 13 of the EIRs sets out an exception from the duty to disclose if the information requested is personal information protected by the Data Protection Act 1998 (DPA). Personal data is defined in Section 1(1) of the DPA as:

*“personal data” means data which relates to a living individual who can be identified from those data; or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.*

I consider that information regarding names and addresses of members of the public, constituents whose correspondence was forwarded by an AM or MP, officers of external organisations and civil servants clearly falls within the description of personal data as defined by the DPA and that its disclosure would breach the first data protection principle. The first data protection principle has two components:

- 1 Personal data shall be processed fairly and lawfully and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

Guidance from the Information Commissioner’s Office (Personal information (section 40 and regulation 13) v 1.3) states (at p11):

- *The starting point is to consider whether it would be fair to the data subject to disclose their personal data. The key considerations in assessing this are set out in the section on Fairness below.*
- *If disclosure would not be fair, then the information is exempt from disclosure.*

This approach was endorsed by the Court of Appeal in the case of *Deborah Clark v the Information Commissioner and East Hertfordshire District Council* where it was held:

*“The first data protection principle entails a consideration of whether it would be fair to disclose the personal data in all the circumstances. The Commissioner determined that it would not be fair to disclose the requested information and thus the first data protection principle would be breached. There was no need in the present case therefore to consider*

*whether any other Schedule 2 condition or conditions could be met because even if such conditions could be established, it would still not be possible to disclose the personal data without breaching the DPA” (paragraph 63).*

Release of information under the EIRs is not release to the requestor, but release to the world. Members of the public identified in correspondence with AMs would have had no reasonable expectation that their correspondence would be published to the world, and as such, release of their personal data would constitute unfair processing under the DPA.

Additionally, the ICO has issued guidance on whether release of names of officials and employees named in correspondence would be unfair, and thus in breach of the first principle of the Data Protection Act 1998. The guidance states:

*In assessing whether employees can have a reasonable expectation that their names will not be disclosed, key factors will include their level of seniority and responsibility and whether they have a public facing role where they represent the authority to the outside world.*

Where the officials in question are not senior staff, do not have a public facing role and where they are acting entirely in an administrative capacity, I have concluded that they have a reasonable expectation that their names will not be disclosed. It is my view, therefore, that disclosure of their names would breach the first data protection principle, and thus are exempt from release under regulation 13 of the Environmental Information Regulations 2004.