



9 November 2018

Dear ,

Request for Information – ATISN 12706

I wrote to you on 17 October regarding your request for information on tidal lagoon funding.

You asked for:

1. The name of any entity to which a loan has been given for the purpose of building a tidal lagoon in Wales.
2. The amount.
3. The term.
4. The security given.
5. Any conditions.
6. Any papers submitted by the applicant or prepared within Welsh Government, making a case for the loan and explaining why the applicant was the most appropriate entity to receive the loan.

I confirm we hold information caught by your request. You have already received some information in relation to a loan for Tidal Lagoon plc under ATISN 12284. The Welsh Government has also provided a £1.25m loan to Tidal Lagoon (Swansea Bay) plc. The term of this loan is to 31 March 2019 and the security given is a guarantee for £1m by a third party. The conditions of the loan agreement are given at Annex A.

In terms of your final question, I have concluded that the information is exempt from disclosure under Regulation 12(5)(e), confidentiality of commercial or industrial information, Regulation 12(4)(e), internal regulations, and Regulation 13, personal information, of the Environmental Information Regulations 2000. The reasoning for withholding this information is given at Annex B.



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

CONDITIONS from the Facility Agreement between Tidal Lagoon (Swansea Bay) Plc and Welsh Ministers

3. PURPOSE

3.1 The Borrower shall use all money borrowed by it under this Agreement towards the development costs of the Project including, but not limited to, the following:

3.1.1 master planning architectural design;

3.1.2 breakwater research and development; and

3.1.3 sluice gate and turbine development of the Project.

3.2 The Lender is not obliged to monitor or verify how any amount borrowed under this Agreement is used.

4. CONDITIONS PRECEDENT

4.1 The Borrower may only make a Drawdown Request, and the obligations of the Lender under this Agreement only arise, once the Lender has received all the documents and evidence specified in Schedule 1 in the form, and containing the information, that it requires.

4.2 The Lender's obligation to make an advance of the Loan is subject to the further conditions precedent that, on both the date of the Drawdown Request and the Drawdown Date:

4.2.1 the Warranties are true and correct in each case in all material respects; and

4.2.2 no Event of Default or Potential Event of Default is continuing or would result from the proposed Loan.

4.3 The conditions specified in this clause 4 are inserted solely for the Lender's benefit.

The Lender may waive them, in whole or in part and with or without conditions, without prejudicing the Lender's right to require subsequent fulfilment of such conditions.

SCHEDULE 1

CONDITIONS PRECEDENT

1. CONSTITUTIONAL DOCUMENTS, RESOLUTIONS AND CERTIFICATES

1.1 A copy of the constitutional documents of the Borrower and the Guarantor.

1.2 A copy of the resolutions duly passed by the board of directors of the Borrower approving the entry into, terms of and transactions contemplated by the Finance Documents.

1.3 A copy of relevant approvals and certificates from the Guarantor approving entry into the Guarantee.

1.4 A sample of the signature of each person authorised on behalf of the Borrower to execute or witness the execution of the Finance Documents or to sign or send any document or notice in connection with any Finance Document by the resolutions referred to in paragraph 1.2 of this Schedule 1.

1.5 A certificate, signed by a director of the Borrower, confirming that the borrowing in respect of the total Facility would not mean any borrowing, security or similar limit binding on the Borrower would be exceeded or that any such borrowing, security or similar limit binding on the Borrower be in breach of any other agreement with any other lender or creditor and/or security granted to any lender or creditor and confirming that each copy of a document relating to it that it has provided under this Schedule 1 is correct, complete and in full force and effect at a date no earlier than the date of this Agreement.

2. FINANCE DOCUMENTS

2.1 Each of the Finance Documents duly executed.

2.2 A Drawdown Request, duly completed by the Borrower.

2.3 Each notice required to be sent under the Finance Documents.

3. FINANCIAL INFORMATION

3.1 A copy of the Borrower's unaudited management accounts for the trading period from 1

January 2014 to 30 November 2014 including the following

3.1.1 profit and loss account:

3.1.2 balance sheet; and

3.1.3 cash-flow statement.

4. OTHER DOCUMENTS AND EVIDENCE

4.1 Lender satisfaction with financial due diligence on the Guarantor.

4.2 A signed direct debit mandate for payments to the Lender.

4.3 A copy of the written consent of Mr xxxxxxxx to the Borrower entering this Agreement.

4.4 A copy of any power of attorney under which the Guarantor may execute the Guarantee.

4.5 A copy of any other authorisation, document, opinion or assurance which the Lender

considers necessary or desirable in connection with the entry into, and performance of,

the transactions contemplated by the Final Finance Documents, or for the Finance Documents to be valid and enforceable.

Regulation 12(4)(e) – internal communications

This Annex sets out the reasons for the engagement of regulation 12(4)(e) - Internal communications of the Environmental Information Regulations and our subsequent consideration of the Public Interest Test.

Regulation 12(4)(e) states that 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.

Regulation 12(4)(e) is a qualified (public interest tested) exception. Even if the exception is engaged, public authorities must go on to apply the public interest test set out in regulation 12(1)(b). A public authority can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information. Because of this, consideration has been given to the effects of disclosure to the world at large rather than any personal interest you may have in being provided with the information.

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, particularly in terms of ensuring transparent and accountable government by disclosing how the Welsh Government utilises its resources, spends public money and that both are invested wisely on behalf of the people of Wales.

The information caught by your final question consists of the sharing of advice between officials and the provision of advice by officials to Ministers regarding the application for funding by Tidal Lagoon (Swansea Bay) plc. The advice discusses particularly sensitive and complex information regarding the proposed project, including the discussion of financial and commercial matters relating to the proposed project. Whilst the UK Government has announced its decision not to support the proposed project, it is still very much a live project and the related information therefore remains highly sensitive.

It is important for good governance that officials are able to fully engage with each other and with Ministers and exchange and provide advice away from the public gaze and that there should be no disincentive in doing so. If officials believed their advice or freely exchanged views would be made public, it is likely to inhibit the future provision

of advice and exchange of views, leading to less rigorous and in-depth exploration of options and impairment of the quality of decision making. Unless officials are able to provide options and advice surrounding the possible offer of support to any company, the effectiveness of the possible support that could be offered and the process of reaching such a decision would be undermined. This would not be in the public interest.

The Welsh Government believes the public interest in this project is satisfied by the amount of information already published and being released with this request. Further information will be published at appropriate junctures, for example, regarding the work being undertaken by the Swansea Bay Task Force established by Swansea City Council.

In this regard, the Welsh Government believes the balance of public interest to withhold the information outweighs the public interest to release it for the reasons outlined above. The information has therefore been withheld under Regulation 12(4)(e) of the EIRs.

Regulation 12(5)(e) – confidentiality of commercial or industrial information

The exception states:

*12.—(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—
(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest*

In order to refuse information under this Regulation, guidance¹ from the Information Commissioner states that public authorities will need to establish that:

- *the information is not on emissions;*
- *the information is commercial or industrial in nature;*
- *it is confidential under either the common law of confidence, contract, or a statutory bar;*
- *the confidentiality is protecting a legitimate economic interest;*
- *the confidentiality will be adversely affected by disclosure; and*
- *the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

The withheld information is in relation to your final question relating to the loan application by Tidal Lagoon (Swansea Bay) plc and associated internal information. The information is both commercial and confidential in nature and is not regarding emissions.

Prejudice Test

Having consulted with the affected third parties (Tidal Lagoon (Swansea Bay) plc and the guarantor), I believe the withheld information, if released into the public domain,

¹ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

would prejudice the economic interests of Tidal Lagoon (Swansea Bay) plc. The information was shared with the Welsh Government in confidence and relates to the company's current commercial activities. The company has a legitimate commercial interest in ensuring that its' inaugural project, namely the proposed Swansea Bay Tidal Lagoon, proceeds without hindrance or interference on such commercially sensitive matters, particularly given the sums already invested by both private investors and the Welsh Government. To release the information at this time would be likely to harm the company's efforts in this regard. Disclosure would also be likely to mean the company experiences a limitation in its ability to maintain competitive tension with its investors if they are aware of the Welsh Government's commercial considerations, which would be likely to reduce the company's ability to secure value for money from its additional investments.

I further believe that releasing the withheld information would be likely to prejudice Tidal Lagoon (Swansea Bay) plc's and other related entities commercial interests in relation to the ongoing discussions on the matter of further private support for the proposed Swansea Bay Tidal Lagoon, subject, of course, to the proposed project receiving the necessary consents.

Public interest arguments in favour of release

Given the fundamental significance of the proposed Swansea Bay Tidal Lagoon project, as the world's first tidal lagoon power plant, the Welsh Government acknowledges there is significant public interest in the proposed project with strong feelings both for and against it. The Welsh Government also acknowledges there is public interest in openness and transparency within Government, particularly in terms of how the Welsh Government spends public money and that the money is invested wisely. It is further recognised there is benefit in the public understanding the considerations being undertaken by Government in providing funding to cover working capital requirements for such a project.

Public interest arguments in favour of withholding

There is a significant public interest in ensuring that the proposed Swansea Bay Tidal Lagoon project is able to continue unimpeded. It is believed that the public interest is satisfied by the amount of information being released in relation to this request, is otherwise already in the public domain and what is intended for future publication, as outlined above, in relation to the work being undertaken by the Swansea Bay Task Force.

It is the view of the Welsh Government that discussions are continuing between various parties on the proposed Swansea Bay Lagoon Project. Therefore it is still in development and detailed discussions with potential private investors are ongoing, hence the balance of public interest is likely to favour withholding the information. This balance may change over time.

Regulation 13 - Personal Data

Regulation 13 of the EIRs sets out an exception from the right to know if the information requested is personal information protected by the General Data Protection Regulation (GDPR) and Data Protection Act 2018 (DPA). Personal data is defined in the GDPR as:

“any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”

We have concluded that, in this instance, the information in relation to names and contact details amounts to personal data. Under Regulation 13 of the EIRs, personal data is exempt from release if disclosure would breach one of the data protection principles set out in Article 5 of the GDPR. We consider the principle being most relevant in this instance as being the first. This states that personal data must be:

“processed lawfully, fairly and in a transparent manner in relation to the data subject”

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).

In this instance, the withheld information amounts to the personal data of officials and private sector individuals who do not have openly public facing roles and would not expect their names and contact details to be released in this context. There are generic contact details available in the public domain for members of the public to contact the Welsh Government and the company. Such generic systems mean members of the public do not make direct contact with officials and private sector individuals and avoids those individuals dealing with potentially unnecessary and disruptive correspondence. In this context, the individuals were liaising with each other as part of their normal course of business. In doing so, there would be no expectation that their personal details would at any time be placed in the public

domain. we believe that they would have no expectation that this information would be made public. Thus, we believe release of this information would be unfair and so breach the first data protection principle.

For that reason, the information is being withheld under Regulation 13 of the EIRs. This is an absolute exemption and not subject to the public interest tests.