



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2019/0012

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50719655

Dated: 17 December 2018

Appellant: Daniel Morris
Respondent: Information Commissioner
Public Authority: The Welsh Government

Heard at: London

Date of hearing: 12 June 2019

Date of decision: 21 June 2019

Before

Angus Hamilton

Judge

Subject matter: Freedom of Information Act (FOIA) 2000 s 1(1)(a)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal for the reasons given below.

Abbreviations used in the reasons:

IC: Information Commissioner

DN: Decision Notice

FOIA: Freedom of Information Act

FTT: First Tier Tribunal

REASONS FOR DECISION

1. There seems to be no dispute that the Information Commissioner (IC) has correctly set out the chronology in this matter and I have therefore adopted that chronology.
2. The Appellant wrote to the Welsh Government on 6 December 2017 and requested information in the following terms:

"Please provide all recorded information the Welsh Government holds regarding superfast broadband availability for postcodes SA18 2UN and SA18 2UG from Superfast Cymru's inception in 2012 through various extensions to present".

3. The Welsh Government responded on 23 January 2018 and provided the information requested, subject to some personal data being withheld under section 40(2) of the FOIA. The Welsh Government also provided a link to information about the current position for all premises within the two postcode areas.
4. On 23 January 2018 the Appellant requested an internal review of the Welsh Government's handling of the request. He also raised concerns about the delayed response to his request.
5. The Welsh Government provided the outcome of its internal review on 15 February 2018. It provided some additional recorded information, a contextual explanation and confirmed that it did not hold any further information relevant to the request. The Welsh Government also apologised for its delay in responding to the request, which was outside the statutory timescale.
6. On 10 January 2018, the Appellant complained to the Commissioner

about the way his request for information had been handled. He considered that the Welsh Government held more information than that provided and was not satisfied with the time it had taken for it to respond to the request.

7. The Commissioner determined that the scope of her investigation was to establish whether the Welsh Government held any additional information which it had not disclosed either prior to or during her investigation. The Commissioner also considered whether the Welsh Government responded outside the required statutory timeframes.
8. During the course of the Commissioner's investigation, the Welsh Government disclosed some additional information relevant to the request.
9. Having considered both parties' representations on the issue whether the Welsh Government held further undisclosed information falling within the scope of Mr Morris' original request, the Commissioner concluded that, in the circumstances of this case, she was satisfied that, on the balance of probabilities, no further information was held falling within the scope of the request. The Commissioner issued a Decision Notice (DN) reflecting this conclusion.
10. The Commissioner also concluded that as the Welsh Government did not provide its response to the Appellant's FOIA request within the statutory time for compliance, it had breached section 10 FOIA in the handling of the Appellant's request. The Commissioner did not require any action to be taken on this point.

11. The Appellant then submitted an appeal to the FTT dated 14 January 2019.

The Relevant Law

12. Section 1(1) of FOIA sets out the basic right of the freedom of information regime:

Any person making a request for information to a public authority is entitled-

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

13. Section 3 of FOIA clarifies when a public authority can be said to hold information:

(2) For the purposes of this Act, information is held by a public authority if—

- (a) it is held by the authority, otherwise than on behalf of another person, or*
- (b) it is held by another person on behalf of the authority.*

14. It follows that the requester is not entitled to information which the public authority does not hold. If the public authority does not hold the information, that is an end of the matter. In any dispute over whether a public authority holds the information requested the test to be applied is whether on the balance of probabilities the public authority holds that information.

15. The IC has properly highlighted an earlier decision on this point. The Tribunal in *Linda Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072; 31 August 2007)* held that in determining a dispute as to whether information is 'held':

" There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed." (Linda Bromley and Information Commissioner v Environment Agency EA/2006/0072 ('Bromley') at paragraph 13).

This Appeal

16. Mr Morris' appeal is based principally upon his consideration of the terms of a contract between the Welsh Government and BT/Openreach for the provision of an improved broadband network. The parties refer to this as the 'Grant Agreement'. Mr Morris has referred to specific clauses in this agreement – namely Clauses 31, 17, 16.7.1 and 8 which, he submits, indicate that BT holds information falling within the scope of his request and that BT is holding this information on behalf of the Welsh Government and is thus covered by s.3 FOIA

17. The IC, in her Response to the Appeal, has summarised the Appellant's analysis very well and I have therefore adopted that summary:

The Appellant has argued that BT (termed "the Grantee" within the Grant Agreement) produced schedules of implementation for specific postcodes, which it routinely changed. He considers that "it is unrealistic to think that the data created during Implementation Works was not held on behalf of the Welsh Ministers, planning to provide £205M of public funding."

The Appellant contends that even if the Commissioner accepted that the details were only "backwards looking" then after twenty two quarters, data should have been created regarding the planned and implemented works. He argues that changes would be held by BT on behalf of the Welsh Government according to the Grant Agreement. Further, he asserts that the Change Control process would be in force, thus creating historical records for the two narrowly-defined postcodes.

The Appellant has said that the Grant Agreement has been extended repeatedly. He considers that "from a business

perspective it would be wholly irresponsible for the Welsh Government not to inspect or collect the plans and records of implementation, as successor projects/agreements may have been negotiated with vendors other than BT/Openreach."

Finally, the Appellant considers that there is information within the public domain that would fall within the scope of his request which was not referred to by the Welsh Government in its response or internal review (namely two datasets.) The Appellant acknowledges that the Welsh Government may be able to claim an exemption in respect of this information and considers that this should have been considered by the Commissioner in her DN to ensure that the Welsh Government discharges its duty properly under FOI/EIR legislation to help requesters locate relevant information in a timely fashion.

18. The IC points out that this issue was investigated before the DN was issued and indeed the IC arguably supplemented the Appellant's contentions by pointing out to the Welsh Government the terms of Clause 8.2 of the Grant Agreement which explains that the Project Plan must be available electronically for Welsh Ministers. The IC told the Welsh Government that, in her view, any information falling within the scope of Mr Morris' request and which the Welsh Government could access by virtue of Clause 8 would be information held by BT on behalf of the Welsh Government. The IC also specifically asked the Welsh Government whether any other clauses within the Grant Agreement could be relevant in considering whether BT held any of the information sought by Mr Morris on behalf of the Welsh Government. The IC also asked the Welsh Government to consider whether it was possible that BT might hold further information on behalf of the Welsh Government which fell within the scope of the Appellant's request. The IC asked the Welsh Government to ensure BT conducted searches to access information to which the Welsh Government was entitled under the terms of the Grant Agreement. The IC asked the Welsh Government to provide details of all

relevant searches together with their results and an explanation as to why the Welsh Government was satisfied that BT did not hold any information on behalf of the Welsh Government falling within the scope of the Appellant's request.

19. The IC's Response to the Appeal notes that:

The Welsh Government responded to the Commissioner on 7 February 2019 and explained that it was of the view that BT does not hold information within the scope of the request on its behalf. It explained that under the Grant Agreement, the Welsh Government provided funding to BT to build out its broadband network. BT was not building this network on behalf of the Welsh Government. It further explained that the Welsh Government does not and will not own the network or have any involvement in running it. It went on that the Grant Agreement contains clauses which allows the Welsh Government access to certain information. - It explained that the purpose of these clauses is to ensure the Welsh Government can monitor performance under the terms of the agreement. These clauses are inserted purely for reasons of good governance and for audit. Other than the right to inspect, the Welsh Government has no rights in relation to this information and does not have control over it. The information still belongs to BT and when the agreement is terminated, this information will be retained by BT.

20. The IC accepts the veracity of this response and points to the decision in *Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190* in which the Tribunal accepted that the Commissioner was entitled to accept at face value the response of a public authority where there was no evidence of an attempt to mislead the IC or of a motive to withhold information actually in its possession. Bearing this point in mind and the searches conducted by the Welsh Government the IC believes she was right to conclude that on the balance of probabilities that the Welsh Government did not hold any further information that fell to be

disclosed to the Appellant.

21. The points accepted by the IC are repeated by the Welsh Government in its own submissions to the Tribunal. The Welsh Government helpfully draws the Tribunal's attention to a number of cases where consideration was given to the issue as to when it can be properly said that information is held 'on behalf' of another party. Perhaps the most helpful of these is the Scottish case of *Mr Shields and the Scottish Parliament (008/2005)*. The key issues were as described in that case:

31. If an authority holds information on behalf of another person or organisation, it will not control that information in the same way as it would with information held in its own right. The authority would not have power to delete or amend that information without the owner's consent; it would not be able to apply its own policies or procedures to it. It may have restricted access to it.

22. After analysing the clauses in the Grant Agreement highlighted by the Appellant the Welsh Government concludes:

The Grant Agreement contains clauses which allow the Welsh Government access to certain information. The purpose of these clauses is to ensure the [Welsh Government] can monitor performance under the terms of the Agreement. These clauses are included purely for the purpose of good governance and for audit . The [Welsh Government] does not have any direct control over the information. The information is owned and controlled by BT PLC and at the conclusion of the agreement; the information will be retained by BT PLC.....

In respect of the Grant Agreement to which the Appellant refers, it is the [Welsh Government]'s position that due to the manner in which information is owned and controlled by BT PLC under the terms of the Grant Agreement, the information is not held by them

on behalf of the Welsh Government and as such, the information arising from the Grant Agreement is not held by the Welsh Government and does not fall to be provided under S1 of the FOIA.

23. Mr Morris has submitted a Reply to the Responses from the IC and the Welsh Government. Unfortunately, this was not of any additional assistance to the Tribunal as it does not address at all the central issue relied on by the IC and the Welsh Government namely – that any information held by BT which may be within the scope of the Appellant’s request is not information held on behalf of the Welsh Government. His Reply simply does not address this issue at all.
24. I would note at this point that the Appellant’s Grounds of Appeal appear to raise an issue additional to the issues based on the terms of the Grant Agreement. The relevant paragraph reads:

I also note that whilst the Welsh Government has belatedly provided some data (August 2018), this conflicts with both the Open Market Review of June 2017 and its updates in November 2017. Neither dataset was referenced by the Welsh Government in its pitiful disclosure of 23 January 2018, following its Internal Review, nor after I told the ICO where to tell the Welsh Government to look. The Welsh Government may have been able to claim an exemption (that the data was readily available in a public form). The Commissioner ought to have noted this in the Decision Notice, to ensure that Welsh Government discharges its duty properly under FOI/EIR legislation to help requesters locate relevant information in a timely fashion. The datasets and summary of consultations from the OMR Consultation are available on the Welsh Government's website now, as they were at the time of the time of the request 404 days ago.

25. I am afraid that I am rather unclear as to the point being made by the Appellant here and, more importantly, its significance in terms of the issues to be decided by the Tribunal. I note that the IC did not consider that this issue required investigation. If it is the case that information which Mr Morris sought from the Welsh Government was already publicly available on its website then in all likelihood the exemption at s.21 FOIA (covering information which is already reasonably accessible to an applicant) would apply. However, I do not see how this assists in the assessment of whether BT held any information on behalf of the Welsh Government which fell to be disclosed.

26. In summary I do not consider that the Appellant has produced any compelling argument to rebut the assertions made by the Welsh Government and accepted by the IC that the information referred to in the Grant Agreement was not held by BT on behalf of the Welsh Government. I can see no other reason for suspecting that this assertion is incorrect. I conclude therefore that, on the balance of probabilities, the Welsh Government does not hold any further information which falls to be disclosed to the Appellant.

17. This appeal is therefore dismissed.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 21 June 2019