

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 02 August 2010

Public Authority: Wales Audit Office
Address: 24 Cathedral Road
Cardiff
CF11 9LJ

Summary

The complainant requested information regarding the names of elected members of the Isle of Anglesey County Council referred to in a report produced by Wales Audit Office. During the course of the Commissioner's investigation it became apparent that the Wales Audit Office did not hold the specific information requested but did hold other information relevant to the request. Wales Audit Office stated the information was exempt from disclosure under section 44 of the Act and the Commissioner finds that the exemption was correctly applied. The Commissioner requires no steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. In July 2009, Wales Audit Office (WAO) issued a report¹ following its Corporate Governance Inspection of the Isle of Anglesey County

¹ http://www.wao.gov.uk/assets/englishdocuments/Anglesey_corp_governance_eng.pdf

Council (the "Council"). The report itself provides background on the purpose of the inspection.

3. The report refers to the conduct of some elected members of the Council but does not reveal the identity of those individuals.

The Request

4. On 14 August 2009 the complainant made the following request to WAO:

"The voters of Anglesey DEMAND that the names of the members of Anglesey County Council that have brought the Council into DISREPUTE and wasted public money as mentioned in your recent audit BE PUBLISHED FORTHWITH."

5. WAO responded on 7 September and stated that it held "information of the description" specified in the request but that it was being withheld. WAO stated that it had applied the following exemptions:

- Section 44 (prohibitions on disclosure); WAO stated that the information was obtained by the Auditor General pursuant to Part 1 of the Local Government Act 1999 and, because disclosure would prejudice his functions, is subject to a restriction on disclosure provided by section 54 of the Public Audit (Wales) Act 2004.
- Section 33 (Audit Functions); WAO stated that disclosure would inhibit the co-operation of councillors, officers and members of the public with auditors and inspectors. WAO concluded that while there was a public interest in disclosing the names referred to in the report because it would promote councillor accountability, there was a greater public interest in withholding the information.
- Section 36 (prejudice to effective conduct of public affairs); WAO stated that disclosure would cause tension and make it harder for councillors and officers to work together in order to make the improvements identified in the report. WAO concluded that the public interest favoured maintaining the exemption.
- Section 40(2) (personal information); WAO concluded that disclosing some of the information would breach the Data Protection Principles.

6. The complainant wrote to WAO on 14 September 2009 to express his dissatisfaction with its decision to withhold the information requested and on 12 October 2009 WAO provided him with the result of its internal review of its original decision. WAO concluded that its decision to apply the exemptions referred to in paragraph 5, above, was appropriate.

The Investigation

Scope of the case

7. On 19 October 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The decision not to disclose the names of the elected members referred to in the report had implications for the electorate of Anglesey who, in the complainant's view, had a right to know if elected members had acted inappropriately or if the conduct of such individuals had been questioned.
 - The complainant considered there to be no law that "protects people in public office that [sic] have been accused of misconduct".
8. During the course of the Commissioner's investigation it became apparent that WAO did not hold a list of the names of members that it considered to "have brought the Council into disrepute and wasted public money" as requested by the complainant. It did however hold "fieldwork records" which identified some councillors in adverse terms. The fieldwork records were, in the main, written records of interviews conducted by WAO officials with councillors, officers and members of the public but they also contained correspondence submitted to the Auditor General by interested parties during the course of his investigation.
9. The complainant did not accept that the specific information was not held and the Commissioner has addressed this matter further in paragraphs 15 - 25, below.
10. The Commissioner considered that the fieldwork records – while not containing a definitive list of those elected members who, in WAO's opinion, had engaged in questionable conduct – did fall within the broader scope of the request. This is because any individual could read

through those records and with reasonable ease draw his or her own conclusions regarding the elected members who were considered to have contributed to the difficulties faced by the Council, even though they were never identified as such by WAO. The Commissioner has therefore considered whether WAO was correct to refuse to disclose the fieldwork records.

Chronology

11. On 16 December 2009 the Commissioner wrote to WAO and asked it to provide him with a copy of the withheld information and this was provided on 18 January 2010, together with explanation of how that information was relevant to the request and clarification that it considered its application of the various exemptions to have been appropriate.
12. Following allocation to one of his case resolution teams the Commissioner contacted WAO on 13 April 2010 to ask for further information regarding its application of the exemption under section 44. In particular, the Commissioner asked for a summary to clarify how the withheld information was obtained pursuant to Part 1 of the Local Government Act 1999.
13. WAO provided its response on 29 April 2010 and there followed a delay while the Commissioner considered the application of section 44 of the Act.
14. On 7 June the Commissioner telephoned WAO to clarify whether it held any further relevant information and on 8 June 2010 the Commissioner discussed the case with the complainant with a view to resolving this matter informally. This was not possible and the Commissioner asked WAO to provide further information that would allow him to progress this matter to a conclusion through a formal Decision Notice. WAO provided the relevant information on 11 June 2010.

Analysis

Substantive Procedural Matters

Is the requested information held?

15. In its refusal notice of 7 September 2009 WAO stated that it held information of the description specified in the request. However, during the Commissioner's investigation it became apparent that WAO did not

hold a list of names of elected members of the Council that it considered to have acted inappropriately but only held fieldwork records referred to in paragraphs 8-10, above.

16. Understandably, having been previously advised that WAO did hold the information he requested, the complainant was unwilling to accept during the Commissioner's investigation that WAO did not hold the information specified in his request. The Commissioner has therefore considered whether the information was held.
17. In the Commissioner's view, the normal standard of proof to apply in determining whether a public authority holds any requested information is the civil standard of the balance of probabilities.
18. This is in line with the approach taken by the Information Tribunal in the case of *Bromley & others v the Environment Agency* (EA/2006/0072), in which it stated:

"...we must consider whether the Information Commissioner's decision that the Environment Agency did not hold any information covered by the original request, beyond that already provided, was correct. In the process, we may review any finding of fact on which his decision is based. The standard of proof to be applied in that process is the normal civil standard, namely, the balance of probabilities..."
(paragraph 10)

because

"...there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records" (paragraph 13).

19. In deciding where the balance lies, the Commissioner will usually consider, among other things, any explanations offered by the public authority to explain why the information is not held.
20. The purpose of WAO's inspection of the Council is set out in the summary section of the report referred to in paragraph 2, above. The report clarifies that in the Annual Letter issued by the Council's Relationship Manager in January 2009² it was recommended that the Auditor General carried out "an inspection under section 10A of the Local Government Act of 1999 of corporate governance at the Council".

² http://www.wao.gov.uk/assets/Local_Reports/Isle_of_Anglesey_CC_annual_letter_07-08.pdf

21. The report goes on to clarify that the inspection set out to answer the question "Is the Council properly run?". This is an important statement in relation to determining whether the specific requested information was held by WAO; the statement highlights that the purpose of the inspection was not to investigate the conduct of individual elected members and hold them to account but to determine whether the Council as a whole was properly run.
22. Clearly, as part of the inspection, it was necessary to interview elected members but WAO's view is that it did not use the information gathered from those interviews to record its view of individuals' conduct. Rather, it used the information as part of the process of determining whether the Council was properly run.
23. The Commissioner asked WAO whether, aside from the fieldwork records, it held any other information that demonstrated that, in the opinion of WAO, named members of the Council acted inappropriately. For example, the Commissioner asked WAO to clarify if it used the fieldwork records to produce a summary sheet that included WAO's opinions on the conduct of elected members.
24. WAO clarified that it did hold other information in the form of a spreadsheet that replicates the 'judgement cells' (the view of the interviewer) of each fieldwork record, outline reports and 'drawing conclusion papers' that were used to summarise the evidence gathered during the inspection and subsequently fed into the final report. The Commissioner has seen copies of the outline reports and the drawing conclusion papers and accepts WAO's view that they do not identify its views on the conduct of individual named members and do not therefore fall within the scope of the request.
25. In summary, the Commissioner is satisfied that, taking into account the purpose of the inspection and WAO's explanation of the information it does hold, on the balance of probabilities it did not form an opinion on the conduct of individual elected members and does not therefore hold the specific requested information.
26. However, as set out in paragraph 10 above, the Commissioner does consider that the fieldwork records fall within the scope of the request and he has gone on to consider whether this information was appropriately withheld.

Exemptions

Section 44 – prohibitions on disclosure

27. Section 44(1) states that:

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court.”

28. The exemption is absolute and there is no need to consider the public interest in disclosure against the public interest in withholding the information.

WAO's position

29. In its refusal notice of 7 September 2009, WAO stated that the withheld information (the fieldwork records):

“...is information obtained by the Auditor General pursuant to Part 1 of the Local Government Act 1999 and, as such, because disclosure would prejudice the Auditor General's functions, is subject to the restriction on disclosure provided by section 54 of the Public Audit (Wales) Act 2004. It therefore falls within the section 44 exemption (prohibitions on disclosure) of the Freedom of Information Act 2000.”

30. In the findings of its internal review of 12 October 2009, WAO went further and stated that the information falls within section 54(1) of the Public Audit (Wales) Act 2004 (the “PAWA”) because it was obtained pursuant to Part 1 of the Local Government Act 1999 and “does not meet any of the criteria that permit disclosure specified in section 54(2) or 54(2ZA) of the PAWA. The section 44 exemption applies because PAWA prohibits disclosure”.

31. In arriving at his decision regarding WAO's application of section 44 of the Act, the Commissioner has considered the following questions:

- Was the information obtained pursuant to section 10A of the Local Government Act 1999?
- If so, does PAWA prohibit disclosure?

Section 10 of the Local Government Act 1999 (the "LGA")

32. Section 10A of the Local Government Act as extant at the time of the inspection stated that:

"10A Inspections: Auditor General for Wales

(1) The Auditor General for Wales may carry out an inspection of the compliance with the requirements of this Part by—

- (a) a Welsh best value authority, or*
- (b) a police authority for a police area in Wales.*

(2) If the Secretary of State directs the Auditor General for Wales to carry out an inspection of the compliance with the requirements of this Part by a specified authority mentioned in subsection (1) in relation to specified functions, the Auditor General for Wales shall comply with the direction.

(3) Before giving a direction under subsection (2) the Secretary of State shall consult the Auditor General for Wales.

(4) In carrying out an inspection, and in deciding whether to do so, the Auditor General for Wales shall have regard to—

- (a) any relevant recommendation under section 7(4)(ea), and*
- (b) any guidance issued by the Secretary of State."*

33. WAO clarified that section 10A(1)(a) has subsequently been repealed by the Local Government (Wales) Measure 2009 with effect from 1 April 2010 but with savings provisions until 1 April 2011; i.e. the provisions of section 10(A)(1)(a) continue to have effect until 1 April 2011³. The power of the Auditor General to carry out special inspections is now set out under section 21 of the Local Government (Wales) Measure 2009. Information obtained pursuant to those provisions also falls within section 54 of PAWA.

34. The Commissioner is satisfied that the Council falls within the definition of a "best value authority" set out in section 1(3) of the LGA⁴. The Commissioner is also satisfied that the interviews conducted by officials of the WAO and the subsequent fieldwork records that recorded those interviews were an integral part of the inspection process. As such the Commissioner agrees with the view presented by WAO that the withheld information was obtained by the Auditor General pursuant to

³ http://www.opsi.gov.uk/legislation/wales/wsi2009/wsi_20093272_en_1

⁴ http://www.opsi.gov.uk/acts/acts1999/ukpga_19990027_en_2#pt1-pb1-l1g1

Part 1 (specifically section 10A(1)(a)) of the Local Government Act 1999.

Does PAWA prohibit disclosure?

35. The full text of section 54 of PAWA is included in the legal annex. In summary, it prohibits the disclosure of "information relating to a particular body or other person is obtained by the Auditor General for Wales or an auditor, or by a person acting on behalf of the Auditor General for Wales or an auditor", pursuant to "Part 1 of the Local Government Act 1999 (c27) or Part 1 of the Local Government (Wales) Measure 2009" or "in the course of an audit, study, assessment or inspection" under the above legislation.
36. Section 54(3) states that it is an offence to disclose information in contravention of section 54(2).
37. Section 54(2) states that information must not be disclosed except in accordance with sections 54(2) and (as amended by the Local Government and Public Involvement in Health Act 2007) 54(2ZA - 2ZD). In effect, section 54(2) of the PAWA provides a list of circumstances in which information obtained pursuant to an inspection can be disclosed. The Commissioner has not considered each subsection, as many are clearly not relevant. For example, section 54(2)(a) states that information should not be disclosed except "with the consent of the body or person to whom the information relates". While WAO has not confirmed whether it has the consent of the individuals interviewed during the inspection to disclose the information, the Commissioner considers that consent would be unlikely and that it would not be practical to approach each individual to request consent. In addition the PAWA, as amended, provides further provision regarding the notion of consent referred to in section 54(2)(a) and the Commissioner considers that the exception is not met.
38. The Commissioner considers that the most relevant exceptions are contained in section 54(2ZA) and (2ZB). Those exceptions to the prohibition on disclosure state:

"(2ZA) A person who is, or acts on behalf of a person who is, a public authority for the purposes of the Freedom of Information Act 2000, may also disclose such information—

(a) in accordance with section 145C(5) or (8) of the Government of Wales Act 1998; or

(b) in any other circumstances, except where the disclosure would, or would be likely to, prejudice the effective performance of a function imposed or conferred on the person by or under an enactment.

(2ZB) An auditor who does not fall within subsection (2ZA), or a person acting on his behalf, may also disclose such information except where the disclosure would, or would be likely to, prejudice the effective performance of a function imposed or conferred on the auditor by or under an enactment."

39. In order to determine whether the exceptions to the prohibition on disclosure provided by section 54(2ZA) and (2ZB) apply, the Commissioner had to consider whether disclosure of the withheld information in this case would prejudice the audit and inspection functions of the Auditor General and his officials within WAO. If disclosure would prejudice those functions then the PAWA would prohibit disclosure.
40. In correspondence with the Commissioner, WAO stated its view that disclosure of the withheld information in this case would mean that "interviewees, both those subject to statutory access provisions and those co-operating on a voluntary basis, would be less forthcoming with relevant sensitive information in future inspections if they were to see that such information may be disclosed." The Commissioner considers this argument to hold considerable weight. In his view, individuals would be less likely to be open and frank in their views if they believed there to be a chance that information provided during an audit or inspection could be disclosed into the public domain. As such he does not believe it to meet the exception to disclosure defined by section 54(2ZB) of PAWA.
41. WAO also argued that disclosure would prejudice the audit and inspection functions of the Auditor General and WAO officials because it "would exacerbate interpersonal conflict within the Council leading to further failure to secure good corporate governance and best value (the overall Part 1 duty)." The Commissioner is aware that the difficulties faced by the Council have been widely publicised and he agrees that disclosure would be unlikely to help it address the problems it faces. This would therefore appear to fall under the definition of circumstances that would or would be likely "*prejudice the effective performance of a function imposed or conferred on the person by or under an enactment*", as defined by section 54(2ZA) of PAWA.
42. In summary, the Commissioner believes that WAO has demonstrated how disclosure of the withheld information is prohibited by section 54 of the PAWA and that section 44(1)(a) of the Act is engaged. The

section 44 exemption is an absolute exemption, which means that it is not subject to the public interest test. Given that the Commissioner believes this absolute exemption to be engaged, he has not gone on to consider whether any other exemption is engaged.

Procedural Requirements

43. Section 17(1)(b) states that a public authority refusing a request for information must issue a refusal notice specifying the exemption in question. While WAO referred to section 44 of the Act it did not specifically state the subsection on which it was relying. The Commissioner considers that this represents a breach of section 17(1)(b).

The Decision

44. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- It correctly withheld the information on the basis that section 44(1)(a) of the Act was engaged.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- By failing to specify the subsection of section 44 on which it was relying, WAO breached section 17(1)(b) of the Act.

Steps Required

45. The Commissioner requires no steps to be taken.

Right of Appeal

46. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 2nd day of August 2010

Signed

**Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

The Freedom of Information Act 2000

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Prohibitions on disclosure.

Section 44(1) provides that –

"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court."

The Local Government Act 1999

Section 10A provides that -

"(1) The Auditor General for Wales may carry out an inspection of the compliance with the requirements of this Part by—

- (a) a Welsh best value authority, or*
- (b) a police authority for a police area in Wales.*

(2) If the Secretary of State directs the Auditor General for Wales to carry out an inspection of the compliance with the requirements of this Part by a specified authority mentioned in subsection (1) in

relation to specified functions, the Auditor General for Wales shall comply with the direction.

(3) Before giving a direction under subsection (2) the Secretary of State shall consult the Auditor General for Wales.

(4) In carrying out an inspection, and in deciding whether to do so, the Auditor General for Wales shall have regard to—

(a) any relevant recommendation under section 7(4)(ea), and

(b) any guidance issued by the Secretary of State.”

Public Audit (Wales) Act 2004

Section 54 provides that –

(1) This section applies if information relating to a particular body or other person is obtained by the Auditor General for Wales or an auditor, or by a person acting on behalf of the Auditor General for Wales or an auditor—

(a) pursuant to a provision of this Part or Part 1 of the Local Government Act 1999 (c. 27), or

(b) in the course of an audit, study or inspection under a provision of this Part, section 145C of the Government of Wales Act 1998 (c. 38) or Part 1 of the Local Government Act 1999.

(2) The information must not be disclosed except in accordance with any of these—

(a) with the consent of the body or person to whom the information relates;

(b) for the purposes of any functions of the Auditor General for Wales or an auditor under this Part or Part 1 of the Local Government Act 1999;

(c) for the purposes of the functions of the Secretary of State relating to social security;

(d) for the purposes of the functions of a Local Commissioner in Wales under Part 3 of the Local Government Act 2000 (c. 22);

(e) for the purposes of any functions of the Assembly which are connected with the discharge of social services functions by local authorities in Wales;

(f) in accordance with section 145C(5) or (8) of the Government of Wales Act 1998;

(g) for the purposes of any criminal investigation which is being or may be carried out, whether in the United Kingdom or elsewhere;

- (h) for the purposes of any criminal proceedings which have been or may be initiated, whether in the United Kingdom or elsewhere;
- (i) for the purposes of the initiation or bringing to an end of any such investigation or proceedings;
- (j) for the purpose of facilitating a determination of whether any such investigation or proceedings should be initiated or brought to an end.

(3) A person commits an offence if he discloses information in contravention of subsection (2).

- (4) A person guilty of an offence under subsection (3) is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.

(5) In subsection (2) "social services functions" has the same meaning as in the Local Authority Social Services Act 1970 (c. 42).

(6) The Secretary of State may by order made by statutory instrument amend or repeal the preceding provisions of this section.

- (7) An order under subsection (6) may be made only if—
- (a) section 49 of the Audit Commission Act 1998 (c. 18) (restriction on disclosure of information) has been amended or repealed in the same Session as that in which this Act is passed or in any later Session;
 - (b) the Secretary of State thinks that the amendments or repeals to be made by the order under subsection (6) will (subject to paragraph (c)) have the same effect as the amendments to or repeal of section 49 of that Act;
 - (c) the order would not have the effect of imposing any further restriction on the disclosure of information under this section.

(8) An order under subsection (6) may not be made unless a draft of the order has been laid before, and approved by a resolution of, each House of Parliament.

Section 54(2) of PAWA, as amended by Local Government and Public Involvement in Health Act 2007

- "(2ZA)A person who is, or acts on behalf of a person who is, a public authority for the purposes of the Freedom of Information Act 2000, may also disclose such information—
- (a) in accordance with section 145C(5) or (8) of the Government of Wales Act 1998; or

(b) in any other circumstances, except where the disclosure would, or would be likely to, prejudice the effective performance of a function imposed or conferred on the person by or under an enactment.

(2ZB) An auditor who does not fall within subsection (2ZA), or a person acting on his behalf, may also disclose such information except where the disclosure would, or would be likely to, prejudice the effective performance of a function imposed or conferred on the auditor by or under an enactment.

(2ZC) A person who does not fall within subsection (2ZA) or (2ZB) may also disclose such information in accordance with consent given by the Auditor General for Wales or an auditor.

(2ZD) Section 54ZA makes further provision about consent for the purposes of subsection (2ZC)."