

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 18 July 2011

Public Authority: Welsh Assembly Government
Address: Crown Buildings
Cathays Park
Cardiff
South Glamorgan
CF10 3NQ

Summary

The complainant asked for emails, letters and minutes of meetings between the Welsh Government's Minister for Health and Social Services or her officials and specified consultants over a specified time period. The Welsh Government disclosed some information but took seven months to provide a substantive response. It refused to disclose some relevant information on the basis that section 35(1)(a) was engaged and that the public interest favoured maintaining the exemption. The Commissioner agreed that the exemption was engaged but found that the public interest favoured disclosure. The Commissioner has noted his concerns at the time taken to provide the complainant with a substantive response.

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. The following information is taken from the Welsh Assembly Government's (the "Welsh Government") refusal notice of 18 January 2011.

3. McKinsey & Co Consultants (McKinsey) was jointly commissioned by the Chief Executive NHS Wales and the Health Boards to work with colleagues from the Welsh Government's Health and Social Services Directorate General (HSS DG) and NHS Wales to help develop a '5-year Service, Workforce and Financial Strategic Framework' (Strategic Framework). McKinsey's role was to provide advice on developing performance management systems and an evidence base for change; to review and challenge the 2009/10 NHS Trust and Local Health Board (LHB) Financial and Service Plans, and to provide a focus for a co-ordinated set of actions to ensure the achievement of targets. The Strategic Framework was published in June 2010. There are 12 National Programmes associated with the Strategic Framework, each of which will set a number of specific policies and, thereafter, deliverables to be achieved over the next five years.
4. In February 2010, McKinsey was approached by the Welsh Government to work with its HSS DG to ensure that it was 'fit for purpose' in taking forward the implementation of the Strategic Framework.

The Request

5. On 22 June 2010 the complainant wrote to the Welsh Government and asked for:
 - All emails, letters and minutes of meetings between Mrs Edwina Hart [Minister for Health and Social Services] or her officials, and the consultants McKinsey & Co since 1 September 2009; and
 - A full breakdown of the total cost of the work undertaken by McKinsey & Co, funded by the Welsh Government, and the seven Local Health Boards.
6. The Welsh Government responded on 19 August 2010. It disclosed some information regarding the cost of the work. It stated that it was considering the first part of the request and the exemptions under sections 35, 41 and 43 of the Act. The Welsh Government said that it would write to the complainant again by 20 September 2010.
7. The Welsh Government sent the complainant further holding letters, explaining that it was still considering the disclosure of information relevant to the first part of the request, on 20 September, 19 October, 11 and 30 November 2011.

8. Following the Commissioner's involvement, on 22 December 2010, the Welsh Government disclosed some information relevant to the first part of the complainant's request. On 18 January 2011, it provided the complainant with its substantive response. It disclosed some further information relevant to the first part of the request but stated that other information was exempt by virtue of section 35(1)(a) of the Act.

The Investigation

Scope of the case

9. The complainant originally complained to the Commissioner on 4 November 2010. At that time the complainant was concerned with the delays he had encountered in obtaining a response to his request. Following the Welsh Government's substantive response of 18 January 2011, the complainant clarified that he was unhappy that information relevant to the first part of the request had been withheld.
10. Given the significant delays the complainant experienced in obtaining a substantive response to his request, the Commissioner has, in this case, waived the requirement for the complainant to ask the public authority to conduct an internal review of its handling of his request.
11. In his correspondence with the Commissioner, the complainant made no reference to the Welsh Government's response to the second part of his request and the Commissioner has clarified that it does not form part of his complaint.
12. In his letter to the Commissioner of 8 February 2011, the complainant asked the Commissioner to consider the following points:
 - The refusal of the Welsh Government to disclose the information he requested, with particular reference to slide presentations used by McKinsey and the information it produced that went into the creation of the Strategic Framework.
13. The complainant stated that he considered disclosure of the advice and recommendations given to the Welsh Government by McKinsey to be in the public interest.
14. The scope of the Commissioner's investigation was therefore to consider all withheld information relevant to the first part of the

complainant's request of 22 June 2010 and to determine whether the Welsh Government correctly withheld that information.

15. During the course of the Commissioner's investigation the following issues were resolved informally and do not therefore form part of this decision notice:
 - The Welsh Government redacted, under section 40(2) of the Act, the names of some junior members of staff employed by McKinsey. The Commissioner has clarified with the complainant that he is not pursuing disclosure of this information and the Commissioner has therefore not considered the application of this exemption.
 - During the Commissioner's investigation it became apparent that the withheld information contained what appeared to be the names of all – or a significant proportion of - the employees of the Welsh Government's Health and Social Services Directorate General. This information was presented in the form of an organisation chart. The Commissioner has clarified with the complainant that he is not seeking disclosure of the organisation chart.

Chronology

16. As stated in paragraph 9, above, on 4 November 2010 the complainant contacted the Commissioner to complain about the delays he had faced obtaining a response to his request. The Commissioner contacted the Welsh Government on 17 December 2010 and it agreed to ensure that its substantive response was sent to the complainant by 18 January 2011. On 22 December 2010, the Welsh Government disclosed some information to the complainant and on 18 January 2011 it issued its substantive response; some further information was disclosed but other information was withheld under section 35(1)(a) of the Act.
17. On 27 January 2011, the Commissioner wrote to the complainant to clarify whether he was content with the level of disclosure or whether he would like to pursue his complaint. On 8 February 2011, the complainant wrote to the Commissioner to clarify that he did want to pursue his complaint.
18. The Commissioner clarified the scope of his investigation in a letter to the complainant of 10 February 2011 and wrote to the Welsh Government on the same day to ask for a copy of the withheld information and further reasoning behind its decision to withhold relevant information. The Welsh Government's response was received by the Commissioner on 25 February 2011.

Analysis

Exemptions

Section 35 – formulation and development of government policy

19. The Welsh Government has withheld the following information under section 35(1)(a):
 1. Information regarding the reform and restructure of the Welsh Government's HSS DG – this includes emails, attachments to emails in the form of presentation 'slides', and memorandums between McKinsey and the Welsh Government.
 2. Information regarding the 5-year Service, Workforce and Financial Strategic Framework (Strategic Framework) – this includes emails and attachments, in the form of presentation 'slides' used by McKinsey to develop a dialogue between stakeholders, memorandums and letters between McKinsey, the Welsh Government and Local Health Boards in Wales and draft versions of the Strategic Framework.
20. Section 35(1)(a) states that:

'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

 - (a) the formulation or development of government policy'
21. Section 35 is a class based exemption, therefore if information falls within the scope of a particular sub-section of 35(1) then exemption will be engaged; there is no need for the public authority to demonstrate prejudice to these purposes. However, section 35 is subject to the public interest test.
22. In this case the Commissioner is satisfied that the withheld information relates to the formulation of government policy. The information falls into two strands; information relating to the development of the Strategic Framework and information relating to the reform of the Welsh Government's HSS DG.
23. The Act does not define what is meant by the formulation or development of government policy. Although often used interchangeably, the Commissioner considers that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions

are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.

24. Also, in the Commissioner's view, the term 'relates to' should be interpreted broadly to include any information concerned with the formulation or development of the policy in question and does not specifically need to be information on the formulation or development of that policy.
25. Having viewed the withheld information, it is clear to the Commissioner that the information can be considered to relate to the formulation and development of the Strategic Framework and that this constitutes a government policy on taking forward the NHS in Wales. The work to reform the HSS DG was closely associated with the Strategic Framework and was aimed at ensuring it was best placed to deliver that policy. As such, the Commissioner's decision is that section 35(1)(a) is engaged.

Public interest test

26. Section 35(1)(a) is a qualified exemption and, having determined that the exemption is engaged, the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
27. Although there are two strands of information – (i) information on the formulation and development of the Strategic Framework and (ii) information on the reform of the HSS DG – the Commissioner considers that the public interest arguments are shared and he has not considered each strand separately.

Public interest arguments in favour of disclosing the requested information

28. In the complainant's view, the advice and recommendations provided by McKinsey to the Welsh Government should, in the interests of transparency and democracy, be made available to the public so that it can ascertain how decisions that fundamentally affect the health service in Wales were made. The complainant also believes that it is in the public interest for details of the issues currently facing the health service in Wales to be disclosed.
29. The Welsh Government also identified the general concept of open and transparent government as a public interest argument in favour of disclosure. In its refusal notice it went on to say that disclosure "might enable the public to see how thoroughly the wide range of issues have been considered and debated". The Welsh Government also said that disclosure might provide the public with "a better understanding of how the Welsh Government are taking forward a significant programme of work likely to have an impact on vital and important services".
30. A further factor the Commissioner identified was that disclosure might clarify the relationships between government and external consultants in terms of the part they play in shaping government policy.

Public interest arguments in favour of maintaining the exemption

31. In its refusal notice of 18 January 2011, the Welsh Government said that during the period September 2009 to June 2010, McKinsey worked closely with HSS DG officials to get a better understanding of the main issues facing the NHS in Wales. The Welsh Government also said that to do so, McKinsey had to be able to access confidential information and data, such as financial, statistical and technical information, from the Welsh Government and from NHS organisations in Wales (for example, Local Health Boards), although it was not clear to the Commissioner what relevance this had to its arguments regarding the public interest test. The Welsh Government went on to say that the Chief Executive of NHS Wales is also Director General of the HSS DG and his relationship with the Chief Executives of Local Health Boards and NHS Trusts is unique in that he has day to day contact with them in his dual role. The new NHS structures in Wales are built on a more collaborative and integrated way of working and, in the Welsh Government's view, the Chief Executive of NHS Wales should be able to discuss policy issues with Chief Executives of

NHS organisations without information being released into the public domain.

32. The Welsh Government also said that disclosure of the slide presentations used by McKinsey to develop a dialogue between individuals involved in the process (the development of the Strategic Framework and the reform of the HSS DG) could affect how consultants are commissioned to assist with policy development work in the future. The Assembly's Government's view is that fear of such information being published would be likely to lead to inferior discussions and information gathering exercises taking place, which would in turn undermine the effectiveness of consultancy.
33. The Welsh Government went on to say that disclosure of the information would provide an unbalanced picture of the issues facing the NHS in Wales and HSS DG at this time. It stated that the comments and expression of views contained within the slide presentations are not weighted in any way and in some cases represent the point of view of one individual. The discussions that followed are not recorded and the Welsh Government is concerned that disclosure of the withheld information would be without the contextual information that would have been provided to those who were party to the discussions. The Welsh Government believes that, if disclosed, the information could be taken out of context and result in a serious risk that civil servants will be forced to defend the positions taken on certain issues, including those that were discounted immediately. In its view, by "distracting attention away from the current progress on the development of the policy process" disclosure would be likely to adversely impact on the further development of the 12 National Programmes and the conclusion of the final stages of the HSS DG reform.
34. Furthermore, the Welsh Government considers the Strategic Framework to be only the start of the policy making process. The 12 National Programmes are the vehicles that will develop the policy over the next five years and the Welsh Government considers development of government policy in this area to be ongoing. It also considers that disclosure of the information could destabilise the development work being undertaken as part of the 12 National Programmes and that this would be likely to not only prejudice but to cause substantial harm to the ongoing policy process.
35. The Welsh Government also stated that stakeholders who provided information to McKinsey had the expectation that the information would only be made available to a limited audience. The Welsh

Government is concerned that if it was considered that such information could be disclosed into the public domain before the work was completed, the information may not have been provided so openly.

36. In its refusal notice the Welsh Government also said that it “would be in the public’s interest that this programme (the Strategic Framework and the reform of the HSS DG) is allowed to proceed as planned, in order to deliver the improvements to service delivery and efficiencies in a number of areas, particularly in the current economic climate.” It went on to say that it would not be in the public interest if the finite resources available to drive the programme forward were “distracted to dealing with a debate/discussion on matters that are no longer pertinent to present considerations, or to deal with outdated information.”
37. The Welsh Government also said that disclosure of the information contained in the presentational slides would result in the Minister being held to account for how individuals’ views or standpoints were taken account of in the process. It said that the information was collected and summarised in a format designed for detailed discussion by an informed and involved audience, not for publication as public documents. The Welsh Government’s view was that disclosure of the information into the public domain would affect the ability of officials in the Welsh Government and in the NHS to have a full and frank exchange of views in the future and would hamper good policy making.
38. In the Welsh Government’s view, the Strategic Framework is a short, medium and long-term plan that is still its inception stage. The reform of the HSS DG is also under “active development”. It considers that disclosure of the withheld information, while the issue is still ‘live’, would be likely to inhibit debate, by making the provision of free and frank opinions less likely, and thereby limit the exploration of the full range of policy options that ought to be considered. It is also of the view that disclosure could put at risk its ability to take a measured view of the priorities for action and skew detailed policy discussions.

Balance of the public interest arguments

39. In reaching a conclusion on the balance of the public interest, the Commissioner has taken into account those factors that relate to the specific information in question here, including what harm may result through disclosure of the information in question and whether disclosure of information relating to the formulation and development of policy on the reform of the HSS DG and the

Strategic Framework would serve the public interest. This is in addition to the general public interest in transparency and openness in relation to the government policy formulation and development process.

Safe space and the 'chilling effect'

40. The public authority argued that disclosure would result in harm to the policy-making process, in that the participants in this process would be inhibited if they were aware that the record of their contributions may later be subject to disclosure via the Act. In *DfES v the Commissioner and the Evening Standard* (EA/2006/0006) the Information Tribunal provided a number of guiding principles for consideration of the balance of the public interest in connection with section 35(1)(a). The arguments of the public authority about disclosure inhibiting participants in the policy making process are relevant to two factors highlighted by the Tribunal: 'safe space' and 'chilling effect'.
41. The term 'chilling effect' refers to an adverse effect on the frankness and candour of participants in the policy making process. Arguments about 'safe space' are related to chilling effect arguments but distinct, as the need for a safe space within which to debate policy exists regardless of any chilling effect that may result through disclosure. The basis of safe space arguments is that an erosion of the safe space for policy making would have a detrimental impact on the quality of the policy making process. In short, safe space arguments are related more to ongoing policy discussions and the chilling effect relates to the likely candour of future discussions.
42. The weight that the Commissioner affords to chilling effect and safe space arguments will depend on how closely they relate to the information in question. For example, an argument that disclosure would result in a chilling effect to policy making in general may be likely to carry less weight than an argument that a chilling effect would result to the specific policy area to which the information relates. Also key is the stage reached in the policy-making process at the time of the request. Where a public authority argues that harm would result to a specific and ongoing policy-making process, this will generally carry more weight than an argument suggesting that harm would result to future policy-making in general through disclosure of information relating to policy that was complete at the time of the request.
43. In this case, the argument advanced by the Welsh Government is closely related to the information in that it has argued that

disclosure would have resulted in harm to the policy-making process recorded in the information in question. It argued that the Strategic Framework was only the start of the policy making process and that disclosure would harm the ongoing development of policy in relation to the 12 National Programmes.

44. The Commissioner has therefore considered whether the policy formulation and development process could be considered to be ongoing at the time of the request. He notes that the Strategic Framework was published in June 2010 and that it is available via the NHS Wales website¹. The statement on the website is dated 10 June 2010 and it is therefore clear the Strategic Framework was completed before this date. The date of the request was 22 June 2010. The Commissioner acknowledges the argument that policy development will continue in the medium to long term but in this case the specific policy – ie the Strategic Framework – was clearly finalised by the time of the request. While there will clearly be a need for ongoing policy formulation and development in order to implement the strategies identified in the framework – the 12 National Programmes - the Strategic Framework itself was a completed piece of work. The status of the reform of the HSS DG is less clear but the information the Commissioner has seen suggests that the input from McKinsey was due to finish in mid-June. This was prior to the submission of the request. The Welsh Government has not provided specific arguments to clarify whether the reform of the HSS DG was ongoing at the time of the request, as it has focused on the Strategic Framework.
45. The Commissioner considers that the 'safe space' arguments are undermined when the timing of the request is taken into account. He acknowledges that there is a need for officials and Ministers to be able to debate 'live issues' without being hindered by outside comment and/or media. He is also aware that there has been media coverage of this issue and the work undertaken by McKinsey². However, the Commissioner considers that, in this case, any such debates in relation to the development of the Strategic Framework itself must have been completed before the request was received by the Welsh Government, given that it was published before that date.

¹ <http://www.wales.nhs.uk/news/16445>

² <http://www.bbc.co.uk/news/uk-wales-11387314> and <http://www.bbc.co.uk/news/uk-wales-11385517>

46. The argument of the public authority is also that a chilling effect would result if participants had been concerned that their contributions to documents in draft form and other contributions to an area of policy-making, that was at an early stage at the time of the request, could later be disclosed.
47. The Commissioner has considered the circumstances of the case and the information in question. In previous cases considered by the Tribunal arguments have been made that disclosure of advice that went into the policy formulation and development process might improve the quality of the deliberative process and the Commissioner considers that this argument holds some weight. If parties considered that the information might become subject to public scrutiny it could improve the level of rigour and discipline that went into the policy formulation and development process. This is supported by the Tribunal's comments in *Baker v the Information Commissioner and the Department for Communities and Local Government (EA/2006/0043)*.

Robustness of officials

48. The Welsh Government argued that the threat of disclosure of civil servants' advice would lead such officials to be less candid when offering opinions. The Commissioner noted that the Tribunal, in the case of *Department for Energy and Sport v the Information Commissioner and the Evening Standard (EA/2006/0006)* commented that "we are entitled to expect of [civil servants] the courage and independence that...[is]...the hallmark of our civil service". It went on to describe civil servants as "highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions". In short, they should not be easily discouraged from doing their job properly.
49. Bearing these comments in mind, the Commissioner does not consider that the Welsh Government's argument about the candour of civil servants holds significant weight.

Information in the public domain

50. The Welsh Government stated that some of the information about the Strategic Framework it has withheld is likely to be in the public domain but said that it be an almost impossible task to determine which elements have been made public and which have not, given the fast moving pace of this agenda.
51. Given that the public authority has been unable to identify what information is in the public domain, the Commissioner has been

unable to clarify this point and to determine what weight if any to give to this issue.

The information itself

52. The withheld information consists substantially of slide presentations used by McKinsey to facilitate debate on this policy area. There are also emails and memoranda that were exchanged by senior civil servants (for example the Director General of the HSS DG / Chief Executive of NHS Wales) and senior employees of McKinsey. The Commissioner is of the view that the nature of the information itself weakens the public interest arguments in favour of withholding the information. For example, while senior civil servants do express opinions in emails and memoranda and no doubt had input into the slide presentations, the slides themselves were put forward by McKinsey. They do not record the views of civil servants that were debated during any discussions. As such, the arguments regarding safe space, the chilling effect and the robustness of officials are to an extent weakened.
53. In addition, the Commissioner considers that this policy area is of significant importance to the people of Wales, as it sets out a framework for taking forward the NHS for the next five years. The Commissioner considers that the public interest is served by putting this information into the public domain so that the people of Wales gain a greater understanding of the policy formulation and development process.

Summary

54. Taking into account the arguments presented above regarding safe space, the chilling effect (both of which included arguments about the timing of the request), the robustness of officials and the nature of the information itself, the Commissioner has determined that the public interest in disclosure outweighs the public interest in maintaining the exemption. Disclosure of the withheld information would enhance the general transparency of the way in which decisions on significant policy areas are made and will provide the people of Wales with a greater understanding of the way in which policy decisions were made in relation to this specific and significant area.
55. The Commissioner does not consider that the arguments regarding the way in which the information will be used to hold significant weight in this case. The Welsh Government argued that the information could present an unbalanced view to the public and, as a result, distract it from its work on development on the 12

National Programmes; ie it would be forced to answer questions and defend its position in relation to information on the formulation and development of the Strategic Framework, when such information is not a balanced representation of discussions or the policy formulation and development process. The Commissioner considers that the Welsh Government could, to a large extent negate such problems, by issuing a brief statement with the information to explain the context and background. In addition, the Commissioner believes that the executive of any elected government should have the expectation that it will have to answer questions about decisions made in relation to key policy areas.

Section 40(2)

56. The Commissioner is mindful that the withheld information contains the names of a number of individuals (other than those already scoped out of the request), employed by the Welsh Government, McKinsey and other organisations within the health sector in Wales; eg NHS Wales. The information is mainly contained in emails but also meeting minutes and a memorandum sent by McKinsey. Perhaps because the main focus of the request was the information itself, rather than the names of individuals involved in the restructure of the HSS DG or the Strategic Framework, the Welsh Government has not specifically addressed whether this information should be disclosed.
57. The Commissioner considers that the information falls within the definition of personal data set out in section 1(1) of the Data Protection Act 1998 (the "DPA") and, bearing in mind his role of regulating the Act and the DPA, he has considered whether section 40(2) of the Act is engaged.
58. Section 40(2) of the Act states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles.
59. Having already determined that the information constitutes the personal data of the named individuals, the Commissioner has gone on to consider whether disclosure would breach any of the data protection principles.
60. The Commissioner considers that the first data protection principle is most relevant to this case. The first data protection principle requires that the processing of personal data be fair and lawful and,

- at least one of the conditions in schedule 2 of the DPA is met, and
 - in the case of sensitive personal data, at least one of the conditions in schedule 3 of the DPA is met.
61. This means that, in order to comply with the first data protection principle when dealing with personal data, both requirements (fair and lawful processing and a schedule 2 condition) must be met.
62. The Commissioner's approach to assessing whether disclosure under the Act would comply with the first data protection principle is to firstly assess whether disclosure would be fair.
63. In considering this issue, the Commissioner has taken the following factors into account:
- The reasonable expectations of the data subjects.
 - Consequences of disclosure.
 - The legitimate interests of the public.
64. A data subject's expectations are likely in part to be shaped by generally accepted principles of everyday interaction and social norms, for example privacy. It is accepted that every individual has the right to some degree of privacy and this right is enshrined in Article 8 of the European Convention on Human Rights.
65. However, the Commissioner considers that the fact the information relates to the individuals' public life – ie their role in the restructure of the HSS DG or the Strategic Framework - to be significant. The Commissioner's guidance on section 40³ suggests that information about someone acting in an official or work capacity should normally be disclosed unless there is some risk to the individual concerned. Bearing in mind that the named individuals are involved in the decision making process of such significant strands of work, the Commissioner considers that they should have an expectation that their names and/or view and other information they created during the process could at some point be disclosed. In fact the Commissioner is aware that some of the names of individuals have already been disclosed by the Welsh Government. The Commissioner does not consider that disclosure

³http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specalist_guides/PERSONAL_INFORMATION.ashx

of the names would present any risk to the individuals concerned or have significant consequences that would impact on their right to privacy.

66. The Commissioner also considers that there is a legitimate public interest in disclosure of information that would lead to increased transparency in the decision making processes of public authorities, particularly when the decisions impact on the daily lives of the public. The Commissioner considers that the withheld information is of significant importance to the people of Wales and that there is a legitimate public interest in disclosure of the names of the individuals involved in such key decisions.
67. Taking into account the above, the Commissioner considers that disclosure would not be unfair.
68. Having determined that disclosure of the names of individuals would not be unfair, the Commissioner has gone on to consider whether a Schedule 2 condition could be satisfied. The Commissioner considers that condition 6 is most relevant in this case.
69. The sixth condition establishes a three part test which must be satisfied;
 - there must be legitimate interests in disclosing the information,
 - the disclosure must be necessary for a legitimate interest of the public and,
 - even where the disclosure is necessary it nevertheless must not cause unwarranted interference (or prejudice) to the rights, freedoms & legitimate interests of the data subject.
70. The Commissioner considers that 'legitimate interests' have already been considered as part of the balancing exercise considered above and 'unwarranted intrusion' test to have been dealt with under the consideration of the consequences of disclosure on the data subjects. He has therefore gone on to consider only the second limb of the test i.e. whether it is 'necessary' to disclose the requested information to meet the identified legitimate interests.
71. The Commissioner appreciates that it will not be necessary in all cases to name individuals because other information that can be made available will satisfy the legitimate public interest. However, in this case the disclosure of the withheld information without the names of the data subjects would make it difficult to understand the context of the information; for example emails could be

rendered meaningless if the name of the author and the recipients are redacted. The Commissioner feels that, in this case, it is important that the decision making processes, in relation to the restructure of the HSS DG and the Strategic Framework, are transparent so that the public is able to access information that is relevant to their daily lives.

72. In the context of freedom of information requests, the Commissioner considers it is likely that it will be unlawful to disclose personal information where it can be established that the disclosure would be a breach of a statutory bar, a contract or a confidence. In the current case he has seen no evidence that any of these breaches would occur, and as a consequence he has concluded that disclosure would not be unlawful.
73. In summary, the Commissioner does not consider that section 40(2) of the Act is engaged because disclosure of the names contained in the withheld information that have not been scoped out of the request would not breach any of the data protection principles.

Procedural Requirements

74. Section 1(1)(a) of the Act states that any person making a request for information to a public authority is entitled to be informed whether that information is held.
75. Section 1(1)(b) states that, subject to further provisions of the Act, the person making the request is entitled to have that information communicated to him.
76. Section 10(1) states that the public authority should confirm whether it holds information of the type requested within 20 working days.
77. Section 17(1) requires a public authority refusing to disclose requested information on the basis that an exemption applies to issue a valid refusal notice within the statutory timescale – not later than the twentieth working day following the date of receipt of the request.
78. The Welsh Government did not specifically state that it held information relevant to the request until 19 August 2010 and the Commissioner considers this to be a breach of section 1(1)(a) and 10(1). The Assembly did not provide the information to the complainant within 20 working days and the Commissioner

considers this to be a breach of section 1(1)(b) and a further breach of section 10(1).

79. The Commissioner also finds that the Welsh Government breached section 17(1) by failing to provide a valid refusal notice within the statutory timescale.

The Decision

80. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

Steps Required

81. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose the withheld information it has identified as being within the scope of the request, taking into account the information that has been scoped out of the request; ie the names of junior employees and the organisation chart containing the names of employees of the HSS DG.
82. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

83. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

84. Although the Commissioner has already commented in this notice on the delays encountered by the complainant, he would like to reiterate his concerns. The Welsh Government indicated to the Commissioner during his investigation that, taking into account the volume of information potentially relevant to the request, it might have legitimately applied section 12 (cost of compliance

exceeds the appropriate limit) of the Act and refused to comply with the request. The Assembly also stated that it had tried to comply with the request (and had therefore not applied section 12) in order to be as open and transparent as possible.

85. While the Commissioner has some sympathy with the motivation behind this course of action, he does not think it reasonable that the complainant should have to wait seven months for a substantive response. This undermines the basis of the Act and makes it less likely that relevant information will be of public interest.
86. The Commissioner suggests that the Welsh Government review its procedures for handling information requests to ensure that similar delays do not occur in the future. He would also suggest that the individuals responsible for handling requests with the various departments and directorates that make up the Welsh Government are provided with appropriate training to allow them to identify any relevant sections of the Act at an early stage. The Commissioner considers that his guidance on the life cycle of a request might be a useful starting point for any members of staff who have such responsibilities⁴.

⁴http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/gnp_3_lifecycle_of_a_request.pdf

Right of Appeal

87. 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: 0300 1234504

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

88. 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.
89. 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 18th day of July 2011

Signed

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

Legal Annex

General Right of Access

Section 1(1) provides that -

"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."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

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."

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (d) the formulation or development of government policy,
- (e) Ministerial communications,
- (f) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (g) the operation of any Ministerial private office.”

Section 35(2) provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (h) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (i) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

Section 35(3) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

Section 35(4) provides that –

“In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.”

Section 35(5) provides that –

"In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (j) between Ministers of the Crown,
- (k) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (l) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."