

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 June 2012

Public Authority: Welsh Assembly Government
Address: Cathays Park
Cardiff
CF10 3NQ

Decision (including any steps ordered)

1. The complainant requested information relating to Powys Fadog and the River Lodge Hotel, Llangollen. Some information was disclosed and other information withheld under sections 36, 40 and 42 and 43. During the Commissioner's investigation the Welsh Government disclosed some additional information but maintained its reliance on sections 36, 40 and 42. The Welsh Government also introduced its reliance on section 21 of the FOIA. The Commissioner's decision is that the Welsh Government has correctly withheld some information under sections 21, 36, 40 and 42. The Commissioner has also concluded that some information which the Welsh Government considered falls outside the scope of the request was relevant to the request and should have been considered for disclosure. The Commissioner has also identified a number of procedural matters associated with the handling of the request.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Reconsider the information which the Welsh Government has considered out of scope of the request and either disclose the information or issue a valid refusal notice in accordance with section 17 of the FOIA.
 - Disclose the name of the journalist who contacted the Welsh Government about a media enquiry in relation to the River Lodge Hotel.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Background

4. The request in this case relates to a property known as the River Lodge Hotel, which was purchased by the Welsh Government in March 2007. The Welsh Government subsequently entered into negotiations with Powys Fadog, a local social enterprise with a view to developing the property to secure an acceptable community use for the building.
5. In June 2009 the Assembly Government and Powys Fadog entered into an Agreement for Lease for the property. This lease was subject to a number of conditions including that Powys Fadog undertake remedial and improvement works to bring the property back into a good state of repair. A pre-condition to the lease being granted was that Powys Fadog was required to demonstrate that it had secured funding to cover the cost of remedial works.
6. The Welsh Government has conducted a number of internal investigations into the River Lodge project. It has also undertaken an options appraisal assessment in order to consider the alternative options for future use of the site.

Request and response

7. On 24 March 2011, the complainant wrote to the Welsh Government and requested information in the following terms:

“The report undertaken in June 2009 by Chris Munday in relation to the River Lodge Llangollen. If there is more than one version, please could I have all of them with the dates.

Any correspondence or paperwork, to or from, or on behalf of Chris Munday in relation to the River Lodge, and Powys Fadog.

The internal audit instigated by Dame Gill Morgan in relation to the River Lodge in Llangollen in March/April 2010”.
8. Following a complaint to the Commissioner about the delay in receiving a response to the request, the Welsh Government issued a refusal notice on 30 June 2011. The Welsh Government disclosed some information relevant to part 1 of the request and withheld other information under sections 40, 42 and 43 of the FOIA. In relation to part 3 of the request, the Welsh Government withheld all of the information under section 36

of the FOIA. No reference was made in the refusal notice to part 2 of the request.

9. On 4 July 2011, the complainant requested an internal review of the Welsh Government's handling of the request.
10. On 20 September 2011, the complainant contacted the Commissioner to advise that he had still not received the outcome of the internal review from the Welsh Government.
11. On 2 November 2011, the Welsh Government provided the outcome of its internal review. The Welsh Government withdrew its reliance on section 43 of the FOIA, but continued to withhold information relevant to parts 1 and 3 of the request under sections 36, 40 and 42. It also introduced its reliance on section 21 to parts of the information held relevant to part 1 of the request. The Welsh Government addressed part 2 of the request and disclosed some information, but withheld other information under sections 21, 36, 40 and 42.

Scope of the case

12. The complainant initially complained to the Commissioner about the delay in him receiving a response to his request. He subsequently complained to the Commissioner about the delay in the Welsh Government responding to his request for an internal review.
13. In view of the significant delays throughout the handling of this request, on 20 September 2011, the Commissioner exercised his discretion and accepted the complaint without an internal review having been carried out. However, following the acceptance of the complaint, the Welsh Government provided the outcome of its internal review on 2 November 2011.
14. During the course of the Commissioner's investigation, the following issues were resolved informally:
 - (i) The Welsh Government withdrew its reliance on section 43(2) and disclosed the information it had originally withheld under this exemption, apart from information which was also considered exempt under another exemption.
 - (ii) The Welsh Government disclosed additional information falling within the scope of part 2 of the request which was not considered to be exempt.

- (iii) In its internal review response of 2 November 2011, the Welsh Government confirmed that, it was relying on section 21 in relation to the parts of final version of the project review report which had been published on its website.
- (iv) The Welsh Government withdrew its reliance on section 21 in relation to information held relevant to part 2 of the request.
15. Based on correspondence and discussions with the complainant, the Commissioner considers this complaint to relate to the Welsh Government's handling of the request, and in particular:
- Whether the Welsh Government should disclose the information it has continued to withhold under the various exemptions.
 - To investigate the procedural issues associated with the Welsh Government's handling of the request, and in particular the delays experienced in responding to the initial request and the internal review request.

Reasons for decision

Interpretation of request/Information captured by the request

Part 1 of the request

16. This part of the request refers to a project review report which the Welsh Government undertook into the River Lodge project. The final version of this report has been considered by the Commissioner in a decision notice on a previous case - FS50350554¹. In that case, the Welsh Government disclosed parts of the final version of the report and withheld other parts under sections 40, and 42 of the FOIA. The Commissioner's decision in that case was that the information which had been withheld from the final version of the report had been appropriately withheld by the Welsh Government.
17. Part 1 of the request in this particular case is for a copy of the project review report and all versions of the report. In arriving at his decision in this case the Commissioner has therefore been mindful of his previous decision on case reference FS50350554.
18. In its internal review outcome of 2 November 2011, the Welsh Government confirmed that, in relation to part 1 of the request, there were "three working drafts" of the project review report considered to

¹ http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50350554.ashx

fall within the scope of the request. The Welsh Government stated that it was withholding the three drafts in their entirety under section 36 of the FOIA, and some information contained within the drafts under sections 40, 42 and 21 of the FOIA.

19. During the course of the Commissioner's investigation, the Commissioner identified that, included within the information held relevant to part 2 of the request, there appeared to be a total of nine versions of the project review report (including the final report). He asked the Welsh Government to explain why these earlier drafts had not been considered relevant to part 1 of the request.
20. The Welsh Government stated that the five early development drafts were not considered to be actual "versions" of the report because they were not circulated by the author to any third party. The early drafts represented developmental stages of the first version that was circulated for comment. As the documents were not considered to be "versions", the Welsh Government do not consider them to fall within the scope of the request.
21. Whilst the Commissioner notes the Welsh Government's interpretation of the request, he considers that the wording of the request "If there is more than one version, please could I have all of them with the dates", should be interpreted broadly and would encompass all drafts of the report, and not just those that were circulated to third parties for comment. In reaching this view, the Commissioner has taken into account the dictionary definition of "version" as "a particular form of something differing in certain respects from an earlier form or other forms of the same type of thing". The Commissioner therefore believes that all drafts of the report fall within the scope of part 1 of the request.
22. Whilst the Welsh Government does not agree that the early development drafts of the project review report fall within the scope of part 1 of the request, it accepts that all drafts of the project review report fall within the scope of part 2 of the request and has confirmed that it considers all drafts of the project review report to be exempt in their entirety under section 36 of the FOIA, and parts of the drafts exempt under sections 40 and 42. The Commissioner will consider the application of these exemptions later in this notice.

Part 2 of the request

23. In its responses to the Commissioner, the Welsh Government provided two schedules listing the documents falling within the scope of part 2 of the request, and the exemption(s) considered applicable to each document. These schedules were entitled "document 2" and "document

3" and the Commissioner has used the numbering system relevant to these schedules in this notice.

24. The Welsh Government considered that some of the items listed within the schedules did not fall within the scope of the request as they related to other information requests received about the subject matter ie the River Lodge Hotel, and its handling of those requests, and media enquiries received about the River Lodge Hotel.
25. In order to assess whether the documents fell within the scope of the request, the Commissioner considered the wording of the request. Part 2 of the request was for "Any correspondence or paperwork, to or from, or on behalf of Chris Munday in relation to the River Lodge, and Powys Fadog".
26. During the course of the Commissioner's investigation, the Welsh Government reconsidered its position in relation to some of the documents originally considered to be out of scope and either disclosed them, in full or in part, or indicated the exemptions it considered applicable and the reasons why. However, it maintained that certain documents were not relevant to the request.
27. The Commissioner considers that the objective reading of this request to be for **all** documents sent to/from or on behalf of Chris Munday, and relates to **any** information relating to the River Lodge Hotel, and Powys Fadog. The Commissioner therefore considers all of the information highlighted in the two schedules to fall within the scope of the request.
28. In relation to the documents that the Welsh Government maintain are not relevant to the request, the Commissioner requires it to reconsider these documents and either disclose them or issue a valid refusal notice in accordance with section 17 of the FOIA. These documents are listed in the confidential annex attached to this notice.
29. During the course of the Commissioner's investigation, the Welsh Government sought to rely on section 21 of the FOIA in relation to certain items held relevant to part 2 of the request. The items to which the Welsh Government sought to apply section 21 comprised of emails which had been received from or sent to the complainant or ones which he had been copied into. Subsequently, the Welsh Government reviewed its position in relations to these documents and advised that it considered the documents to be out of scope of the request. This is because in its refusal notice of 30 June 2011, the Welsh Government stated that "You will know that the information captured by the second bullet of your request include a number of e-mails and other correspondence between you and me [Chris Munday]. Unless I hear from you to the contrary, I will assume that your request in this

particular instance relates to information other than that to which you already have access". The Welsh Government confirmed that it has not received any contact from the complainant to suggest that he was not happy with this interpretation of his request.

30. In view of the above, the Commissioner accepts that any items received from/sent to/copied to the complainant are out of scope of part 2 of the request.

Section 21 - Information accessible to applicant by other means

31. Section 21(1) of the FOIA can be applied when all the relevant requested information is reasonably accessible to the applicant. It is an absolute exemption and so there is no public interest test.
32. Following the Commissioner's investigation into case reference number FS50350554 which was a request for the final version of the project review report (part 1 of the request), the Welsh Government published a redacted version of the project review report on its website. In its internal review response of 2 November 2011, the Welsh Government stated that it was relying on section 21 in relation to part 2 of the request, specifically, the sections of the project review report published on its website. It provided the complainant with a link to the relevant document.
33. The Welsh Government stated it was also relying on section 21 in relation to certain documents relevant to part 2 of the request. However, during the Commissioner's investigation it withdrew its reliance on section 21 in relation to this information.
34. The Commissioner has viewed the redacted version of the project review report which has been published on the Welsh Government's website and he is satisfied that the information is reasonably accessible to the complainant and as such the Commissioner considers that the Welsh Government correctly applied section 21(1) to this information. The Welsh Government has applied various exemptions to other information contained within the versions of the project review report and these will be considered further in this notice.

Section 36 – prejudice to the effect conduct of public affairs

35. Sections 36(2)(b)(i) and (ii) provide that information is exempt if its disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. Section 36(2)(c) provides that information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. These

exemptions can only be cited where the reasonable opinion of a specified qualified person is that these exemptions are engaged.

36. The Welsh Government is relying on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) in relation to various documents and information in their entirety, as listed below. The Welsh Government has also claimed that parts of some of the documents below are also exempt under sections 21, 40(2) and 42.
- (i) Drafts of the project review report (part 1 of request – although considered by the Welsh Government to fall within part 2).
 - (ii) Early and final versions of submissions and briefings to Ministers about the River Lodge Hotel (attachments to emails relating to part 2 of request).
 - (iii) Draft documents regarding the preparation of detailed advice to the Business Minister to enable him to respond to a question raised during Business Ministers questions on 22 March 2011. (attachments to emails relating to part 2 of the request).
 - (iv) The internal audit review report (part 3 of request).
37. In order to engage any limb of section 36, the 'qualified person' must give an opinion that the prejudice would or would be likely to occur, but that in itself is not sufficient; the opinion must be reasonable.
38. To establish whether section 36 has been applied correctly the Commissioner considers it necessary to:
- ascertain who is the qualified person for the public authority;
 - establish that an opinion was given;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
39. In deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that is, not irrational or absurd, and in accordance with reason. If it is an opinion that a reasonable person could hold, then it is reasonable. This is not the same as saying that it is the *only* reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be *a* reasonable opinion.

40. The Commissioner has also been guided by the Information Tribunal's comments in *Guardian Newspapers & Brooke v Information Commissioner & BBC1* (paragraph 91), in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus,

'does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'.

41. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion, the Commissioner is restricted to focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.

42. The Commissioner is satisfied that, under section 36(5) of the FOIA, the First Minister is the qualified person for the Welsh Government.

43. The Commissioner's consideration of the Welsh Government's application of section 36 in this case has been somewhat hampered by its interpretation of the request, and the information deemed to fall within the scope of the request. This has resulted in three separate opinions being sought and provided by the qualified person in relation to information which has been withheld in this case. Details of the dates of qualified person's opinions relevant to this case are below:

- Opinion sought 4 May 2011 – opinion provided on 12 May 2011.
- Opinion sought 20 October 2011 – opinion provided on 24 October 2011.
- Opinion sought 13 March 2012 – opinion provided on 19 March 2012.

44. The Welsh Government provided the Commissioner with copies of the detailed submissions put to the qualified person and confirmation that he agreed the engagement of section 36. The qualified person was also provided with copies of the withheld information with each submission. The Commissioner notes that the qualified person signed his agreement to each submission which indicated that the level of prejudice claimed was the lower threshold of "would be likely".

45. In each submission to the qualified person, separate representations were made in relation to the application of each limb of section 36 claimed. The Commissioner has first considered the applicable sections of 36(2)(b)(i) and (ii) to the withheld information. Whilst slightly different representations were made in relation to each document

considered exempt under section 36(2)(b), the Welsh Government's arguments can be summarised as follows:

46. In relation to section 36(2)(b)(i), the Welsh Government claim that disclosure would be likely to inhibit the future free and frank provision of advice by staff to senior management of Ministers. It believes that the prospect of disclosure would be likely to lead to officers being less frank when documenting initial assessments on important matters. The expectation of initial assessments not being disclosed allows officers to be bolder in preliminary assessments in the knowledge that if different outcomes or conclusions are finally agreed, the preliminary assessments will not have more far reaching implications than necessary. The Welsh Government also argues that disclosure would be likely to affect the provision of advice in the future, and deter officers from preparing written advice for senior managers and Ministers. This would be likely to result in both senior managers and Ministers being less well informed of important issues, for which they are responsible, and damage its established practice for formulating advice to Ministers.
47. In relation to section 36(2)(b)(ii), the Welsh Government believes that disclosure would be likely to inhibit the free and frank exchange of views for the purpose of deliberation between managers and staff and engaging Ministers appropriately in sensitive matters. It argues that the prospect of disclosure would be likely to lead to managers and staff being less frank in recorded communications, which could in turn lead to less effective decision making. The Welsh Government believes that its internal process of advising and seeking decisions from Ministers is crucial to the effective and efficient administration of business. Further, in relation to disclosure of the drafts of the project review report specifically, the Welsh Government argues that disclosure would be likely to inhibit the drafting process. It argues that it is central to the drafting process of reports about sensitive matters such as this that officials are able to freely and frankly share information with relevant colleagues for the purpose of deliberation and discussion.
48. In reaching a view on this case the Commissioner has taken into account the fact that the documents in question were intended for a limited audience within the Welsh Government and were not intended for wider dissemination. The documents contain content that could be fairly characterised as free and frank and that relate to the provision of advice and / or the exchange of views.
49. Having examined all the relevant information the Commissioner is satisfied that it was a reasonable opinion that disclosing the documents detailed at paragraph 36 above would have been likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. The Commissioner therefore finds that

the exemptions at section 36(2)(b)(i) and (ii) were correctly engaged in respect of the withheld information.

50. As the Commissioner is satisfied that the exemptions under sections 36(2)(b) are engaged in relation to all of the information withheld under section 36 he has not gone on to consider whether or not the section 36(2)(c) exemption is engaged.

Public interest test

51. Section 2 of the FOIA sets out the circumstances under which a public authority may refuse a request for information. According to this section, where a public authority has identified a qualified exemption, it must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information. This is often referred to as the "*public interest test*". When considering the public interest in relation to section 36, the Commissioner can consider the severity, extent and frequency of the prejudice or inhibition to the effective conduct of public affairs.

Public interest arguments in favour of disclosing the withheld information

52. The Welsh Government believes that the public interest arguments in favour of disclosure are the same for each limb of section 36 it has claimed. The Welsh Government acknowledges that there is a public interest in it being as transparent and accountable as possible in the way that it operates, particularly in terms of efficiency, effectiveness, propriety and value for money issues in respect of projects like the River Lodge Hotel. The Welsh Government acknowledges transparency in the way that it operates would be increased as a consequence of disclosure. It also acknowledges that disclosure would increase public awareness about how the Welsh Government handled the River Lodge Hotel project.
53. The Welsh Government accepts that there is also a public interest in revealing draft positions so that the public is given a fully informed picture of the decision making process. Disclosure would be likely to increase public confidence in the process by demonstrating the checks and balances in place within the Welsh Government and would show the range of options considered during the process.
54. In respect of one submission and one briefing to Ministers (and various drafts of these documents), the Welsh Government believe that the public interest in disclosure is weakened by the fact that the briefing to Ministers was withdrawn, and the submission was not completed, as both documents were considered to be in need of review by senior

management and advisors. As such, the information does not represent the concluded view of officials and could be misleading to the public.

Public interest arguments in favour of maintaining the exemption

55. The Welsh Government's arguments in favour of maintaining sections 36(2)(b)(i) and 36(2)(b)(ii) are similar in that, in essence, it believes disclosure would lead to poorer decision making, which could lead to less effective use of public money.
56. The Welsh Government believes it is important, for the process of effective government, that officials be allowed freedom to develop their views and give free and frank advice to senior managers and Ministers often within short timescales and not be inhibited by the possibility of publication. It argues that disclosure of the withheld information would be likely to stifle the free and frank exchange of views between managers and/or staff who have responsibility for sensitive issues and engaging Ministers appropriately in matters requiring consideration, particularly in relation to projects such as the River Lodge project which involves expenditure of public money and this would not be in the public interest.
57. The Welsh Government maintains that it is in the interest of good government that officials familiar with the detailed aspects of a particular project, such as the River Lodge Hotel, prepare detailed advice for Ministers and senior management. It considers that disclosure would inhibit the ability of its staff when imparting or commissioning of advice or the offering of opinions or considerations to express themselves openly, honestly and completely; thereby reducing the frankness and candour of officers in recorded communications. This could lead to a lack of awareness of such important issues and remove the opportunity for senior managers to intervene in such projects and correct or rectify issues. This would in turn be likely to adversely affect the decision making process by senior management and Ministers, who would not be in full possession of the facts or opinions of the officials integrally involved in any project or matter, particularly those involving the use of public money, as in this case. The Welsh Government do not believe that this is in the public interest
58. In relation to drafts of various documents, the Welsh Government believes there is a strong public argument in maintaining and protecting the efficacy of the drafting process. To release such draft documents would give a misleading impression to the public, because by their nature, the early drafts represent initial thoughts of the official drafting it and provide opportunities for officials to seek further evidence, make suggestions and offer opinions as frankly as possible. The Welsh Government believes this is particularly important when issues are 'live',

as in this case. At the time of the request, in March 2011, the Welsh Government advises that it was actively considering new funding requests in relation to the Rover Lodge Project.

59. In respect to documents prepared for Ministers (briefings and submissions to Ministers), the Welsh Government believes that its internal process for consulting and advising Ministers, and in particular the checks built in to the process which allow for senior management to quality assure any advice is crucial to support efficient administration and good governance. Disclosure of the withheld information would be likely to inhibit the free and frank exchange of views for the purposes of such deliberation.

Balance of the public interest arguments

60. The Commissioner's view is that the Welsh Government's public interest considerations in relation to maintaining sections 36(2)(b)(i) and 36(2)(b)(ii) are sufficiently similar for him to be able to reach an appropriate opinion on conflated arguments.
61. The Commissioner acknowledges that there is a strong public interest in openness and transparency in relation to government activities. In this case disclosure of the withheld information would inform the public about the River Lodge Hotel project, which is an asset purchased using public money. Disclosure would also inform the public about the proposals for the River Lodge Hotel.
62. The Commissioner notes that the Welsh Government has communicated information about the River Lodge Hotel to members of the local community (including local Assembly Members). This includes an options appraisal report which outlined the options open to the Welsh Government in respect of its land holding at River Lodge. In the Commissioner's view, this goes some way to satisfying the public interest
63. The Commissioner gives weight to the Welsh Government's argument that there is a strong public interest in officials and advisers retaining the ability to communicate between themselves freely, frankly and in confidence. Similarly, he gives weight to the argument that it is in the public interest that decisions are made based on the best advice available and with full consideration given to all the options available.
64. In relation to any inhibition of the frankness of future advice and exchange of views by officials, the Commissioner believes that the guiding principle is the robustness of those officials, i.e. they should not be easily deterred from carrying out their functions properly, in order to manage projects like the River Lodge Hotel effectively. However, such

arguments must be considered on a case by case basis. Whilst the Commissioner does not consider that officials would be likely to be deterred from providing advice, he does consider that they may be less candid if they believed that it may be disclosed into the public domain. In this case the Commissioner accepts that an inhibiting effect would be likely as the issues under consideration were “live” at the time of the request and weight must be given to protecting the process in question so that relevant parties involved in the discussions can continue to contribute to them with frankness and candour.

65. In weighing the public interest factors, the Commissioner has taken into account the likelihood of disclosure restraining, decreasing or suppressing the freedom with which opinions or options are expressed or considered. The Commissioner finds that disclosure of the withheld information, given the ongoing nature of matters involving the River Lodge project at the time of the request, would cause prejudice of some impact on other similar circumstances in the future. He considers there is a strong public interest in the Welsh Government being able to discuss similar matters freely and frankly to ensure that every aspect is considered with a view to making a full and informed decision. He has therefore given significant weight to the timing of the request when considering where the balance of the public interest lies.
66. Having considered the opposing public interest factors in this case, the Commissioner concludes that the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information. As the Commissioner finds that the information was correctly withheld under sections 36(2)(b)(i) and (ii), he has not considered the other exemptions claimed by the Welsh Government in respect of the documents listed at paragraph 36.

Section 40 – the exemption for personal data

67. Section 40(2) of the FOIA states that information is exempt if it is the personal data of any person other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles. There are, therefore, two steps to considering whether this exemption is engaged.
 - (i) Does the information constitute the personal data of any individual aside from the requester?
 - (ii) Would disclosure of that personal data be in breach of any of the data protection principles?
68. As to whether the information is the personal data of an individual other than the requester, the definition of personal data is given in the Data

Protection Act 1998 ('the DPA'). This states that for information to be personal data it must relate to a living individual and that individual must be identifiable from that information.

69. Due to the circumstances of this case and the content of the withheld information, the level of detail which the Commissioner can include in this Notice about the Welsh Government's submissions to support its position in respect of its application of this exemption and the Commissioner's consideration of those arguments is limited. This is because inclusion of any detailed analysis is likely to reveal the content of the withheld information itself. The Commissioner has therefore produced a confidential annex which sets out in detail his findings in relation to the application of the exemption. This annex will be provided to the Authority but not, for obvious reasons, to the complainant.

Is the information personal data?

70. In order to rely on the exemption provided by section 40, the information requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as data which relates to a living individual who can be identified:
- from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
71. The information which the Welsh Government has withheld under section 40(2) comprises names of officers involved in the River Lodge Hotel project and details relating to their involvement contained within:
- (i) the final and draft versions of the project review report (part 1 of request),
 - (ii) various emails and attachments to emails (part 2 of request), and
 - (iii) the internal audit review report (part 3 of request).

The Welsh Government acknowledges that some parts of the information withheld under section 40, if read in isolation, may not constitute personal data. However, the Welsh Government believes that disclosure of parts of the withheld information could lead to identification of the individuals concerned. The Welsh Government considers that the withheld information constitutes the personal data of those officers, that disclosure would be unfair and would therefore breach the first data protection principle.

72. The Commissioner has already considered that the eight drafts of the project review report and the internal audit review report are exempt in their entirety under section 36 of the FOIA. His consideration of the

application of section 40 therefore refers to information contained within the final version of the project review report and information falling within the scope of part 2 of the request.

73. The Commissioner accepts that a living individual can be identified from their name and is satisfied that the names which have been redacted constitute personal data. In relation to details relating to various officers' involvement in the River Lodge project, the Commissioner is satisfied that where this information identifies the individual, it also constitutes the personal data of the individual as he/she is clearly the focus of the withheld information. The Commissioner also accepts that even if just the names of the officers were withheld, there is a reasonable prospect that they could be identified if other information withheld under section 40(2) were to be disclosed.
74. The Commissioner accepts that the withheld information in the context of this request is the personal data of individuals other than the requestor.

Would disclosure contravene any of the principles of the DPA?

75. Having concluded that the withheld information falls within the definition of "personal data" the Commissioner has gone on to consider if disclosure of this information would breach any of the data protection principles, the Commissioner has focussed on the first data protection principle. This requires that personal data shall be processed fairly and lawfully. The focus of this analysis is therefore whether disclosure would in general be fair to the individuals to whom it relates. In reaching a conclusion on this issue, the Commissioner has considered the reasonable expectations of the individuals involved, the consequences of disclosure upon them, and the legitimate interests of the public in accessing the information.
76. The Commissioner will consider the release of the withheld information in two separate groups, namely the names of individuals withheld from various emails and attachments relating to part 2 of the request, and the information withheld from the final version of the project review report (the names of officers involved in the River Lodge project and details of their involvement in the scheme).

Part 2 of the request – emails and attachments relating to the River Lodge project

77. The information which has been withheld from these documents comprises the names of junior officers who were involved in the River Lodge project, and the name of a journalist in relation to a media enquiry about the River Lodge Hotel. The Welsh Government advises

that the majority of the junior officials do not have public facing roles. It considers that all of the individuals whose names have been withheld would have a reasonable expectation that their details would not be disclosed to the public at large and to do so would be unfair.

78. The Commissioner notes that the information relates to all of the individuals in a professional capacity and there are no 'private' considerations.
79. In relation to the name of the journalist who contacted the Welsh Government regarding a media enquiry about the River Lodge Hotel, the Commissioner accepts that the individual may have had an expectation that his details would not be disclosed into the public domain in relation to this particular media enquiry. However, the Commissioner notes that the individual's details are publicly available in relation to a number of media articles about the River Lodge Hotel. As a result he considers there to be limited adverse consequences of disclosure on the journalist. The Commissioner considered whether the legitimate interests of the public are sufficient to justify any impact of disclosure on the rights and freedoms of the journalist. The Commissioner considers there is a limited public interest in knowing the identity of the journalist who contacted the Welsh Government in the interests of transparency and accountability, and disclosure would be necessary to achieve it. Given the limited impact of disclosure the Commissioner concludes that disclosure of the journalist's name would be both fair and lawful. The Commissioner therefore finds that section 40(2) does not apply to the journalist's name.
80. All of the documents from which junior officials' details have been redacted were created in their roles as public sector employees. However, the Commissioner has taken into account the fact that the employees' names which have been withheld occupy posts which are junior to the Welsh Government's senior management team, and the majority have no public facing role within the Welsh Government. Some of the officers no longer work for the Welsh Government. The Commissioner can therefore understand that these individuals would reasonably expect their details to remain 'private' as they would not anticipate any requirement for them to be made 'public' in order for them to fulfil their occupational role. The Commissioner has a long established position that the personal data of junior officials whose roles are not public facing is not normally disclosable and he saw no reason to depart from that position in this matter. Consequently, he considers that it would be unfair to release the names of the junior officials and as such disclosure would breach the first data protection principle.

Final version of the project review report

81. The information which has been withheld from this document comprises the names of individuals involved in the River Lodge project and details of their involvement in the scheme.
82. As stated in paragraph 69 of this notice, for reasons of confidentiality, the Commissioner's consideration of the Welsh Government's position in relation to information which has been withheld from this document has been discussed in detail in confidential annex attached to this notice.
83. Based on the nature of the withheld information and the submissions provided to the Commissioner by the Welsh Government, the Commissioner is satisfied that the individuals concerned would have had a reasonable expectation that their information would be kept confidential and not passed onto third parties without their explicit consent.
84. In assessing the consequences of disclosure the Commissioner has considered what those consequences might be and has then looked at other related factors. Based on the withheld information, and the Welsh Government's representations, the Commissioner considers that any disclosure would cause unnecessary and unwarranted interference into the rights and freedoms of the individuals in this case.
85. The Commissioner has identified some legitimate interest which could be considered to favour disclosure; including the transparency and accountability of public authorities in relation to decisions and assessment of projects such as the River Lodge Hotel, which is a publicly owned asset.
86. Taking into account the arguments outlined in the confidential annex, and the nature of the withheld information, the Commissioner does not consider that the legitimate interests of the public in accessing this information are sufficient to outweigh the individuals' right to privacy. The Commissioner considers that the individuals had a reasonable expectation of privacy in relation to the withheld information and that to release this information would be unfair and likely to cause damage or distress to them.
87. In conclusion, the Commissioner finds that disclosure of the information requested would be unfair and would therefore contravene the first data protection principle. The Commissioner upholds the Welsh Government's application of section 40(2) to this information.

Section 42

88. Section 42 of the FOIA states that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
89. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
90. The information which the Welsh Government has withheld under section 42 in this case consists of legal advice requests and responses between the Welsh Government and its legal advisers, and other documents or parts of documents which reveal or record discussions between the Welsh Government and its legal advisers.
91. After reviewing the requested information which was withheld in this case under section 42, the Commissioner is satisfied that all of the information falls within the scope of this exemption. It is clear to the Commissioner that advice sought by the Welsh Government and received from its legal advisers constitutes communications between a lawyer and a client. In addition, the Commissioner's view is that as certain documents and parts of documents which the Welsh Government has withheld under section 42 refer to legal advice which has passed between a lawyer and a client they are also covered by this exemption.
92. Information will only be privileged so long as it is held confidentially. As far as the Commissioner can see, the legal advice was not publicly known at the time of the request and there is therefore no suggestion that privilege had been lost. The Commissioner is persuaded that the withheld information is legally privileged and therefore exempt under section 42.
93. As section 42 is qualified exemption and therefore subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

94. The Welsh Government acknowledges that there is a public interest in individuals being able to exercise their rights under the FOIA to enhance their understanding of the reasons for decision or actions taken by a public body.
95. The Welsh Government also accepts that there is an inherent public interest in ensuring that public authorities are transparent in the decisions they make in order to promote accountability and improve the quality of decision making. In this case, disclosure of the withheld information would assist the public in ascertaining whether there was any incompatibility between the advice provided and the decisions taken and whether any advice provided had been followed.

Public interest arguments in favour of maintaining the exemption

96. The Welsh Government maintains there is a strong element of public interest inbuilt in the privilege itself and this has long been recognised by the courts. It argues that government departments need high quality, comprehensive legal advice for the effective conduct of their business. Without such advice, the quality of the Welsh Government's decision-making would be considerably reduced as it would not be able to make fully-informed decisions on the basis of the best advice available, and with a full appreciation of relevant facts.
97. The Welsh Government believes that it is of vital importance that it is able to obtain full and frank legal advice in confidence. The purpose of legal advice is to set out the strengths and weaknesses of a case so that the client can be fully informed of what options are available before a decision can be taken. If legal advice was routinely disclosed it would potentially place the Welsh Government in a weakened position compared to other persons or organisations not bound by the provisions of the FOIA. The Welsh Government consider there is a strong public interest in ensuring that legal professional privilege applies equally to all parties to ensure they are on a level footing.
98. The Welsh Government argues that disclosure of legal advice has a significant potential to prejudice its position to defend its legal interest – both directly, by unfairly exposing its legal position to challenge, and indirectly by “diminishing the reliance it can place on the advice having been fully considered and presented without fear of favour”.

Balance of the public interest arguments

99. In considering the balance of the public interest under section 42, the Commissioner accepts that there is a strong element of public interest

inbuilt into legal professional privilege in order to protect the confidentiality of communications between lawyers and their clients. This confidentiality is essential so that clients can share information fully and frankly with legal advisers in order that any advice is given in context and with the full appreciation of the facts and furthermore that the advice which is given is comprehensive in nature. However, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure.

100. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered whether the advice is likely to affect a significant amount of people, the timing of the request and the status of the advice.
101. The Commissioner accepts that there is a public interest in disclosing information that allows scrutiny of a public authority's role and enhances transparency in its decision making process by allowing the public to understand and challenge those decisions. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general.
102. The Commissioner appreciates that there is a strong public interest in public authorities being as accountable as possible in relation to matters relating to publicly owned assets, as in this case. The Commissioner also notes that disclosure of the information may reassure the public that decisions had been made about the River Lodge Hotel on the basis of good advice and information and thus increase public confidence in how the Welsh Government will deal with similar matters in the future.
103. The Commissioner considers that Parliament did not intend the principle of legal privilege to be used as an absolute exception. In the case of *Mersey Tunnel Users Association v ICO & Mersey Travel (EA/2007/0052)* the Tribunal confirmed this point. In that case the Tribunal's decision was that the public interest favoured disclosing legal advice obtained by Mersey Travel and it ordered disclosure of the information requested. The Tribunal placed particular weight on the fact that the legal advice related to issues which affected a substantial number of people, approximately 80,000 people per weekday. Whilst the Commissioner notes that there has been considerable local attention in issues associated with the River Lodge Hotel he does not believe that in this case the subject matter of the request affects a substantial number of people.

104. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Welsh Government and its legal advisors and that this would be likely to lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of the best quality legal advice.
105. The Welsh Government argued that it needs to be able to obtain free and frank legal advice. The Commissioner accepts that if disclosure were ordered, this would undermine the Welsh Government's ability to obtain such advice in a timely fashion in the future and have the confidence that advice given is done so freely without the consideration of disclosure. The Commissioner believes that there must be reasonable certainty relating to confidentiality and the disclosure of legal advice. If there were a risk that it would be disclosed in the future the principle of confidentiality might be undermined and the legal advice less full and frank than it should be.
106. In reaching a view on the balance of the public interest in this case and deciding the weight to attribute to each of the factors on either side of the scale, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered the timing of the request and the status of the advice. The Commissioner has given significant weight to the general public interest in preserving the principle of legal professional privilege. In addition, he considers that the timing of the request means that significant weight should be attributed to the argument that disclosure of the requested information would harm the candour between the Welsh Government and its legal advisors. The advice related to a live matter in that at the time of the request, the Welsh Government was considering options for the property in question.
107. Whilst the Commissioner considers that the arguments in favour of disclosure have significant weight, he has determined that in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exemption under section 42. He therefore determines that the exemption at section 42 has been applied correctly by the Welsh Government.

Procedural Requirements

108. The original request was made on 24 March 2011. The Welsh Government responded on 3 June 2011, and disclosed some information but withheld other information under various exemptions. At the time of its internal review on 2 November 2011, the Welsh Government disclosed some additional information relevant to the request. Further, during the Commissioner's investigation the Welsh Government released

additional information relevant to the request. In failing to provide the information it has disclosed within 20 working days of the request, the Welsh Government breached section 10(1) of the FOIA. The Welsh Government also did not comply with section 17(1) of the FOIA as it failed to issue a refusal notice within twenty working days of receipt of the request.

Other matters

109. Whilst there is no explicit timescale laid down by the FOIA for completion of internal reviews, the Commissioner considers that they should be completed as promptly as possible. The Commissioner believes that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
110. The Commissioner is concerned that in this case, it took 85 working days for an internal review to be completed. The Commissioner does not believe that any exceptional circumstances existed to justify that delay, and he therefore wishes to register his view that the Welsh Government fell short of the standards of good practice by failing to complete its internal review within a reasonable timescale. He would like to take this opportunity to remind the Welsh Government of the expected standards in this regard and recommends that it aims to complete its future reviews within the Commissioner's standard timescale of 20 working days.
111. The Commissioner would also like to express his concerns about the general handling of this request by the Welsh Government. In its initial refusal notice, it interpreted part 1 of the request incorrectly, in that it only considered the final version of the project review report, despite the request clearly stating that it was for all versions of the report. The Welsh Government also initially failed to address part 2 of the request in its entirety.
112. The failure of the Welsh Government to identify all the information relevant to the request has hampered the Commissioner's investigation, particularly in relation to information which it withheld under section 36 of the FOIA which requires the opinion of the qualified person in order for the exemption to apply.
113. The Commissioner would like to remind the Welsh Government of the importance of interpreting a request and determining all the relevant information held relevant to the request at the outset.

Right of appeal

114. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

115. 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.

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

Signed

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