

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 January 2013

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

Decision (including any steps ordered)

1. The complainant requested relating the People's Council of North Wales or the West Cheshire/North East Wales sub regional strategy to the Powys Fadog/River Lodge project. The Welsh Government refused to provide the information requested under sections 40(2) and 36(2)(c) of the FOIA. The Commissioner's decision is that the Welsh Government incorrectly applied section 36(2)(c) and correctly applied section 40(2) to some of the withheld information.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information with the exception of the name of a third party in one of the documents (document B as referred to in paragraph 18 of this notice).
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 Act and may be dealt with as a contempt of court.

Request and response

4. On 21 March 2011 the complainant wrote to the Welsh Government and requested:

"Any e mails, letters or paperwork relating the People's Council of north Wales or the West Cheshire/North east wales sub regional strategy to the Powys Fadog/River Lodge project, specifically but not exclusively to or from Karen Sinclair AM, Rhodri Morgan AM or WAG officials. I would like to request any information available from January 2009 to the present".

5. The Welsh Government responded on 15 April 2011 stating that compliance with the request would exceed the appropriate limit as provided under section 12 of the FOIA and invited the complainant to refine the request.

6. On 19 April 2011 the complainant wrote to the Welsh Government and refined her request to:

"Any e mails, letters or paperwork relating the People's Council of north Wales or the West Cheshire/North east wales sub regional strategy to the Powys Fadog/River Lodge project, I would like to request documents either to, from or on behalf of Karen Sinclair and Rhodri Morgan. I would like to request any information held from January 2009 to present".

7. The Welsh Government issued a refusal notice on 29 July 2011 confirming that it held information relevant to the request, but it was exempt under sections 40(2) and 36(2)(c) of the FOIA.
8. On 10 August 2011 the complainant requested an internal review of the Welsh Government's handling of her request.
9. The Welsh Government provided the outcome of its internal review on 5 October 2011 and upheld its decision that the information was exempt under sections 40(2) and 36(2)(c) of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way her request for information had been handled. She specifically asked the Commissioner to consider whether the information she requested on 19 April 2011 should be disclosed. She also asked the Commissioner to investigate the handling of the request by the Welsh Government, and in particular the delays experienced.
11. The Commissioner understands that the requested information was subsequently disclosed via employment tribunal, but this was after the request was made. He has therefore still proceeded to consider this case at the time of the request.

Reasons for decision

Section 36 - prejudice to the effective conduct of public affairs

12. 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. The phrase 'otherwise prejudice' means that this section refers to prejudice not covered by section 36(2)(b).
13. 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.
14. 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.
15. 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.
16. The Commissioner has also been guided by the Information Tribunal's comments in *Guardian Newspapers & Brooke v Information Commissioner & BBC*¹ (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,

¹ Appeal numbers EA/2006/0011 & EA/2006/0013

“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”.

17. Therefore, in the Commissioner’s opinion this means that when assessing the reasonableness of an opinion, he 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.
18. The withheld information in this case comprises of sections of the following two documents -
 - (i) Document A - letter dated 21 July 2009 from Karen Sinclair to Rhodri Morgan.
 - (ii) Document B – letter dated 24 August 2009 from Rhodri Morgan to Karen Sinclair responding to her letter of 21 July 2009.

At the time the letters were written, Karen Sinclair was an Assembly Member and Rhodri Morgan was the First Minister. Karen Sinclair ceased to be an Assembly Member in May 2011 and Rhodri Morgan ceased to be First Minister in November 2009.

19. The Commissioner is satisfied that, under section 36(5) of the FOIA, the First Minister is the qualified person for the Welsh Government.
20. The Welsh Government provided the Commissioner with a copy of the submission 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 the submission. The Commissioner notes that the qualified person signed his agreement to the submission which indicated that the level of prejudice claimed was the lower threshold of “would be likely”.
21. The Welsh Government states that the relationship between the First Minister and an elected representative forms the basis of democratic representation in Wales. It argues that the relationship is one based on the trust that an Assembly Member needs to maintain if he or she is to carry out their role effectively. There is a duty on Assembly Members, most clearly expressed in this Code of Conduct, to represent the interests of their constituents/constituencies and in doing so, there is an implied understanding that there has to be a right of privacy whilst representing their interest in the public arena.

22. Whilst Karen Sinclair ceased to be an Assembly Member in May 2011, the Welsh Government is of the view that the prospect of disclosure of comments made to the First Minister has "a real potential to impact upon the way that Assembly Members might engage with the Welsh Government whilst undertaking their core functions of working in the best interests of the people they represent". It believes there is a real and significant risk that disclosure would be likely to lead to elected representatives being less forthcoming in the way they bring matters to the Welsh Government's attention. As such, the Welsh Government considers that disclosure would be likely to prejudice the effective conduct of public affairs.
23. Having viewed the withheld information detailed at paragraph 18 and on the basis that the qualified person's opinion is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold, the Commissioner finds that the opinion of the qualified person was a reasonable one, namely, it was reasonable to consider that disclosure would be likely to impact on the way in which elected representatives engage with the Welsh Government which in turn would be likely to prejudice the effective conduct of public affairs. He therefore finds that section 36(2)(c) is correctly engaged.

Public interest test

24. Section 36(2)(c) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian Newspapers & Brooke v Information Commissioner & BBC* indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the FOIA:

"The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice." (Paragraph 88)

25. Therefore, the Commissioner's view is that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity,

extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

Public interest arguments in favour of disclosing the withheld information

26. The Welsh Government acknowledges that disclosure would increase the transparency and openness about the way in which an Assembly Member has corresponded with the former First Minister in relation to the subject matter ie the River Lodge Hotel. It also accepts that disclosure would increase public knowledge about how the Assembly Member acted in connection with the subject matter.

Public interest arguments in favour of maintaining the exemption

27. The Welsh Government believe that open lines of communication between elected representatives and Ministers, often on sensitive matters, is essential for the democratic process to operate efficiently and the relationship is one based on trust. The Welsh Government considers that disclosure of such exchanges would be highly likely to lead to an undermining of this relationship. The relationship is considered to be crucial to elected representatives' ability to represent their constituents' interests and express themselves in frank terms in dealings with Ministers. The Welsh Government is of the view that disclosure would lead to elected representatives being less able to represent their constituents effectively, and in turn lead to a significant weakening of the democratic process, which would not be in the public interest.

Balance of the public interest arguments

28. Where, as with this case, a qualified exemption is engaged the information must still be disclosed unless, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
29. Other than indicating the factors which were taken into account in assessing where the public interest lies, the Welsh Government has not provided any specific arguments as to why it considers that on balance the public interest in maintaining the exemption outweighs that in disclosing the withheld information in this case or provided details of any particular weighting exercise that may have been carried out.
30. Having seen the withheld information, the Commissioner will consider where the balance of the public interest lies.
31. The National Assembly for Wales website states that the roles and responsibilities of an Assembly Member is to "carry out the Assembly's

democratic work; they represent the interests of Wales and its people, make laws for Wales and hold the Welsh Government to account". There is a Code of Conduct for all Assembly Members which provides guidance on the standards of conduct expected of them in the discharge of their Assembly and public duties².

32. The Code of Conduct states that Assembly Members should observe the seven general principles of conduct identified by the Committee on Standards in Public Life – selflessness, integrity, objectivity, accountability, openness, honesty and leadership. Under the principle of openness, the Code of Conduct states that:

"Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions, and restrict information only when the wider public interest clearly demands.

Assembly Members must not prevent any person from gaining access to information which that person is entitled to by law, but must not disclose confidential information, including confidential information from Assembly Committees, without consent unless required to do so by law. Any such confidential material received by Members in the course of their Assembly duties should only be used in connection with those duties and must never be used for the purpose of financial gain. In any activities in relation to, or on behalf of, an organisation with which a Member has a financial relationship, including activities which may not be a matter of public record such as informal meetings and functions, Members must always bear in mind the need to be open and frank with other Assembly Members, and with officials."

33. The Commissioner accepts that the relationship between elected representatives and Ministers is essential to the operation of good government and helps to ensure that the democratic process operates effectively. Given the primary role of an Assembly Member is to represent the interests of members of the public, and the fact that these individuals have put themselves forward for the position, the Commissioner does not accept that the prejudice to the way in which Assembly Members engage with Ministers in the future would be severe, extensive or frequent enough to outweigh the public interest in being transparent about the way in which Assembly Members have represented these interests in correspondence with Ministers.

² <http://www.assemblywales.org/memhome/pay-expenses-financial-interests-standards/mem-commissioner-standards/cod-yydddygiad.htm>

34. The Commissioner has also taken into account the fact that the withheld information in this case comprises of parts of two items of correspondence, the majority of which was disclosed by the Welsh Government in relation to an earlier information request which was the subject of previous complaint to the Commissioner – case reference FS50318915³. Whilst the Commissioner accepts that the content of the withheld information in this case can be fairly categorised as candid and frank, he does not consider it to be any less forthright than other parts of the documents in question which the Welsh Government has previously disclosed. He also finds that the severity of the effects would have been significantly diminished by the passage of time, the information was created in 2009 and the request was made in 2011.

Conclusion on the public interest test

35. The Commissioner has considered the public interest arguments taking into account the severity, frequency and extent of the claimed prejudice. He has given due weight to the opinion of the qualified person but has concluded that in all the circumstances of this case the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the requested information.

Section 40 – personal information

36. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').

37. In this case, the Welsh Government argued that the requested information is the personal data of a third party and disclosure under the FOIA would breach the first data protection principle.

Is the requested information personal data?

38. 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,

³ http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50318915.ashx

- 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.
39. As detailed at paragraph 17 of this notice the withheld information comprises of sections of two documents:
- (i) Document A - letter dated 21 July 2009 from Karen Sinclair to Rhodri Morgan.
 - (ii) Document B – letter dated 24 August 2009 from Rhodri Morgan to Karen Sinclair responding to her letter of 21 July 2009.
40. Although the Welsh Government has not specified whose personal data it considers the withheld information to be, the Commissioner considers that the withheld information constitutes the personal data of the authors of the letters as it represents their views and opinions on matters. In addition, in the case of document B, another third party is mentioned by name. As such, the Commissioner considers that the name of the third party in document B represents the personal data of that individual.

Would disclosure contravene the first data protection principle?

41. Having accepted that the information requested constitutes the personal data of living individuals other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles.
42. The Welsh Government stated that disclosure of the information would breach the first data protection principle. The first data protection principle requires that the processing of personal data is fair and lawful and, at least one of the conditions in schedule 2 is met, and in the case of sensitive personal data, at least one of the conditions in schedule 3 is met. In the case of personal data, both requirements (fair and lawful processing and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.
43. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individuals concerned, the nature of those expectations and the consequences of disclosure to the individual. He has then balanced against these the general principles of accountability, transparency as well as any legitimate interests which arise from the specific circumstances of the case.

44. In assessing what information third parties should expect to have disclosed about them, the Commissioner considers a distinction should be drawn as to whether the information relates to the third party's public or private life. Where the information relates to the individual's private life (ie their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).
45. In relation to the name of the third party in document B, the Commissioner is satisfied that they would not have had any expectation that their personal data would be released in response to a freedom of information request. The Commissioner notes there is information in the public domain about the individual's involvement in the River Lodge project in a private capacity. The Commissioner however accepts that, in the context of the withheld information, disclosure would cause an unwarranted intrusion into the individual's private life. Consequently, the Commissioner considers that disclosure of the third party's name would be unfair and contravene the first data protection principle. He therefore finds that section 40(2) has been correctly applied to this information.
46. The Commissioner considers that employees of public authorities should be open to scrutiny and accountability and should expect to have some personal data about them released because their jobs are funded by the public purse. The Commissioner considers that the seniority of the individual acting in a public or official capacity should be taken into account when personal data about that person is being considered for disclosure under the FOIA. This is because the more senior a member of staff is, the more likely it is that they will be responsible for making influential policy decisions and/or decisions relating to the expenditure of public funds. In previous decision notices the Commissioner has stated that he considers that occupants of senior public posts are more likely to be exposed to greater levels of scrutiny and accountability and there should therefore be a greater expectation that some personal data may need to be disclosed in order to meet that need
47. With the exception of the name of the third party referred to in document B, the Commissioner considers that the remaining withheld information constitutes the personal data of the authors of the documents. The Commissioner notes that these individuals occupied senior public facing positions at the time the letters were written (First Minister and Assembly Member). At the time of the request, however, the Commissioner notes that Rhodri Morgan no longer occupied the post of First Minister, having been replaced in December 2009 and the Assembly Member had announced in 2009 her decision to step down from the position in the elections which took place on 5 May 2011. The Welsh Government believe that the withheld information represents the

private views of the Assembly Member in question and she fully expected those views to remain private and not be disclosed into the public domain. The Welsh Government confirmed that it had sought consent to disclosure from the Assembly Member and consent was refused.

48. The Commissioner is satisfied that, due to the seniority of the data subject in this case and the nature of their roles, it is reasonable to conclude that they may have had some expectation that this level of personal data may be disclosed. The Commissioner also notes that whilst the information could be considered to an extent to represent the personal views of the individuals, the letters were written in relation to their roles as public officials. As referred to in paragraph 34 of this notice, the Commissioner also notes that other parts of the letters in question, which also could be considered to be the personal data of the authors was disclosed by the Welsh Government in response to an earlier information request.
49. The Welsh Government has submitted limited arguments in relation to the consequences of disclosure and its representations have focussed only on the consequences to the Assembly Member. The Welsh Government believes that disclosure would cause "disproportionate harm to the rights and interests" of the Assembly Member and would be "likely to have a prejudicial effect on the individual and cause unfair damage". The Commissioner accepts that some parts of the withheld information appear to represent the personal views of the Assembly Member. He appreciates that disclosure of any personal data might lead to some level of distress. However, the Welsh Government has not provided any specific reasons or evidence as to why disclosure would cause significant distress or damage to the Assembly Member or any of the other individuals.
50. Given the above, the Commissioner does not believe that the disclosure of the withheld information (with the exception of the name of the third party referred to in document B) would be unfair.
51. The Welsh Government stated that it is "not satisfied that the public has a legitimate interest in knowing the details of comments made in this instance which have not impacted upon the action of the Welsh Government in any material way". It argues that even if there was a legitimate interest in disclosure it would be outweighed by the harm to the rights and interests of the individual concerned (the Assembly Member).
52. The Commissioner notes that the subject matter of the request ie the River Lodge project has been the subject of significant media attention The Commissioner believes there is a legitimate interest in the public

knowing the detail of how an Assembly Member corresponded with the then First Minister about the subject matter. He considers that there is a legitimate interest in disclosure of the information as there is a strong public interest in increased transparency and accountability by senior decision makers in such matters and that disclosure of the withheld information is necessary to achieve it. Disclosure is necessary to meet this interest. The Commissioner concludes that disclosure of the withheld information with the exception of the third party's name in document B would be both fair and lawful. He also finds that the disclosure of this information (with the exception of the third party's name) would also meet schedule 2 condition 6 of the DPA. The Commissioner therefore finds that section 40(2) does not apply to this information.

Procedural Requirements

53. The refined request was made on 19 April 2011 and the Welsh Government did not issue a refusal notice until 29 July 2011. In failing to issue a refusal notice within 20 working days of the request, the Welsh Government breached section 17(1) of the FOIA.

Other matters

54. Whilst there is no explicit timescale laid down by the FOIA for completion of internal reviews, the Commissioner considers that internal reviews 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.
55. In this case it took 39 working days to complete the internal review and the Commissioner does not believe that any exceptional circumstances existed to justify that delay. 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.

Right of appeal

56. 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

57. 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.
58. 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

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