

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 November 2013

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

Decision (including any steps ordered)

1. The complainant requested various information regarding legal advice in respect of questions he had asked surrounding the definition of his professional status according to the Department for Education and Skills (DfES). The complainant also considered that three of six questions he had previously raised had either not been given satisfactory answers or had not been addressed at all. The Welsh Government relied on section 42 to withhold the legal advice and has subsequently responded to the outstanding questions.
2. The Commissioner's decision is that the Welsh Government has now complied with its requirements under section 1(1) of the FOIA but its failure to address all of the complainant's questions at the time of the internal review represents a breach of section 10(1) of the FOIA. The Commissioner also considers that the Welsh Government has correctly relied on section 42(1) of the FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 3 December 2012, the complainant wrote to the Welsh Government and requested the following information regarding legal advice in respect of his questions surrounding the definition of his professional status according to the DfES, and which he considered had not been answered:

"...a complete copy of that advice and all associated information, including: internal emails and those to external agencies/persons, all

electronic communications, notes from meetings concerning this advice, staff (including the Minister), minutes or other notes from meetings concerning this advice, records of conversations on this matter whether conducted in person or by telephone etc."

5. The Welsh Government responded on 10 January 2013. It stated that was refusing the request by virtue of section 42 of the FOIA.
6. The complainant was dissatisfied with this response and also asked that his six questions outlined below and previously referred to in undated email should be addressed:

"In your letter...you state that:

1. *The term 'fully qualified teacher' is not one that is used by either the Welsh Government or the GTCW to describe the status of qualified teachers in Wales.*
2. *Annex V11, 2 of EU Directive 2005/36 places an obligation upon the GTCW and the Minister to issue a letter of certificate with respect to teaching qualifications obtained in Wales, but both parties have so far refused to meet this obligation in denial of my repeated requests and in violation of my rights under the Directive and the EU Treaty...*

...So are my professional qualifications those covered by the Directive? A Yes or no answer can reasonably be expected here.

3. *In the statutory legislation concerning induction arrangements in Wales is it anywhere stated that the completion of an induction year forms part of the professional qualification to teach? A yes or no answer can reasonably be expected here.*
4. *Does teacher induction in Wales form part of the professional qualification to teach? A yes or no answer can reasonably be expected here (there is only ostensible similarity to question 3, so do please answer).*
5. *In Wales, does a period of induction begin after access to the teaching profession and right to pursue that profession have already been secured on the basis of the award of QTS? A yes or no answer can reasonably be expected here.*
6. *Does a teacher completing a PGCE in Wales become 'qualified' by virtue of the award of QTS before undertaking a period of induction? A yes or a no answer can reasonably be expected here."*
7. Following an internal review the Welsh Government wrote to the complainant on 12 February 2013. It upheld its original decision to rely

on section 42 of the FOIA for the legal advice and provided a response to five of the complainant's six questions.

Scope of the case

8. The complainant contacted the Commissioner on 18 March 2013 to complain about the way his request for information had been handled. He confirmed that his complaint was twofold and would like a copy of the legal advice withheld on the basis of Legal Professional Privilege (LPP). He also asked the Commissioner to investigate his concerns regarding the six questions he did not believe had been answered.
9. Having sought clarification of the scope of the complaint, the complainant confirmed to the Commissioner that in addition to the information withheld on the basis of LPP, he did not consider the Welsh Government had provided answers to his questions three, five and six.
10. As the complainant is satisfied with the responses he has received to questions one, two and four of his request, these do not fall within the scope of the Commissioner's investigation. This decision notice will therefore only consider the Welsh Government's response to questions three, five and six.
11. During the course of the Commissioner's investigation, the Welsh Government also disclosed some information it had previously withheld on the basis of section 42(1) which the Commissioner did not consider constituted legally privileged information. This decision notice does not therefore contain an analysis in respect of this information and focuses solely on the information the Welsh Government is still withholding by virtue of section 42(1) of the FOIA.

Reasons for decision

12. Section 1(1) of the FOIA, sets out the general right of access to information held by public authorities and states:

"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 the information of the description specified in the request, and*
- (b) if that is the case, to have the information communicated to him."*

13. Whilst section 10(1) of the FOIA deals with the times for compliance with a request and states:

"...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."

14. The Welsh Government has confirmed that it did not make any direct reference to the complainant's question three in its internal review on the basis that a response had already been provided to him in a separate letter of 27 November 2012.
15. The Commissioner has considered the contents of this letter and does not consider that it answered the question and he also notes that this letter pre-dated the complainant's request for information.
16. However, during the course of the Commissioner's investigation the complainant and the Welsh Government have continued to correspond and he notes that in a letter dated 8 August 2013 the Welsh Government provided the following response to question three of the request:

"In our view, overall the answer to your question 3 is yes. The Induction regulations say that you are not able to be employed as a teacher in a maintained school in Wales unless you hold Qualified Teacher Status ("QTS") and have either successfully completed an induction period, be in the process of completing an induction period, or have completed an induction period and awaiting the outcome. We have already directed you to the Education (Induction Arrangements for School Teachers) (Wales) Regulations 2005, where this is set out."

17. The Commissioner also notes that the Welsh Government provided the following response in its internal review letter of 12 February 2013 to the complainant in relation to questions five and six of his request for information:

"Your successful completion of a PGCE at Bangor University in 2009 means that you hold qualified teacher status (QTS). It is a legal requirement (Education (Induction Arrangements for School Teachers) (Wales) (Amendments) Regulations 2012 in Wales) that all teachers who gain QTS after 1 April 2003 must complete a period of statutory induction in order to be employed as a teacher in Wales."

However the complainant does not consider that the Welsh Government has answered his questions and believes that the Welsh Government should have responded with either a 'yes' or a 'no' in relation to these questions. He has continued to correspond with the Welsh Government

regarding this matter post internal review and since bringing his complaint to the Commissioner.

18. In a letter to the complainant dated 27 February 2013, the Welsh Government acknowledged that the complainant has sought to prescribe the form the answers should take, however informed the complainant that it is for the public authority to determine how best to provide an appropriate response. It further informed the complainant that it considers it has answered his questions as far as their position and the extent of their knowledge allows. The Welsh Government also suggested that should the complainant wish to obtain a more definitive answer to his questions, he may wish to seek his own legal advice.
19. The Commissioner also notes that the Welsh Government's letter of 8 August 2013 referred to in paragraph 16 of this notice specifically addressed the complainant's concerns regarding his chosen format of response and stated:

"We consider that answers to these questions have already been provided in previous correspondence as they overlap with the answers to other questions that you raised. Nor do we consider...they are questions that it is possible to answer with a simple yes or no answer without a recognition of the overall legislative (both domestic and European) framework within which they sit..."

20. Nevertheless, the Welsh Government did go on to provide a yes or no answer to questions three, five and six albeit with qualifications. Its response to question three has already been provided in paragraph 16 above whilst its responses to questions five and six have been reproduced below:

...overall the answer to your question 5 is no. You can only complete a period of induction once you have achieved QTS. But in addition, once you hold QTS then the answer to question 3 applies – that you are not able to be employed as a teacher in a maintained school in Wales unless you hold QTS and have either successfully completed an induction period, be in the process of completing an induction period, or have completed an induction period and awaiting the outcome

...overall the answer to your question 6 is no. This is because to be employed as a teacher in a maintained school in Wales you have to hold QTS and have either successfully completed an induction period, be in the process of completing an induction period, or have completed an induction period and awaiting the outcome."

21. The Commissioner has considered the answers provided by the Welsh Government and would wish to highlight that a public authority is not

obliged to give a 'yes' or a 'no' answer in response to a request for information/questions. A public authority is only required to give supporting answers.

22. The Commissioner therefore considers that the Welsh Government has complied with its obligations under section 1(1) of the FOIA, however, its failure to specifically address question three of the complainant's request at the internal review stage represents a breach of section 10(1) of the FOIA.

Section 42 – Legal Professional Privilege

23. Section 42(1) of the FOIA provides an exemption from the disclosure of information protected by legal professional privilege.
24. Section 42(1) will be engaged if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
25. 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 advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
26. The Welsh Government has confirmed that it is relying on legal advice privilege in relation to this information.
27. Establishing who the legal advisor is will be key to them identifying when a communication is legally privileged. The Commissioner generally considers that the term 'lawyer' means a legal advisor acting in a professional capacity and includes legal executives.
28. In *Calland v IC the Financial Services Authority* (EA/2007/0136) the former Information Tribunal confirmed that legal advice and communications between in-house lawyers and external solicitors or barristers also attract LPP.
29. The Welsh Government has confirmed that the advice was provided by a qualified lawyer from its Legal Services Department.
30. The Welsh Government has also confirmed that the information was provided on a restricted basis internally and has not been shared with

any third parties outside of the Welsh Government. It is therefore satisfied that it has not lost its confidential character.

31. The Commissioner has considered the disputed information and the assurances provided by the Welsh Government and is satisfied that it does constitute legal advice privilege and that the exemption is engaged. He has therefore gone on to consider the public interest.

Public interest in disclosure

32. The Welsh Government has acknowledged that there is an inherent public interest in ensuring that public authorities are transparent in the decisions they make.
33. The Commissioner would also point out that there is a generic public interest in accountability regarding the expenditure of public money.
34. The Welsh Government accepts the generic public interest in individuals being able to exercise their rights under the FOIA to enhance their understanding of the reasons for decisions taken by a public body and recognises that the complainant has a personal interest in the information.
35. The Welsh Government also accepts that there may be a limited general public interest in the disclosure of this information.

Public interest in maintaining the exemption

36. The Welsh Government has highlighted the need for clients to receive free and frank legal advice from their lawyers to facilitate a candid exchange of views including any potential weaknesses and counter-arguments and has noted the strong element of public interest inbuilt into privilege itself as recognised by the Tribunal in the case of *Bellamy v the Information Commissioner and the DTI* [EA/2005/0023].
37. The Welsh Government has further argued that the fact that the information is still relatively recent is a further factor in favour of maintaining the exemption

The balance of public interest

38. Whilst the Welsh Government has acknowledged the complainant's personal interest in the information, it does not consider that there is any wider public interest in disclosure of the information which would be sufficiently strong to outweigh the significant inbuilt weight accorded to LPP. It also considers the fact that the complainant has received a response to the particular queries he raised, limits the weight accorded to the complainant's personal interest in the information.

39. Therefore, based on the strong element of public interest inbuilt into privilege itself, and the fact that the information is still relatively recent, the Welsh Government considers that in the absence of at least equally strong countervailing considerations in favour of disclosure that the balance in this case is weighted in favour of maintaining the exemption.
40. The Commissioner has considered the public interest arguments put forward by the Welsh Government and he acknowledges the generic public interest in transparency of decisions taken by public bodies and accountability in relation to public expenditure. He also accepts that the complainant has a personal interest in disclosure of this information and that there may be a limited public interest in disclosure of the information. However, he is mindful of the strong public interest inbuilt into LPP in protecting the confidentiality of advice between a lawyer and a client to ensure the full and frank exchange of legal opinion. In the absence of any countervailing factors in favour of disclosure such as significant public expenditure or the decision affecting a large number of people, he has therefore concluded that the balance of public interest is weighted in favour of maintaining the exemption and consequently, that the Welsh Government were correct to rely on section 42 of the FOIA.

Right of appeal

41. 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

42. 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.
43. 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
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