

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 July 2014

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

Decision (including any steps ordered)

1. The complainant has requested the 20 most recent WEFO internal audit reports no longer deemed 'live'. The Welsh Government refused the request on the basis that it was vexatious and cited section 14(1) of the FOIA. The Commissioner's decision is that the Welsh Government has wrongly declared the request to be vexatious under section 14(1) of the FOIA. The Commissioner requires the public authority to issue a fresh response under the FOIA without relying on section 14(1) of the FOIA. The Commissioner also notes that the Welsh Government breached section 17(5) of the FOIA in its handling of this request for information.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response under the FOIA without relying on section 14(1) of the FOIA.
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 12 June 2013, the complainant wrote to the Welsh Government and requested the following information:

"Whilst I understand that the reports in my previous request were restricted as they were deemed live, I have been notified that the following 20 reports are no longer 'live' and should therefore not be exempt from disclosure. As a result, please send me copies of the following reports:"

5. See Annex A for the actual titles of the reports.
6. The Welsh Government responded on 20 September 2013. It stated that:

"Following due consideration, I have decided that your request is vexatious under Section 14(1) of the Freedom of Information Act 2000 (FOIA) and that it should be refused on that basis."

7. Following an internal review the Welsh Government wrote to the complainant on 4 November 2013. It upheld the original decision to refuse the request on the basis of section 14(1) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 27 November 2013 to complain about the way his request for information had been handled.
9. The complainant expressed concern that the Welsh Government had incorrectly applied case law in order to prevent the release of disclosable information. He was also dissatisfied with the length of time it took the Welsh Government to respond to his request.
10. The complainant provided background information to the Commissioner to put his request in context. He explained that he is an investigative journalist interested in the inner workings of government and has produced several stories recently looking at Welsh European Funding Office (WEFO) projects.
11. The Commissioner has considered the Welsh Government's reliance on section 14(1) of the FOIA and whether it complied with its obligations under section 17(5) in respect of the time for compliance. He has also considered the Welsh Government's procedural handling of the request.

Reasons for decision

Section 14(1) – Vexatious requests

12. Section 14(1) of the FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.
13. The term 'vexatious' is not defined in the FOIA, however, the Upper Tribunal in the Information Commissioner vs Devon CC and Dransfield [2012] UKUT 440(AAC), (28 January 2013) took the view that the ordinary dictionary definition of the word 'vexatious' is only of limited use, because the question of whether a request is vexatious ultimately depends on the circumstances surrounding that request.
14. In further exploring the role played by circumstances and whether the request has adequate and proper justification, the Tribunal concluded that 'vexatious' could be defined as the "*...manifestly unjustified, inappropriate or improper use of a formal procedure.*" (paragraph 27)
15. Consistent with the Upper Tribunal's decision which established the concepts of 'proportionality' and 'justification' as central to any consideration of whether a request is vexatious, the Commissioner's guidance for section 14(1) confirms that the key question to ask when weighing up whether a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
16. Where this is not clear, the public authority should weigh the impact on the authority of complying with the request and balance this against the purpose and value of the request. In doing this, public authorities will inevitably need to take into account the wider factors such as the background and history of the request.

Purpose and value of the request

17. The Welsh Government's reliance on section 14(1) is based on the belief that the request lacks purpose and value and is in effect, a fishing expedition on the part of the complainant for information that may prove noteworthy or otherwise useful. It views the request as taking a random, scattergun approach and it is this that lies at heart of its contention that the request is vexatious.
18. In terms of the 20 reports subject to this request, the Welsh Government considers that they are unrelated to each other with the only thread running through them being that they were the 20 most recent WEFO audit reports 'no longer deemed 'live' at the time of the request.
19. Although it accepts that the complainant as a journalist is seeking reports in relation to WEFO funding, it considers that he has not actually

provided any evidence to suggest that he is genuinely seeking to expose possible or actual wrongdoing but is seeking reports of any nature and believes that he will keep 'fishing' for reports for possible wrongdoing until he finds one that meets his own criteria. It informed the complainant in paragraph 23 of its internal review that:

"The request appears to be part of a completely random approach, lacks any clear focus or seems to have been solely designed for the purpose of 'fishing' for information without any idea of what might be revealed."

20. It has further argued that if no such useful information was found, the complainant would re-submit a fresh request with different parameters.
21. In reaching this conclusion it has also taken into consideration the background and history of the request and has provided evidence of six previous but related requests in the period between June 2011 and this request of 12 June 2013.
22. The first request dated 29 June 2011 asked for:

"All 'Article 10' reports written by WEF0's Financial Control Team into Objective 1 projects in Wales since the Objective 1 programme began;

An outline of all requests made by DG-REGIO for the return of Objective One money paid to projects in Wales since the Objective 1 programme began; including the name of the projects in question, the amount of money to be returned, the reason for their request, and the final outcome of each request; and

All Welsh Government final audit reports which deal with irregularities, mismanagement, lack of governance and accountability regarding any Welsh Objective 1 projects since the programme began."

23. The Welsh Government refused this request by virtue of section 12 of the FOIA. However, it also informed the complainant that it would be possible for the request to fall within the appropriate limit if he could focus his request either on a specific project or over a specific or shorter time frame.
24. The complainant subsequently submitted a further request on 11 November 2011 which asked for:

"...the most recent copies of Article 10 reports written by WEF0's Financial Control Team into Objective one projects within the allowed timeframe for FOIA searches? Could I please obtain as many of these reports as possible that can be accessed within the 24 hour FOI limit...FINAL REPORTS – NOT [complainant's emphasis] draft reports."

25. The Welsh Government refused this request by virtue of section 8(1)(c) of the FOIA on the basis that the request was not valid as the complainant did not provide a clearer description of the information, other than to say that he wanted as much of the information as possible within the appropriate limit.

26. The Welsh Government also refused on the same basis the complainant's request dated 24 July 2012 which asked the Welsh Government to provide:

"The 40 most recent 'final' audit reports published by the Welsh Government's European Funds Audit Team (completed reports – not drafts)." [complainant's emphasis]

27. The complainant therefore submitted a request on 15 March 2013 asking for:

*"... the **exact titles** [complainant's emphasis] of the 40 most recent 'final' audit reports published by the Welsh Government's European Funds Audit Team (completed reports – not drafts)."*

28. The Welsh Government provided this information, and on 5 April 2013 the complainant requested the 20 most recent reports specifying their titles in an annex to the request. The Welsh Government provided one of the reports but refused to provide the remaining 19 by virtue of section 33 of the FOIA as the reports were still considered 'live'.

29. On 14 May 2013, the complainant therefore submitted a further request for information which asked the Welsh Government to:

"... provide the titles of the 20 most recent WEFO Article 10 audit reports which are no longer deemed to be 'live' audits not requiring follow-up work.

Please provide an exact explanation as to how and when these audit reports are no longer deemed to be 'live' – which criteria and guidelines does the Welsh Government use to reach this decision?"

30. The Welsh Government provided this information to the complainant on 12 June 2013 which prompted the request subject to the Commissioner's investigation in this notice.

31. The Welsh Government considers that the complainant's initial request for all Article 10 reports, followed by a request for the 40 most recent final audit reports, and then, finally, this request for the 20 reports no

longer deemed live, is indicative of a fishing expedition for information that might provide a useful story rather than a focused and targeted request.

32. The Welsh Government further argued that taking the complainant's requests as a whole, demonstrably shows a pattern of persistent 'fishing' expeditions for information unknown that may or may not be contained within the audit reports selected at random and that the release of these reports would likely prompt further requests for more of the same.
33. The Welsh Government has further stated that whilst the FOIA does indeed allow access to information, Section 1(1)(a) imposes a requirement that the information be 'described' in order for a request to be valid. However, at least one of the complainant's previous requests in relation to its internal audit reports had been refused on the grounds that the information was not sufficiently described, and subsequent requests have merely reduced the number of reports rather than define the actual information the complainant was seeking.
34. The Welsh Government does not accept therefore that the complainant's previous requests produced information that revealed an investigatory thread that was followed in subsequent requests as these requests had been refused. Further, the Welsh Government has argued that the complainant did not know of the existence of the reports until he was provided with a list of their titles in May 2013.
35. The Welsh Government also referred to paragraph 79 of the Commissioner's section 14(1) guidance in reference to random requests and fishing expeditions where:

"the requester casts their net widely in the hope that this will catch information that is noteworthy or otherwise useful to them." (para 79).
36. The complainant however, disagrees with this assessment of his request. He has informed the Commissioner that he is an investigative journalist, interested in the inner workings of government and has produced several stories recently looking at Welsh European Funding projects, some of which he has stated have failed after receiving substantial funding. The complainant added, that although these stories may not be the kind of attention that the Welsh Government seeks, they do shine a light on the way that authorities use public money in Wales.
37. The complainant therefore considers his request to be an attempt to gather information for journalistic research. In response to the Welsh Government's reference to his previous requests referred to in paragraphs 22 to 30 of this notice, he has quoted from the Tribunal's

ruling in paragraph 36 of the Upper Tribunal's decision in the Information Commissioner v Devon County Council and Dransfield which states:

"...an investigative journalist may make a single request which produces certain information and so on. Such a series of requests may be reasonable when viewed both individually and in context as a group."

38. The complainant has further informed the Commissioner that this exactly describes the course of events that led to his request of 12 June 2013. He has confirmed that as his previous requests were refused due to the breadth of information required, he narrowed his request from 40 to 20 reports on the advice from the Welsh Government Press Officer. He subsequently refined his request further when this request was refused as the reports were still deemed 'live'. He then submitted this request following a request for a list of 20 WEFO reports no longer deemed 'live'.
39. The complainant believes that this refining of his requests, forced the Welsh Government into a situation where the only reasonable course of action was to release the information requested, unless they could think of an alternative way of refusing the request.
40. The complainant considers allegations from the Welsh Government that the request was part of a 'fishing expedition' for news gathering purposes, as without any basis at all. He has further stated, that as a journalist, he employs several techniques to obtain information, the FOIA being one of them.
41. The complainant has quoted from paragraph 25 of the Upper Tribunal's decision in the Information Commissioner v Devon County Council and Dransfield which states:

"It may be both annoying and irritating (as well as both dissatisfying and disappointing) for politicians and public officials to have to face FOIA requests designed to expose possible or actual wrongdoing. However, that cannot mean that such requests, properly considered in the light of all the circumstances and the legislative intention, are necessarily to be regarded as vexatious."
42. The Commissioner's specific guidance for section 14(1) acknowledges that public authorities do express concerns about the apparent tendency of some requesters, most notably journalists, to use their FOIA rights where they have no ideas what information, if any, will be caught by the request. He also acknowledges that these requests can appear to take a random approach and are often viewed by public authorities as 'fishing expeditions'. However, the Commissioner would stress that it is a

categorisation that public authorities should consider very carefully as regular use could result in the refusal of legitimate requests.

43. The Commissioner would also point out that whilst fishing for information is not, in itself enough to make a request vexatious, complying with some requests of this nature may prove so burdensome in terms of requiring the authority to spend a considerable amount of time considering exemptions and redactions that when weighing the impact of the request on the public authority against the purpose and value of the request, it is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
44. Public authorities should however take care to differentiate between broad requests which rely on pot luck to reveal something of interest and those where the requester is following a genuine line of inquiry.
45. The Commissioner has considered the arguments of both parties and whilst he accepts that the complainant has not specified the information in the reports, he considers that the request is for specific information and the 20 WEFO reports no longer deemed 'live' do hold a common thread as the complainant, in his role as a journalist has concerns regarding some projects receiving WEFO funding.
46. The Commissioner has also considered the context of the request and believes that the complainant's previous six requests show a persistence to pursue an investigation into WEFO funding as opposed to a 'fishing expedition'.
47. Additionally, he considers that the complainant did describe the information subject to those requests refused by virtue of section 8(1)(c) of the FOIA outlined in paragraphs 24 to 26 of this notice. However, he does accept that the complainant did not specify the titles.
48. The Commissioner is not therefore persuaded by the Welsh Government that the request is part of a 'fishing expedition'. He has nevertheless gone on to consider the arguments from the Welsh Government that the request represents a disproportionate burden on the authority.

The impact on the Welsh Government

49. The Welsh Government considers that compliance with this request would place a disproportionate or unjustified burden on its resources. It has stated that in order to release audit reports into the public domain, each individual report would need to be subject to a number of rigorous processes and review stages involving a number of parties.
50. Firstly, the Welsh Government has stated this necessitates each document to be heavily scrutinised by a professionally qualified auditor

and senior auditor in order to identify any commercially prejudicial or confidential information that could negatively impact on the organisation that was subject to the audit. By way of example, it has stated that financial details may come to the attention of a competitor. Following this, it would need to be approved by the Head of Branch and Head of Division.

51. The Welsh Government has estimated that these processes would take at least two days to complete for each report and involve at least four members of staff. After this, it would need to consult legal services to ensure that the content within the report is redacted where appropriate. This again, would result in resources being tied up with meetings to clarify all issues.
52. It has further explained that the Welsh Government's European Funds Audit Team carries out audit work on behalf of the European Commission. The auditee is the sponsor of a European Project and could be a local authority, educational institution, third sector organisation, Welsh Government department or private company. The auditee is therefore the owner of the audit report.
53. The Welsh Government therefore considers that the burden would extend to the organisation on which the report was focused as it would need to be contacted to seek permission for the report to be published. It has added that the scope of the audit usually means that a number of different personnel were involved from the organisation and in most cases, the recommendations within the report have different owners with each owner needing to discuss and agree to release the information in relation to their area of responsibility.
54. The Welsh Government has further argued that the randomness of the request could potentially require input from 20 different owners and their respective teams.
55. It has also argued that on a wider level, the European Funds Audit Team is required to deliver a set work plan determined by European Commission directives and regulations. This plan must be delivered annually to tight timescales and resource is focused on delivering this work. Failure to meet these requirements could result in a suspension of payments to Wales with the implication that organisations operating European projects may not get paid.
56. The Welsh Government has further stated that the European Commission is keen on good publicity to promote European funded projects and it is likely that the increased burden on organisations to meet the request, together with what may be seen as an already heavy audit burden on European projects, may produce a negative impact on

publicity. This in turn could result in European Commission involvement, therefore increasing this burden further.

57. The Welsh Government concluded that in the light of the requirements outlined above, and the potential for further requests of the same nature, requiring a similar level of scrutiny, that this would impose a disproportionate burden on Welsh Government officials when considered against the purpose of the request.
58. The Commissioner has considered the arguments put forward by the Welsh Government in relation to disproportionate burden and whilst he considers it reasonable that a qualified auditor may need to consider each report, he does not accept that it is necessary to follow the processes outlined in paragraphs 49 to 57 of this notice.
59. Similarly, whilst he also accepts that the Welsh Government may wish to seek the views of the organisation that is the focus of the report, ultimately, it is up to the Welsh Government as the holder of the information to decide whether or not the information should be disclosed.
60. Additionally, the Commissioner notes that in its response to the complainant's original request for information outlined in paragraph 23 of this notice, that the Welsh Government informed the complainant that it is possible that a request would come within the appropriate limit if he was able to focus his request on a specified project or a specific or shorter time frame. This indicates a significantly reduced burden to the one outlined in paragraphs 49 to 57 of this notice.
61. The Commissioner further notes that there was no reference to the necessity to consider whether the contents of each report were appropriate for disclosure into the public domain, and whilst he acknowledges that a public authority cannot take these processes into consideration when estimating its cost of compliance under section 12 of the FOIA, he does not think it unreasonable that a public authority would provide some indication that this might be necessary in the event that a refined request could be brought within the appropriate limit.
62. Indeed, section 16 places an explicit duty on the public authority to provide appropriate advice and assistance when refusing a request on the basis of section 12 of the FOIA.
63. Having considered this request, its context and the arguments put forward by the Welsh Government in terms of disproportionate burden, the Commissioner is not satisfied that that its reliance on section 14(1) was justified, and has therefore concluded that section 14(1) of the FOIA is not engaged in respect of this request.

Section 17 of the FOIA

64. Section 17 of the FOIA concerns the refusal of a request for information and section 17(5) places an obligation on a public authority which is relying on either section 12 or section 14 of the FOIA to give the applicant a notice stating that fact within the time for compliance under section 1(1) of the FOIA.
65. The Commissioner notes that although the Welsh Government received this request on 12 June 2013, it did not provide its substantive response until 20 September 2013. This is in excess of the 20 working day requirement under the FOIA. The Welsh Government has therefore breached section 17(5) of the FOIA in its handling of this request for information.

Right of appeal

66. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

67. 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.
68. 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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