

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2014

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

Decision (including any steps ordered)

1. The complainant has requested a copy of legal advice which confirmed that DfES policy in respect of its Welsh for Adults policy is in accordance with the relevant regulations. The Welsh Government refused this request by virtue of section 42 of the FOIA, however during the course of the Commissioner's investigation it confirmed that it did not hold this information at the time of the request. The Commissioner's decision is that the Welsh Government has complied with its obligations under section 1(1) of the FOIA. The Commissioner does not require the Welsh Government to take any steps.

Request and response

2. On 18 November 2013, the complainant wrote to the Welsh Government and requested the following information in respect of a letter dated 3 September 2013 from its Welsh in Education Unit relating to Further Education Teachers' Qualifications (FETQ) Regulations:

"...a copy of the Ministerial Directive (issued, in response to this letter, to each of the WfA Centres) requiring that fees, for classes led by tutors not specifically qualified to teach Welsh to adults, be repaid immediately.

Alternatively: *[complainant's emphasis] please let me have a copy of the legal advice said by [named officer], to confirm that DfES policy on this matter IS [complainant's emphasis] in accordance with the Regulations."*

3. The Welsh Government responded on 18 December 2013. It stated that it would not be possible to provide a copy of the Ministerial Directive as the document does not exist. In respect of the complainant's request for a copy of the legal advice referred to in paragraph 2 of this notice, the Welsh Government informed the complainant that it does not provide legal advice to the public and suggested that if he wished to obtain legal advice he should approach his own legal advisors.
4. In his request for an internal review, the complainant confirmed that he was not asking the Welsh Government to give him legal advice and reiterated his request for a copy of the legal advice referred to in paragraph 2 of this notice.
5. Following an internal review the Welsh Government wrote to the complainant on 7 February 2014. Whilst it confirmed that legal advice was given to officials, it refused the request by virtue of section 42(1) of the FOIA on the basis that it was protected by legal professional privilege.

Scope of the case

6. The complainant contacted the Commissioner 23 April 2014 to complain about the way his request for information had been handled.
7. During the course of the Commissioner's investigation, the Welsh Government has confirmed that the legal advice was not held at the time of the request. The Commissioner's investigation is therefore to consider whether the Welsh Government has complied with its obligations under section 1(1) of the FOIA.

Reasons for decision

Section 1

8. Under section 1(1) of the FOIA, in response to a request for information a public authority is only required to provide recorded information it holds and is not required to create new information in order to respond to a request.
9. In his consideration of this case, the Commissioner is mindful of the former Information Tribunal's ruling in EA/2006/0072 (Bromley) that there can seldom be absolute certainty that additional information relevant to the request does not remain undiscovered somewhere within the public authority's records. When considering whether a public authority does hold any additional information therefore, the normal

standard of proof to apply is the civil standard of the balance of probabilities.

10. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
11. In this particular case, the Welsh Government has confirmed that it did receive legal advice relevant to the request. However, it has explained that in citing a discussion with a named Welsh Government official, the complainant is referring to a meeting he attended on 13 November 2013 to discuss his dissatisfaction with the Welsh Government's Welsh for Adults policy. In the course of that meeting, it transpired that officials were interpreting the FETQ (Wales) Regulations 2002 differently to the complainant. The Welsh Government has further explained that whilst it was confident that its interpretation was correct, regret was expressed as to the lack of a lawyer present who would be able to confirm.
12. The Welsh Government has further explained that the complainant's request was for the legal advice that allowed its officials in the meeting of 13 November 2013 to assert its interpretation was correct. Following that meeting, on 23 November 2013, officials subsequently received legal advice concerning the interpretation of the FETQ (Wales) Regulations 2002 from the Welsh Government Legal Services Division. This advice was erroneously considered as being caught by the complainant's request of 18 November 2013, however it was outside of the scope of the request as it was not held at this time, and neither could it have been advice that the named Welsh Government official could have relied on at the time of the meeting of 13 November 2013.
13. The Commissioner has considered the Welsh Government's explanation and has concluded that on the balance of probabilities, it has complied with its obligations under section 1(1) of the FOIA in that information relevant to the request would not have been held at the time the request was made.

Right of appeal

14. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

15. 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.
16. 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