

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 December 2015

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

Decision (including any steps ordered)

1. The complaint has requested various items of information in respect of the activities of Visit Wales and its use of two images of Dylan Thomas. Whilst the Welsh Government provided some information, it confirmed that it did not hold information in respect of certain items. It also relied on sections 21, 40, 41 and 42 of the FOIA to refuse a significant amount of the requested information.
2. The Commissioner's decision is that the Welsh Government has correctly refused the request under sections 42, 41 and 21, however in failing to provide relevant information within the time for compliance and to issue a valid refusal notice, the Welsh Government has breached section 10(1) and section 17(1) of the FOIA respectively.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 6 February 2015, the complainant wrote to the Welsh Government and requested various items of information in respect of the activities of Visit Wales and its use of two images of Dylan Thomas. Due to the length of the request, it has not been reproduced in this notice, however it is contained in a separate annex.
5. The Welsh Government responded on 6 March 2015 stating that it needed extra time to consider the public interest test under section 42

of the FOIA and that it would write again by 7 April. The complainant informed the Welsh Government that he was not satisfied with its handling of his request for information.

6. Following an internal review of its procedural handling of the request, the Welsh Government wrote to the complainant on 8 April 2015 to confirm that consideration of the public interest test under section 42 of the FOIA applied only to some, as opposed to all of the information and that it expected to provide a full response within the next few days.
7. Following various correspondence between the two parties, the Welsh Government provided its substantive response on 19 May 2015. It provided information in respect of some items of the request, stated that it did not hold information in respect of items 2d, 3a and 7, and confirmed it was withholding information in respect of item 10(c) by virtue of section 21 of the FOIA and items 1(a), 1(b), 5, 8(b), 9(b), 10(a) and 10(d) by virtue of sections 40, 41 and 42.

Scope of the case

8. The complainant contacted the Commissioner on 30 April 2015 to complain about the Welsh Government's procedural handling of his request for information. On 9 June 2015, the complainant further confirmed that he was not satisfied with the substance of the response dated 19 May 2015.
9. Due to the multi-part request, the Commissioner asked the complainant to clarify the scope of his complaint who confirmed that he remains dissatisfied with the Welsh Government's procedural handling of his request, is not satisfied with the information not held responses in respect of items 2(d), 3(a) and 7, believes that the Welsh Government has not provided all information it holds relevant to item 2(a), considers the responses to 8(b) and 9(b) to be inconsistent with its responses to 8(a) and 9(a), is not satisfied with its refusal to provide information in respect of items 1(a), 1(b) and 5, 10(a), 10(c) and 10(d).
10. In addition to consideration of the procedural handling of this request, the focus of the Commissioner's investigation will therefore consider a) whether the Welsh Government has identified / provided all information falling within the scope of the request which has not been withheld under any of the exemptions under Part II of the FOIA and therefore complied with its obligations under section 1(1), and b) its reliance on sections 42, 41 and 21.

Reasons for decision

Section 1 – General right of access to information held

11. 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 therefore required to create new information in order to respond to a request.
12. In his consideration of whether a public authority has complied with its obligations under section 1(1) of the FOIA, 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 (additional) relevant information therefore, the normal standard of proof to apply is the civil standard of the balance of probabilities.
13. 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 does not expect the public authority to search all of its records, however he does expect the public authority to conduct a reasonable and proportionate search in all cases.
14. In this particular case, the Welsh Government has stated that it does not hold relevant information in respect of items 2(d), 3(a) and 7 of the request, however the complainant is not satisfied with this response. The complainant also considers that the Welsh Government is likely to hold additional information in respect of items 1(a) and 2(a) of his request.
15. The Commissioner notes that the Welsh Government has refused to provide information in respect of item 1(a) by virtue of sections 40, 41 and 42 of the FOIA and this has therefore been discussed in detail in paragraphs 21 to 43 of this notice. He did however ask the Welsh Government to provide details of the search conducted in respect of item 2(a) of the request.
16. The Welsh Government informed the Commissioner that searches for each of the items above were carried out by an examination of the relevant electronic folder where all documents in relation to this case are held. It added that its decision to restrict its search to this one location is based on the fact that due to an ongoing related complex legal matter, all information concerning the issue is held in one place. The Welsh Government confirmed to the Commissioner that no information

is held relevant to items 2(d), 3(a) and 7, whilst it has provided all information it holds in respect of item 2(a).

17. The Commissioner considers that the explanation provided by the Welsh Government appears reasonable. He also notes that the complainant offered no substantive arguments in support of his concerns, and has therefore concluded that based on the balance of probabilities, the Welsh Government has provided all information it holds in respect of each of these items of the request.
18. The Commissioner also notes that the Welsh Government although originally refusing items 8(b) and 9(b) by virtue of section 42 of the FOIA, confirmed to the Commissioner during his investigation that as these questions relate to requests for information about the names of its American and German lawyers, its correct response should have been that it does not hold any information as they had not appointed any lawyers at the time of the request.
19. Having considered the Welsh Government's explanation, the Commissioner is satisfied that it would not have held relevant information in respect of items 8(b) and 9(b) at the time of the request.
20. The Commissioner has therefore concluded that the Welsh Government has complied with its obligations under section 1(1) of the FOIA and has provided all information falling within the scope of the request which has not been withheld by virtue of any of the exemptions listed in Part II of the FOIA.

Section 42 – Legal professional privilege

21. The Welsh Government is withholding information in respect of items 1(a), 1(b), 5, 10(a) and 10(d) of the request by virtue of section 42 of the FOIA.
22. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege.
23. Legal professional privilege (LPP) is not defined under the FOIA or in any other legislation but is a common law concept shaped by the courts over time.
24. LPP is intended to protect the confidentiality of communications between a lawyer and a client. In the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* the former Information Tribunal described LPP as:

"...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges

between the client and his, her or its lawyers related communications and exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation..."

25. A professional legal advisor for the purposes of LPP could be a solicitor, barrister, licensed conveyancer or a legal executive holding professional qualifications recognised by the Institute of Legal Executives (ILEX). The legal advisor can be either an external lawyer or an in-house lawyer employed by the public authority itself. This was confirmed in the former Information Tribunal's ruling in *Calland v Information Commissioner and FSA (EA/2007/0136; 8 August 2008)*.
26. 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.
27. The Welsh Government has confirmed that it is relying on both advice and litigation privilege in respect of this information.
28. With regard to the confidentiality of the information, the Welsh Government informed the Commissioner that the advice has retained its confidential status, has not been distributed on an unrestricted basis within the Welsh Government, or shared with any third parties outside of the organisation.
29. The Commissioner is therefore satisfied that the majority of the information withheld by virtue of section 42 of the FOIA is protected by LPP and that section 42 is therefore engaged. A consideration of the public interest test is therefore necessary.
30. However, the Commissioner does not consider that the following items constitute legally privileged information, but as the Welsh Government also refused them by virtue of sections 40(2) and 41 of the FOIA, they will be discussed in more detail under his analysis of section 41:
 - Annex 5
 - Email dated 13 August 2014 at 08:47am
 - Email dated 13 August 2014 at 10:37am

Public interest in disclosure

31. The Welsh Government has acknowledged the public interest that individuals are able to exercise their rights under the FOIA to enhance their understanding of the reasons for a decision or action taken by a public body.
32. The Welsh Government has also acknowledged the public interest in ensuring that public authorities are transparent in their decisions to promote accountability and improve the quality of decision making.
33. It has further recognised that disclosure of the information withheld by virtue of section 42 of the FOIA would assist the public to ascertain if there was any incompatibility between the advice provided and the policy decision taken, and to be satisfied that the advice was followed.

Public interest in maintaining the exemption

34. The Welsh Government considers that it is highly important to maintain LPP, and that in the absence of at least equally strong countervailing considerations, any attempt to undermine the principle of LPP would result in substantial harm. The Welsh Government has added that the fundamental importance of the principle of LPP has been acknowledged in successive Court and Information Tribunal decisions.
35. Additionally, the Welsh Government has argued that there is a strong public interest in protecting the established principle of confidentiality between lawyers and their clients and information subject to LPP. It has further argued that it is important that it can obtain whatever legal advice it considers necessary in order to ensure that any decision that is ultimately taken is one that has been subject to the most careful consideration.
36. Further, there is a need for reasonable certainty relating to the confidentiality of legal advice, as without this, the quality of the advice itself may not be as full and frank as it might otherwise be.

The balance of public interest

37. The Welsh Government considers that in this instance, the public interest in maintaining the exemption is sufficient to outweigh the public interest in its disclosure.
38. The Commissioner has considered the arguments presented by the Welsh Government both in favour of disclosure and maintaining the exemption, and acknowledges the general public interest factors in favour of transparency and accountability referred to in paragraphs 31 and 32 of this notice.

39. The Commissioner is also mindful of the public interest in being able to ensure that there was no incompatibility between the advice provided and the policy decision taken, and to be satisfied that the advice was followed.
40. However, the Commissioner recognises the general principle that clients should be able to receive free and frank legal advice from their lawyers and acknowledges that this in itself is a strong public interest factor in maintaining the exemption, as confirmed by the Tribunal in the case of *Bellamy v the Information Commissioner* and further reinforced in *Crawford v Information Commissioner & Lincolnshire County Council* (EA/2011/01445) in which the Tribunal states:

"Our starting point, therefore is that the exemption is qualified, not absolute, but that ...must show clear, compelling and specific justification that at least equals the public interest in protecting the information in dispute.

41. The Commissioner notes that factors which might suggest equally strong countervailing arguments include whether there is a large amount of money involved or a large number of people affected, lack of transparency in the public authority's actions, misrepresentation of advice given, or the selective disclosure of only part of that advice. The Commissioner notes that there is no evidence of any of these factors in this particular case.
42. He also notes that at the time of the request, the legal advice was live and directly related to an on-going legal dispute between the Welsh Government and the complainant.
43. Having considered the relevant public interest factors both in favour of disclosure and of maintaining the exemption, the Commissioner considers the weight of public interest is balanced in favour of maintaining the exemption and has therefore concluded that the Welsh Government correctly withheld the information outlined in paragraph 21 of this notice.

Section 41 – Information provided in confidence

44. The Commissioner does not consider that the items referred to paragraph 30 of this notice constitute legally privileged information and could not therefore engage section 42 of the FOIA. However, as the Welsh Government has also relied on section 41 in respect of these particular items, the Commissioner has considered whether section 41 is engaged in respect of them.

45. Section 41(1) of the FOIA states that:

Information is exempt information if –

- (a) It was obtained by the public authority from any other person (including another public authority), and*
- (b) The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person”*

46. Section 41 is an absolute exemption, therefore is not subject to the public interest under the FOIA.

47. The Welsh Government has confirmed that the information in question was provided by its lawyers, which in turn had either been received from or sent to a third party, in respect of on-going legal proceedings. Such third party information was provided both to and from the Welsh Government’s lawyers with expectations of confidentiality and it considers that disclosure of this information would constitute an actionable breach of confidence.

48. In his analysis of whether disclosure of the information would constitute an actionable breach of confidence the Commissioner must consider:

- whether the information has the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and
- whether disclosure would be an unauthorised use of the information and to the detriment of the confider.

49. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.

50. In this case, the disputed information is two emails sent to a third party from the Welsh Government’s lawyers and Annex 5 which is information supplied to the Welsh Government’s lawyers from a third party.

51. The Commissioner has seen no evidence that the withheld information has been put in the public domain and accepts the assurances from the Welsh Government that the information remains confidential. He is therefore satisfied that the information is not accessible by other means.

52. The Commissioner also notes that the information in question would not be considered trivial to either the lawyers or the third parties.

53. The Commissioner is satisfied that the withheld information has the necessary quality of confidence and has therefore gone on to consider whether the information was imparted in circumstances importing an obligation of confidence.
54. The information was provided to the Welsh Government on a voluntary basis from its lawyers with an explicit obligation of confidence. Additionally, Annex 5 was obtained by the Welsh government's lawyers from a third party with an explicit obligation of confidence.
55. The Commissioner has therefore gone on to consider whether disclosure of the information would be to the detriment of the confider.
56. The Commissioner is mindful of the Tribunal's decision in the case of *Bluck v ICO & Epsom and St Helier University Hospital NGHS Trust [EA/2006/0090] paragraph 15* that the loss of privacy can be a detriment in its own right. There is no need therefore for there to be any detriment to the confider in terms of tangible loss in order for it to be protected by the law of confidence other than the loss of privacy in its own right.
57. In this particular case, the Commissioner considers that disclosure into the public domain of the information as a loss of privacy, is highly likely cause distress and detriment to the confider, particularly in respect of Annex 5.
58. Section 41 is an absolute exemption therefore there is no requirement to consider the public interest test. However, within the Common Law of Confidence, there is a defence to an action for a breach of confidence, if it can be demonstrated there was an over-riding public interest defence. The Commissioner has therefore gone on to consider whether there is a public defence for a breach of confidence.
59. The Commissioner accepts that there may be a public interest in the disclosure of the information and acknowledges that the complainant has a personal interest in this information. However, in weighing this against the public interest in keeping the information confidential, the Commissioner has been mindful of the need to protect the relationship of trust between the confider and the confidant; and the need not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority.
60. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining that trust. He therefore finds that the Welsh Government would not have a public interest defence for breaching its duty of confidence and that the request for information is exempt under section 41 of the FOI. He has

therefore concluded that the Welsh Government applied the exemption appropriately. He has not therefore gone on to consider the Welsh Government's reliance on section 40(2) of the FOIA.

Section 21 – Information accessible to the applicant by other means

61. With regard to item 10(c) of the information request, the Welsh Government has refused to disclose the attachments to the following emails from its lawyers to itself on the basis of section 21 of the FOIA.
 - 27 July 2014 at 12:36
 - 14 August 2014 at 12:50
 - 15 August 2014 at 16:36
 - 22 August 2014 @ 12:29
 - 27 August 2014 at 21:14
62. Section 21 of the FOIA provides an exemption to information which is reasonably accessible to the applicant otherwise than under section 1 of the FOIA. The purpose of the section 21 exemption is to ensure that there is no right of access to information via FOIA if it is available to the applicant by another route. Therefore, unlike most exemptions, the circumstances of the applicant can be taken into consideration.
63. Although the information may be available elsewhere, a public authority will need to consider whether it is actually 'reasonably accessible' to the applicant before it can apply section 21. Defining 'reasonably accessible' is open to interpretation, however it generally applies to the following:
 - Information available via the public authority's publication scheme will be reasonably accessible to an applicant.
 - There is another existing, clear mechanism by which the particular applicant can reasonably access the information outside of FOIA. For example, under the Access to Health Records Act 1990.
64. Section 21 is an absolute exemption which means that where the exemption is engaged, a consideration of the public interest test is not necessary.
65. The Welsh Government has explained that each of the attachments to the emails specified in paragraph 61 of this notice were the final drafts of correspondence either sent directly to the complainant or via his lawyer and are therefore within his possession.
66. The Commissioner notes that the Welsh Government has taken the personal circumstances of the complainant into consideration when deciding whether to disclose this information and this is consistent with

bullet point 2 of paragraph 63 of this notice. He also considers that it is not an unreasonable assumption that documents already provided to the complainant will be 'reasonably accessible' to him. The Commissioner is therefore satisfied that section 21 of the FOIA is engaged in respect of this information.

Section 10 – Time for Compliance with the request

67. The complainant has also expressed dissatisfaction with the Welsh Government's procedural handling of his request for information and in particular, the delays in providing a substantive response. The Commissioner has therefore considered whether the Welsh Government has complied with its obligations under section 10 of the FOIA.
68. Under section 1(1) 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 information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him."*
69. Section 10(1) requires a public authority to comply with section 1(1) within 20 working days following the date of receipt.
70. The Commissioner notes that the complainant submitted his request on 6 February 2015 and received correspondence from the Welsh Government on 6 March 2015, stating that it was considering the public interest test in relation to section 42 of the FOIA. At this point, the Welsh Government's procedural handling of the request was compliant with its obligations under section 10(1) of the FOIA.
71. However, the Welsh Government's procedural internal review dated 8 April 2015, confirmed that it was only considering the public interest test in respect of part of the request and its substantive response did in fact include the disclosure of some information to the complainant. The Welsh Government therefore breached section 10(1) of the FOIA in its handling of this request for information.

Section 17 – refusal of the request

72. Section 17(1) states:

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which-

*(a) states that fact,
(b) specifies the exemption in question, and
(c) states (if that would not otherwise be apparent) why the exemption applies."*

73. In this instance, the Welsh Government did not issue a valid refusal notice within the 20 working day time for compliance. As such, it breached section 17(1) of the FOIA.

Right of appeal

74. 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

75. 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.
76. 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