

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 December 2018

**Public Authority:** Welsh Government

**Address:** [freedom.ofinformation@gov.wales](mailto:freedom.ofinformation@gov.wales)

### Decision (including any steps ordered)

---

1. The complainant requested various items of information in respect of the routing of the T3 TrawsCymru bus service in Wales. The Welsh Government initially provided some limited information, withheld a small amount under section 40(2) and did not respond to all items of the request as it considered some were not valid requests for information under the FOIA. During the course of the Commissioner's investigation the Welsh Government provided an amended response to the complainant and cited section 21 in respect of some of the information falling within the scope of the request.
2. The Commissioner's decision is that the Welsh Government was entitled to rely on section 40(2) in respect of the withheld information and section 21 in respect of information accessible to the applicant by other means. However, the Welsh Government's failure to respond to all items of the request, and within the appropriate timescale represents a breach of sections 1(1) and 10(1) of the FOIA.
3. The Commissioner does not require the public authority to take any steps.

### Request and response

---

4. On 22 November 2017, the complainant wrote to the Welsh Government and requested the following information in respect of the routing of the T3 TrawsCymru bus network:

*"1. Could you please tell me on which page of the Bevan Foundation report can I find the phrase you attribute to Dr Winckler, **I suggest that consideration should be given to routing some Trawscymru***

***T3 journeys between Aberystwyth and Wrexham as well as between Barmouth and Wrexham...*** [complainant's emphasis].

2. Could you please tell me whether your copy of the Bevan Foundation report contains the following phrase in paragraph 2.12 in the words of Dr Winckler, ***I recommend that further work be done in advance of the introduction of the proposed T3 service on the feasibility of its operation to Aberystwyth rather than Barmouth...***

3. Could you please tell me on what date(s) in 2014 was routing the T3 from Wrexham to Aberystwyth discussed as you state in your letter?

4. Could you please tell me the name/job title of the Welsh Government official(s) who were involved in discussions regarding routing the T3 from Wrexham to Aberystwyth?

5. Could you please tell me the name/job title/organisations of the officials from the external organisations to the Welsh Government (Local Authorities and Bus Service Providers) who were involved in discussions regarding routing the T3 from Wrexham to Aberystwyth.

(6) Could you please tell me what documentation the Welsh Government holds relating to discussions regarding routing the T3 from Wrexham to Aberystwyth. For example, memos, emails, meeting notes, personal notes, report etc?

(7) Could you please tell me the conclusions that resulted from discussions regarding routing the T3 from Wrexham to Aberystwyth and the reason that, ... ***a decision was taken to not pursue this option?***

(8) Could you please tell me whether the conclusions and decision (after discussions regarding routing the T3 from Wrexham to Aberystwyth) were shared with the partners to the T2/T3 contracts ie Local Authorities and Bus Service Providers?

(9) Could you please tell me the name/job title/organisation of the officials in those partner organisations who were informed of the conclusions and decision to not pursue routing the T3 from Wrexham to Aberystwyth?

(10) Could you please tell me whether high level review will consider the remit from Dr Winckler, ie ***I recommend that further work be done in advance of the introduction of the proposed T3 service on the feasibility of its operation to Aberystwyth rather than Barmouth...***

*(11) Could you please tell me whether your high level review will consider the remit "amended" and provided by your reassuring officials which is vastly different to the recommendation by Dr Winckler...*

5. The Welsh Government responded to five of the eleven items of the request on 20 December 2017, using different numbering to that originally specified in the request. It provided a response to items 3 and 7, and disclosed job titles and organisations in respect of items 4, 5 and 9, but withheld the names on the basis of section 40(2) of the FOIA.
6. Following an internal review the Welsh Government wrote to the complainant on 6 March 2018. It stated that since his request for an internal review did not make reference to the actual Welsh Government responses in respect of five of the eleven items of the request, these had not been considered as part of the review. It further informed the complainant that it was of the view that the six questions it had not provided responses to were not asking for recorded information, and as such were not valid FOI requests, adding that it does not hold recorded information which would answer these questions.

### **Scope of the case**

---

7. The complainant contacted the Commissioner on 5 March 2018 to complain about the way his request for information had been handled. He was not satisfied with the five responses he had originally received on 20 December 2017 or four of the six responses he received following the Welsh Government's internal review. He did however accept that the Welsh Government does not hold relevant information in respect of items 6 and 8 of his request.
  8. During the course of the Commissioner's investigation, the Welsh Government disclosed the name of one of its Deputy Directors it had previously withheld under section 40(2) of the FOIA. This does not therefore form part of the Commissioner's consideration of section 40(2) in this notice.
  9. With the exception of items 6, 8 and part of item 4, the Commissioner considers that the scope of her investigation is to consider the Welsh Government's response to all items of the complainant's request, and in particular, whether it has complied with its obligations under section 1(1) section 21 and section 40(2) of the FOIA.
-

## Reasons for decision

---

### Section 1 – General right of access to information held

10. 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 to respond to a request.
11. In her 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.
12. 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.
13. In this particular case, the Welsh Government did not initially provide a response to items 1, 2, 10 and 11 of the complainant's request, and at its internal review stage, informed the complainant that the FOIA does not require a public authority to provide views or opinions where those views are not already recorded. The Welsh Government also stated that it did not hold any or further information in respect of items 3 and 7 of the request.

#### *Item 3*

14. Item three asked what dates in 2014 the routing of the T3 from Wrexham to Aberystwyth was discussed. The Commissioner notes that in the Welsh Government's response to this item, it informed the complainant that the feasibility of altering the route was discussed on several occasions in 2014 with local authorities, leading up to the tendering of the service by Gwynedd Council in November 2014. It further informed the complainant that the only recorded minute it holds regarding the T3 routing decisions relates to a meeting held on 21 January 2014, and it does not hold a record of all the dates in 2014 on which routing the T3 from Wrexham to Aberystwyth was discussed. It added that officials and local authorities are in regular and frequent discussions via telephone and at meetings on a number of matters, some of which will have included discussions relevant to this item.

However, the discussions are not minuted nor the dates of those discussions recorded. It did however confirm that the discussions would have occurred before Gwynedd Council went out to tender for the T2 and T3 services.

15. The complainant is not satisfied with the amount of information provided as he considers that a decision as complex as the routing of the T3 would have involved multiple local authorities and bus service operators, and at least one meeting on that subject alone to agree a route.
16. The Welsh Government informed the Commissioner that the consideration of routing the T3 from Wrexham to Aberystwyth constituted a very small part of the discussions as the decision was taken not pursue this option at an early stage. However, it has stated that it does not hold any recorded information which confirms this decision and the only relevant information it holds was from the meeting referred to in its original response to the complainant dated 29 as opposed to 21 January 2014.

*Item 7*

17. Item 7 asked for the conclusions which resulted from discussions regarding the routing of the T3 from Wrexham to Aberystwyth and the reason the decision was taken not to pursue this option.
18. The Welsh Government provided information in respect of the agreed specification of the T3 route between Wrexham and Barmouth.
19. The Welsh Government has informed the Commissioner that the only recorded information it holds in relation to this item was provided in its response of 20 December 2017. It confirmed that there is no mention of 'conclusions regarding the possible routing of the T3 to Aberystwyth instead of Barmouth, nor mention of the reason it was not pursued. The meetings are not verbatim with only key actions and notes recorded.
20. The Commissioner has considered the original response to the complainant and the Welsh Government's response to her enquiry in respect of both items 3 and 7 of the request, and whilst she would have anticipated that additional information would be held in relation to this decision, she has concluded that the Welsh Government has provided all information relevant to these items and therefore complied with its obligations under section 1(1) of the FOIA.

*Items 1, 2, 10 and 11*

21. As stated elsewhere in this notice, the Welsh Government did not originally respond to these items of the request. However, following its internal review, it informed the complainant that he was not requesting

recorded information and as such, it did not consider them valid requests for information under the FOIA. It further informed the complainant that it does not hold recorded information which would answer those questions.

22. The Commissioner would point out that regardless of whether the Welsh Government holds relevant information in respect of these items, section 1(1)(a) of the FOIA requires a public authority to inform the complainant in writing whether it holds information of the description specified in the request if the request is deemed to be valid. The Commissioner considers that all the above mentioned items are indeed valid requests for information under the FOIA. Consequently, the Welsh Government's failure to respond at all in its original response and its dismissal of the requests as not valid in its internal review constitutes a breach of section 1(1) of the FOIA.
23. During the course of the Commissioner's investigation, the Welsh Government provided an amended response to the complainant in respect of items 1 and 2, citing section 21 of the FOIA. The Commissioner has therefore considered the Welsh Government's response to these items under her analysis of section 21.
24. Items 10 and 11 were in respect of a planned Welsh Government review of the routing of the T3 and whether it would consider the recommendation of Dr Winckler on the consideration of the feasibility of its operation to Aberystwyth rather than Barmouth.
25. The Commissioner is aware that the complainant has made a number of subsequent related FOIA requests to the Welsh Government which are also the subject of investigation, and she notes that during the course of the Welsh Government's responses it has now provided answers to items 10 and 11 of this request. In particular, the Welsh Government's internal review dated 1 May 2018 states:

*"Dr Winckler suggested that Welsh Government may wish to review the feasibility of rerouting the key east to west T3 service which currently links Barmouth to Wrexham to operate between Aberystwyth and Wrexham instead. Welsh Government is currently reviewing this suggestion and expects to report the findings to Ministers towards the end of May this year."*

26. In the Commissioner's view, this answers both items 10 and 11 of the complainant's request.

## **Section 21 – Information accessible to the applicant by other means**

27. As previously stated, during the course of the Commissioner's investigation, the Welsh Government provided an amended response to

the complainant in respect items 1 and 2 of the request providing a link to the Bevan Foundation report on its website and citing section 21 of the FOIA on the basis that the information is reasonably accessible to the applicant by other means.

28. Section 21 of the FOIA provides an exemption from the duty to provide 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.
29. 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.
30. Section 21 is an absolute exemption which means that where the exemption is engaged, a consideration of the public interest test is not necessary.
31. The Commissioner notes that both items 1 and 2 of the request ask questions in respect of the Welsh Government's copy of the Bevan Foundation Report. She is also satisfied that the complainant has access to the internet and considers that providing the link to the report on the Welsh Government's website will allow the complainant to access the report and answer the questions for himself. She has therefore concluded that the Welsh Government was entitled to rely on section 21 of the FOIA.

## **Section 40(2) – Personal information**

32. 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 Act would breach any of the data protection principles.
33. The Commissioner would point out that at the time the Welsh Government responded to this request, the General Data Protection Act

GDPR 2018 and Data Protection Act 2018 had not yet received royal assent, therefore the DPA 1998 remained the appropriate legislation.

34. In respect of items 5 and 9, the Welsh Government has withheld the names of six individuals, one of which is a Welsh Government official and the remaining five employed by various County Councils in Mid and North Wales.
35. In order to reach a view regarding the application of this exemption, the Commissioner firstly considered whether or not the requested information was in fact personal data.

### **Is the requested information personal data?**

36. Personal data is defined at section 1(1) of the DPA as:

*"personal data means data which relate to a living individual who can be identified-*

- (a) from those data,*
- (b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."*

37. When considering whether the information is personal data, the Commissioner had regard to his own published guidance: "*Determining what is personal data*".<sup>1</sup>

38. Taking into account her guidance on this matter, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of personal data:

- (i) "Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?"*

---

1

[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/what\\_is\\_data\\_for\\_the\\_purposes\\_of\\_the\\_dpa.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf)



(ii) *Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?"*

39. The Commissioner is satisfied that the names of individuals do constitute personal information.
40. The Welsh Government considers that disclosure would breach the first data protection principle.

### **Would disclosure contravene the first data protection principle?**

41. The first data protection principle requires that the processing of personal data be fair and lawful and,
- a. at least one of the conditions in schedule 2 is met, and
  - b. in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
42. 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.

#### *Would disclosure be fair?*

43. In considering whether disclosure of the withheld information would be fair, the Commissioner has taken the following factors into account:
- a. The reasonable expectations of the data subjects.
  - b. Consequences of disclosure.
  - c. The legitimate interests of the public.

#### *The reasonable expectations of the data subjects*

44. The Commissioner's awareness guidance on section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life.<sup>2</sup> Although

---

<sup>2</sup>[http://www.ico.gov.uk/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/PERSONAL\\_INFORMATION.ashx](http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/PERSONAL_INFORMATION.ashx)

the guidance acknowledges that there are no hard and fast rules it states that:

*"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."*

45. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) is will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).
46. The Commissioner notes that the requested information relates to the data subjects' professional lives. However, the Commissioner is mindful that not all information relating to an individual's professional or public role is automatically suitable for disclosure. She notes that whilst there may be little expectation of privacy with regard to information relating to a data subject's work duties, the seniority of the relevant individual(s) should be taken into consideration with a greater expectation of disclosure the more senior the role.
47. The Welsh Government has informed the Commissioner that a decision was taken to withhold the names of the six individuals as it believes that disclosure of their names would be unfair on the basis that that the individuals do not have either senior or public facing roles.
48. The Commissioner accepts that neither the Welsh Government official or the local government officials would not reasonably expect that their names would be disclosed given that their respective roles are neither senior nor outward facing.

#### *Consequences of disclosure*

49. In her assessment of the consequences of disclosure, the Commissioner is mindful of the fact that it is not always possible to quantify or prove the impact that disclosure may have on the data subjects. In this particular case however, the Welsh Government informed the Commissioner that the complainant already knows the names of the Welsh Government officer who has been and continues to be subject to what the Welsh Government considers to be frequent, unnecessary, unfair and biased comments, often circulated to a wide audience including the media, which has led to significant distress. The Welsh Government has stated its Official would be distressed at the disclosure of his name given the frequent accusations levelled at him from the complainant.

50. The Welsh Government also considers that it would not be fair to disclose the names of the five local government officers as it is likely to result in similar correspondence directed at the remaining five individuals.
51. The Commissioner considers that even though the complainant knows the Welsh Government officer's name, disclosure is likely to cause significant distress as disclosure under the FOIA is essentially a disclosure to the world at large. The Commissioner also accepts that disclosure of the names of the five local government officers is likely to cause them a significant level of distress.

*The legitimate public interest in disclosure*

52. Notwithstanding the data subjects reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure. For example, in the case involving the MP's expenses the former Information Tribunal commented that:

*'79. ...in relation to the general principle application of fairness under the first data protection principle, we find:*

*(..) the interests of data subjects, namely MPs in these appeals, are not necessarily the first and paramount consideration where the personal data being processed relate to their public lives'.*

53. In considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
54. In this particular case, the Welsh Government has stated that as requests for information are applicant blind, it does not know what the legitimate interests of the complainant are, however it is concerned that disclosure would be used to target the five local government officers.

In balancing the reasonable expectations of the data subject and the consequences of disclosure of the information against the legitimate public interest in disclosure, whilst the Commissioner accepts that there is a legitimate interest in disclosure, she considers it to be outweighed by the reasonable expectations of the data subjects and the potential consequences of disclosure. The Commissioner has therefore determined that it would not be fair to disclose the requested information as this

would breach the first data protection principle. Consequently she has determined that the Welsh Government was entitled to rely on section 40(2) in respect of the withheld information.

**Section 10(1) – time for compliance with request**

55. Section 10 of the FOIA states that, subject to subsections (2) and (3), 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.
56. The Commissioner notes that the complainant submitted his request on 22 November 2017 and did not receive a response to six of the items of his request until 6 March 2018 and in respect of items 10 and 11, the information itself until 1 May 2018. The Welsh Government clearly therefore breached section 10(1) of the FOIA in its handling of these items of the request for information.

## Right of appeal

---

57. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

58. 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.
59. 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 .....**

**Catherine Dickenson  
Senior Case Officer  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**