

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 October 2018

**Public Authority:** Welsh Government

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

### Decision (including any steps ordered)

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1. The complainant has requested various information in respect of the choice of independent investigators tasked with investigating claims of bullying within the Welsh Government. The Welsh Government provided some information but withheld the remaining information in reliance on section 40(2) FOIA. The Commissioner's decision is that the Welsh Government has complied with its obligations under section 1(1) FOIA and that it was entitled to rely on section 40(2) FOIA in respect of the remaining withheld information. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

### Request and response

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2. On 30 November 2017, the complainant wrote to the Welsh Government and requested the following information in respect of the Welsh Government's procedures to appoint to investigator James Hamilton into WG bullying claims:

*"I would like to read all data pertaining to the choice of investigators and subsequent decision to appoint the investigator James Hamilton tasked with investigating claims of bullying and subsequent internal investigatory procedures used and applied in the Welsh Government 2014 – 2017.*

3. The complainant provided the following further clarification as part of her request:

*"...You will note that the choice was not only the selection of one government employee (as it construed to be with Carwyn Jones in this request) but extends throughout the investigator's appointment process.*

*Therefore the response should not be limited to Carwyn Jones' involvement in the appointment alone."*

4. The Welsh Government responded on 2 January 2018. It informed the complainant that it had no arrangements in place for the First Minister to refer potential breaches of the Ministerial Code to an Independent Advisor and provided a brief outline of the process it had followed. It also informed the complainant that the terms of reference for the inquiry had been published.
5. Following an internal review the Welsh Government wrote to the complainant on 31 January 2018. It partially upheld the complainant's view that it had misinterpreted her request in that it had viewed it as seeking a description of the process to appoint an investigator and provided some recorded information relevant to her request. However, it withheld other information in reliance on section 40(2) FOIA.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 22 February 2018 to complain about the way her request for information had been handled. She was not satisfied that all information relevant to the request had been identified, stating that there must have been some data on file before the data supplied, as well as other data. She was also dissatisfied with the Welsh Government's reliance on section 40(2) FOIA as she considered it all to be in the public interest.
7. The Commissioner notes that during the course of her investigation, the WG provided additional information to the complainant it had previously withheld on the basis of section 40(2) FOIA. She has therefore not included this within the scope of this notice.
8. The Commissioner considers that the scope of her investigation is to determine whether the Welsh Government has complied with its obligations under section 1(1) FOIA and whether its reliance on section 40(2) in respect of the remaining withheld information was justified.

## **Reasons for decision**

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

9. 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.
10. 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.
11. 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.
12. In this particular case, the complainant considers that there must be written documents pre-dating those that have been supplied, as well as other data.
13. By way of background, the issue of whether the First Minister breached the Ministerial Code refers to comments he made on 11 November 2014 when he had been asked if he had ever received reports, or been made aware of allegations of bullying by special and/or specialist advisors, and then again on 14 November 2017 in response to allegations of bullying in the aftermath of the death of Carl Sargeant. The Wales Online refers to calls being made on 16 November 2017 for him not to be his own 'judge and jury' but to appoint an independent adjudicator to investigate these concerns.
14. The Commissioner notes that the decision to appoint the independent investigator James Hamilton was announced on 23 November 2017. She also notes that the dates of the information range from 21 November 2017 to 15 December 2017 with an update provided in relation to the terms of reference for the inquiry. She therefore asked the Welsh Government further questions around this including the date the First Minister actually decided to appoint an independent investigator and who this was communicated too.
15. The Welsh Government informed the Commissioner that as there was no precedent for the appointment of an Independent Adviser, there was no set process for making the appointment. It further informed the Commissioner that the decision was made either late on 20<sup>th</sup> or early on

21<sup>st</sup> November, with the necessary changes to the Ministerial Code being made on 22 November.

16. The Commissioner asked the Welsh Government to clarify why there appeared to be no correspondence from the First Minister. The Welsh Government informed the Commissioner that as the Senior Civil Servant involved and the First Minister sit in close proximity, it was easier to have verbal communication directly between them than to conduct matters via email. It further confirmed that there is no written correspondence from the First Minister as it was all agreed verbally within a 24 hour period.
17. In terms of the written documentation it has identified, the Welsh Government informed the Commissioner that conversations took place between the First Minister, two Senior Civil Servants and James Hamilton, which confirmed his appointment.
18. In terms of its searches, the Commissioner was informed that they included all Welsh Government mailboxes for each of the two Senior Civil Servants and Welsh Government officers. It added that it was not necessary to search under specific terms as there was so little electronic information available it has all been provided by the four individuals as they were aware of what information they had produced in relation to the request.
19. The Welsh Government has confirmed to the Commissioner that there is no additional information held in relation to this request, all electronic information has been provided with appropriate redactions of personal information.
20. The Welsh Government accepts that the lack of documented information would look suspicious to a requester and provided additional background information in the event of a similar situation arising in the future. It informed the Commissioner that it had announced by way of a Cabinet Statement that it would be undertaking arrangements to establish a panel of independent investigators with the process which commenced in June being on-going at the time.
21. Having considered the arguments put forward by the complainant, the details of the search and the Welsh Government's rationale behind it, whilst there is less information than one might anticipate, the Commissioner considers the explanation is reasonable based on the unusual situation the Welsh Government found itself in at the time. She also acknowledges that where two individuals sit in close proximity they are more likely to discuss arrangements verbally than to conduct a conversation via email. She has therefore concluded that based on the balance of probabilities, no further relevant is held. Consequently the

Commissioner is satisfied that the Welsh Government has complied with its obligations in respect of section 1(1) FOIA.

## **Section 40 – personal information**

22. 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 FOIA would breach any of the data protection principles.
23. The Commissioner is mindful that the current data protection legislation is the General Data Protection Act 2016 (GDPR) and the Data Protection Act (DPA) 2018. However, as this legislation had not been ratified at the time the Welsh Government provided its response and internal review, she will consider the arguments relevant to the Data Protection Act (DPA) 1998.
24. In order to reach a view regarding the application of this exemption, the Commissioner has firstly considered whether or not the requested information does in fact constitute personal data as defined by section 1(1) of the DPA 1998.

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

25. 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."*

26. When considering whether the information is personal data, the Commissioner has taken into consideration her published guidance: *"Determining what is personal data".<sup>1</sup>*

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[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)

27. On the basis of this guidance, 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?"*

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

28. The Commissioner notes that the information withheld is the names and contact details of Welsh Government officials, plus another individual whose name and contact details had been put forward as a potential Independent Adviser. She is therefore satisfied that the withheld information does constitute third party personal information as defined by the DPA 1998. The Welsh Government considers that disclosure of the information would breach the first data protection principle.

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

29. 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.

30. 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?*

31. In her consideration of 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 subject*

32. The Commissioner's guidance regarding 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 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."*

33. 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) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). However, not all information relating to an individual's professional or public role is automatically suitable for disclosure.
34. For example, the Commissioner acknowledges the general expectation that details of a person's employment should be considered confidential.
35. However, she also considers the seniority of the data subject is an important factor when considering their reasonable expectations, and in her view, the more senior a person is, the less likely it will be unfair to disclose information about him or her acting in an official capacity.

#### *Welsh Government officials*

36. In this particular case, the Welsh Government has argued that the officials tasked with researching and agreeing the appointment of the Independent Adviser, would have had no expectation that their names would be made public.
37. The Commissioner has considered this view and accepts that the two officials would have no real expectation of disclosure of their names in relation to the appointment of the Independent Adviser

#### *Third party*

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

38. The Commissioner notes that the withheld information also contains the name and contact details of a third party the Welsh Government had identified as a potential candidate for the appointment of the Independent Adviser role. However, as the Welsh Government was unable to contact this individual at the time, it is likely this person is unaware that they were even being considered for the role. As such, the Commissioner accepts that there would be no expectation that this information would be disclosed.

*Contact details of Welsh Government Officials, the appointed Individual Adviser, and third party*

39. Having considered the withheld information, the Commissioner notes that the Welsh Government has also redacted the contact details of each of its officials, the appointed Individual Adviser and the third party. Whilst the Welsh Government does not appear to have provided any arguments in support of its redaction of this information, the Commissioner is aware that contact with most organisations including the Welsh Government is managed through general email addresses for the relevant team; the individuals concerned do not have a public facing role, and would therefore have a general expectation that their contact details remain private. The Commissioner also considers that since the third party may not even be aware that they were considered for the role, there would be a clear expectation that contact details remained private.

*Consequences of disclosure – names of Welsh Government officials*

40. The Commissioner's guidance regarding the disclosure of information about employees states that:

*"Disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life."*

41. The Welsh Government has argued that the circumstances surrounding the appointment of an Independent Adviser were sensitive, generating hundreds of news stories and a significant amount of public interest in the matter, with some of the stories being very hostile towards the Welsh Government and the First Minister in particular. It has further stated:



*"It is not right that those officials who were simply performing their duties as instructed by the First Minister should be exposed by virtue of this request for information."*

42. The Commissioner has considered the arguments put forward by the Welsh Government and whilst she would point out that a blanket ban on the disclosure of the names of public employees is not acceptable, as the employees appear to be relatively junior and do not appear to have a public facing role, she accepts that the disclosure of the names of the two officials is likely to cause them an unjustified level of distress.

*Consequences of disclosure - Third party*

43. The Welsh Government has argued that the release of the name of the third party put forward as a potential candidate for the role of Independent Adviser could lead to unfair and unfounded speculation that this individual was in some way unsuitable, as opposed to the reality that they had not been contactable at the time when it was looking to make the appointment. It was unable to speculate on the consequences this may have on the individual who most likely remains unaware that their name was put forward.
44. The Commissioner accepts that the disclosure of the third party's name in this context is likely to generate an unjustified intrusion and level of distress.

*Consequences of disclosure - contact details of Welsh Government Officials, the appointed Individual Adviser, and third party*

45. The Commissioner has already indicated that the Welsh Government does not appear to have put forward any arguments in support of withholding the contact details of the various individuals specified in paragraph 28 of this notice. However, the Commissioner is mindful that disclosure of the direct contact details of the individuals could potentially result in unwanted direct contact from members of the public, whereas this is currently managed via a general email address for the relevant team.
46. In terms of the consequences for the third party the Commissioner is also concerned that this could lead to unwanted direct contact from members of the public which could be viewed as an unjustified intrusion to this individual's privacy, particularly as the individual played no active role in the process of appointing the independent advisor.

*The legitimate public interest in disclosure*

47. 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.

48. In weighing up the balance, whilst the Commissioner acknowledges the complainant is interested in obtaining this information, and notes the general legitimate public interest in the disclosure of details of the appointment of an independent investigator in respect of a potential breach of the Ministerial Code by the First Minister; the Welsh Government has disclosed the detail of the information itself and considers the disclosure of the remaining withheld information would not aid public understanding of the issues or otherwise serve the public interest in any meaningful way. Additionally, the names of the two Senior Civil Servants have been disclosed during the course of the Commissioner's investigation. Consequently, the Commissioner considers that the reasonable expectations of the data subjects, combined with the consequences of disclosure are weighted in favour of protecting the personal information of the data subjects and she is satisfied that the information should be withheld on the basis of section 40(2) of the FOIA.

## Right of appeal

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49. 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)

50. 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.
51. 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**