

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 15 October 2019

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to a grant provided to a specific firm. The Welsh Government relied on section 43 (commercial interests) and section 40(2) of the FOIA (third party personal data) to withhold the information.
2. The Commissioner's decision is that the Welsh Government has correctly applied section 40(2) to withhold one document, but that it has failed to demonstrate why section 43(2) is engaged and is thus not entitled to rely on that exemption to withhold information.
3. The Commissioner requires the Welsh Government to take the following steps to ensure compliance with the legislation.
  - Disclose, to the complainant, documents 1, 2 and 3. It may redact the signatures, phone numbers and email addresses contained therein.
4. The Welsh Government 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.

## Background

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5. In 2017, the British Steel Pension Scheme was permitted, by the Pensions Regulator, to split off from Tata UK with the aim of making Tata more attractive to investors.
6. Scheme members were given a choice to move to a new British Steel Pension scheme, transfer to a personal pension or have the existing scheme fall into the Pension Protection Fund.
7. When the decision was announced, a number of firms began cold-calling scheme members to encourage them to transfer their pension into less-generous schemes or to introduce them to other companies who would encourage them to switch. Some of these firms were able to gain commission when they transferred scheme members.
8. One of the firms alleged to be involved in cold-calling activities was Celtic Wealth Management and Financial Planning Ltd "CWM." CWM has always maintained that it acted properly and in accordance with the law.
9. In 2014, the Welsh Government made a grant of £118,500 to CWM.

## Request and response

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10. On 1 March 2019, the complainant wrote to the Welsh Government and requested information in the following terms:

*"[I] would like to request:*

- 1. Celtic Wealth Management's submission of evidence on how they met the terms of the grant*
- 2. The Independent Auditor's report on Celtic Wealth Management's submission as above*
- 3. In the event that the terms (e.g. requirements, deliverables, ethical standards) of the grant agreement between Celtic Wealth Management and the Welsh Government are not included in the Auditor's Report – the full terms of that agreement."*

11. The Welsh Government responded on 29 March 2019. It stated that it was withholding all the information it held within the scope of the request, relying on section 43(2) of the FOIA to do so.

12. Following an internal review the Welsh Government wrote to the complainant on 1 May 2019. It maintained its reliance on section 43(2) and also noted that some of the information was the personal data of third parties and thus exempt under section 40(2) of the FOIA.

### **Scope of the case**

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13. The complainant contacted the Commissioner on 7 May 2019 to complain about the way his request for information had been handled.
14. At the outset of the investigation, the complainant confirmed that he had no interest in the personal data contained in the withheld information – providing the Commissioner could confirm that the information which had been redacted matched the description set out, by the Welsh Government, in its internal review.
15. As the Commissioner considers the Welsh Government's description of the personal data it has withheld to be accurate, the focus of this notice is to determine whether the Welsh Government was entitled to rely on section 43(2) of the FOIA to withhold the remaining information.

### **Reasons for decision**

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16. Section 1(1) of the FOIA states that:

*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.*

17. The Commissioner has examined the withheld information in this case and notes that it comprises of:
  1. A Welsh Government grant offer letter to Celtic Wealth Management dated 25 February 2015;
  2. An Audit Certificate signed by the independent auditors dated 13 November 2018; and
  3. A Welsh Government signed Post Completion Monitoring Report dated 13 November 2018;

4. A Job Grant Employment Record Sheet signed by the independent auditors dated 13 November 2018.

### Personal Data

18. Section 40(2) of the FOIA allows information to be withheld if it constitutes the personal data of a third party and where disclosure of that information would breach the GDPR principles.
19. As the complainant had already agreed that he was not interested in the personal data, the Commissioner has not made a detailed consideration of this information. However she notes that the Welsh Government did provide an accurate description, to the complainant, of the information it had withheld.
20. The first three documents contain signatures and contact details which the Commissioner considers should not be disclosed.
21. In relation to document 4, the Commissioner has examined this document and notes that it is a list of all the people employed by CWM at various times over the period of the grant, together with their National Insurance numbers, periods of employment and salary costs.
22. Whilst the complainant has already indicated that he has little interest in this document, the Commissioner considers that the information it contains is the personal data of the employees listed. Those employees could be identified from the document and therefore the Commissioner considers that the Welsh Government would be entitled to rely on section 40(2) of the FOIA to withhold it.

### Section 43(2) – Commercial Interests

23. Section 43(2) of the FOIA states that:

*"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."*

24. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure only "would be likely" to prejudice those interests. For the Commissioner to be convinced that prejudice "would" occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of "would be likely to" occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.

25. The Welsh Government argued that prejudice “would be likely to” occur to CWM as a result of the disclosure of information. It backed up this assertion by providing a lengthy submission it had received from CWM along with a great deal of background information. The independent auditor (who authored document 2) did not claim that its commercial interests would be prejudiced – although it did raise some other concerns – which the Commissioner has considered under “Other Matters.”
26. CWM’s submission to the Welsh Government focused heavily on its relationship with the complainant and on what it perceived as inaccurate press stories which had previously had a detrimental effect on its activities and its employees. CWM argued that disclosure would likely lead to further negative press coverage which, it claimed, would mean that “*it will be very unlikely that CWM will survive as a business.*”
27. CWM also noted that document 3 contained information regarding the company’s staffing levels, premises and assets and that document 1 contained “financial information”. However it did not identify why or how its commercial interests would be likely to be prejudiced by release of that information.
28. In its initial response to the request, the Welsh Government also identified that:

*“The information would reveal commercially sensitive information not otherwise publically available and which, if disclosed would be likely to prejudice the company’s service offering and future strategy. The information for example, contains financial information as part of the process for funding which are not in the public domain.*”

*“Placing this information into the public domain would likely put the company at a commercial disadvantage in a very competitive market. Competitors would have access to a level of information not otherwise available to them so as to enable them to obtain a commercial advantage. Releasing the information would also provide the company’s competitors with an indication of the company’s funding position which in turn would be likely to prejudice their ability to further capitalise its business. It would also have a direct impact upon the Company’s current and future potential revenues as well as its ability to conduct business in the free market by adversely influencing existing and potential clients.”*

However the Welsh Government failed to expand on these arguments in its submission to the Commissioner – which focused on the reputational damage the Welsh Government claimed would occur to CWM if the

information were disclosed. Although the Welsh Government did note that such information:

*"would likely to be of interest to competitors as it provides a level of detail not otherwise available to them. For example, it refers to staffing information, directors loans and shares."* [sic]

29. On reputational damage, the Welsh Government again stressed CWM's assertion that previous media reporting had been inaccurate and had therefore painted a misleadingly negative picture of the company. It stated that:

*"the Welsh Government is of the view that there is a real risk of further commercial prejudice to CWM, not least in the form of a loss of customer confidence should the information be released."*

30. Finally, the Welsh Government was keen to point out that the grant to CWM had been awarded solely on the basis of CWM creating an agreed number of jobs over an agreed period. CWM's grant had been signed off on the basis that it had met those specified objectives. Because of this, the Welsh Government argued, the withheld information would not contain any information which would be likely to shed light on the propriety of CWM's activities – which was the broad focus of the complainant's interest.

#### *The complainant's position*

31. The complainant argued that there was a compelling public interest in disclosure of the information. He suggested that there was a *prima facie* case to suggest that CWM's activities had led, either directly or indirectly, to steel workers losing out on future pension entitlements and therefore there was a public interest in any information which would shed light on those activities.
32. The fact that the Welsh Government had awarded a loan to CWM was, the complainant argued, when requesting an internal review, tantamount to giving a "seal of approval" to the way the business was run. Potential customers engaging with CWM would note the fact that it had received a grant from the Welsh Government and be likely to reach the conclusion that CWM's activities were somehow "approved by" the Welsh Government.
33. In summary, having set out what he considered to be the "case against" CWM, the complainant stated that:

*"[I] therefore find it concerning that Celtic Wealth was still found to have met the terms of its Welsh Government funding. There are clearly questions about whether there were, or should be, any*

*ethical standards included in the funding agreement. If a company like Celtic Wealth Management can meet the terms of its funding, then it would be useful to understand what wrongdoing a company would have to do to not meet the terms of Welsh Government funding of this nature."*

*The Commissioner's view*

34. The Commissioner's view is that the Welsh Government has failed to demonstrate a clear causal link between the release of the information and the prejudice to CWM's commercial interests it believes would be likely to result.
35. In the Commissioner's view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to another party's commercial interests to engage the exemption. Nor is it sufficient for the other party to assert that such prejudice would be likely to occur. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.
36. In the Commissioner's view, the Welsh Government's arguments amount to little more than mere assertions that prejudice would be likely to occur. It has failed to demonstrate why the withheld information would be of more use to CWM's competitors than the financial information already placed into the public domain through Companies House. The Welsh Government has also failed to explain why the information contained in document 1 – which related the financial position of CWM in February 2015 – would be of use to competitors in March 2019, when the request was made.
37. The Welsh Government was not helped in its task, in the Commissioner's view, by a poor and unfocused submission from CWM on why prejudice to its commercial interests would be likely to result from disclosure. CWM's submission was, in the Commissioner's view, largely aimed at justifying its previous actions, defending its own reputation and settling scores with the complainant. CWM provided a great deal of social media correspondence and news articles which were irrelevant to the withheld information or the reasons why that information was being withheld.
38. Whilst the Commissioner accepts that avoiding reputational damage can be a commercial interest, she does not accept that the Welsh Government (or CWM) was able to demonstrate a clear link between disclosure of the withheld information and damage to CWM's reputation.

39. Indeed, the Commissioner considers the Welsh Government's arguments on this point to be contradictory, because it was arguing both that the withheld information contained nothing which would shed light on CWM's business methods and that disclosure would be so damaging to CWM's reputation that it would be likely to threaten the company's very survival.
40. Even if previous reporting of the story was inaccurate (and she takes no position on the matter), the Commissioner considers that this weakens, rather than strengthens the likelihood and severity of prejudice occurring. Placing more information into the public domain is likely to improve the accuracy of any reporting. If, as CWM suggests, previous stories were negative because they were based on inaccuracies, improving the accuracy of reporting would make any further stories less negative.
41. The Commissioner has seen nothing in the withheld information to suggest that any of the parties involved were acting improperly. Whilst she accepts that not all of this information would have been in the public domain at the time of the request, the Welsh Government has failed to demonstrate how the additional information could have been used to damage CWM's interests. She therefore finds that section 43(2) is not engaged in relation to any of the withheld information.
42. As the exemption is not engaged, the Commissioner is not required to consider the balance of the public interest. However, she notes that the weight of the public interest in favour of maintaining the exemption will be closely correlated with likelihood and severity of the prejudice claimed. In this case the Welsh Government has failed to convince her that where prejudice would be likely that it would also be severe or that where that prejudice would be severe it would also be likely.



## Other matters

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### *Third Party Submissions*

43. As previously noted, the Commissioner considers that the Welsh Government's arguments in this case were not assisted by a poor submission from CWM.
44. The First Tier Tribunal in *Derry City Council v Information Commissioner EA/2006/0014*<sup>1</sup> found that a public authority should base any claims of prejudice to commercial interests of a third party on the known views of that third party – and not on its own assumptions of what prejudice it thinks might occur. It was therefore necessary for the Welsh Government to contact CWM to seek its views on disclosure.
45. It is neither possible nor desirable for the Commissioner to determine whether CWM failed to provide what the Welsh Government asked for or whether the Welsh Government failed to ask the right questions of CWM. However, the Commissioner considers that public authorities, when seeking submissions from third parties, should make sure that they seek submissions which are focused on the claimed exemptions.

### *Duty of Confidence*

46. Document 2 is the report of the independent auditor who assessed whether CWM had met the conditions of the grant. The auditor, when consulted by the Welsh Government, did not object to the precise information being released, but it did express more general concerns about the principle of breaching the confidence of its client.
47. The Commissioner is satisfied that the issue does not arise for the auditor in this case because it is the Welsh Government which would be disclosing the information and not the auditor.

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<sup>1</sup> <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i69/Derry.pdf>

## Right of appeal

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48. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

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

49. 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.
50. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**SK9 5AF**