

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 February 2020

**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 requested a copy of the Equality Impact Assessment conducted for the Welsh Government's plan to advance equality for transgender people. The Welsh Government stated that it did not hold the information requested. The Commissioner's decision is that, on the balance of probabilities the Welsh Government does not hold the information requested. The Commissioner does not require any steps to be taken.

### Request and response

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2. On 6 March 2019 the complainant wrote to the Welsh Government and requested information in the following terms:

*"I received an email from the Welsh Government in August 2018 which stated that the "Welsh Government Action Plan to advance equality for transgender people", published in March 2016, had been Equality Impact Assessed.*

*I am making a request under the Freedom of Information Act 2000 to be supplied with a copy of this Equality Impact Assessment".*

3. The Welsh Government responded on 3 April 2019 and stated that it did not hold the requested information.

4. On 4 April 2019 the complainant wrote back to the Welsh Government advising that she had been assured previously that an Equality Impact Assessment ('EIA') had been carried out. She asked for confirmation that an EIA had been undertaken and, if it was but the document was no longer held, whether it had been lost or destroyed.
5. The Welsh Government responded on 5 April 2019 and confirmed that an EIA had been undertaken and intended to be updated throughout the consultation process and published once the consultation ended. However, the Welsh Government advised that, despite a thorough search of its records, it could not be located, and as such it appeared that it had been deleted. It acknowledged that this was *"not satisfactory and apologise for not being able to provide this information"*.
6. On 8 April 2019 the complainant wrote to the Welsh Government and asked whether the document had been deleted in error, or as part of its records management policy. She also asked for the date it was deleted and *"information which explains why it was decided that it was no longer necessary to retain this Equality Impact Assessment, or to recover or replace it if its deletion was due to an error"*. Finally, the complainant asked whether a copy of the document was held in any archive or backup system.
7. The Welsh Government responded on 18 April 2019 and confirmed that it was unable to determine why or how the EIA was lost/deleted. It also confirmed that it had been unable to locate a copy of the document in archive/backup systems. The Welsh Government advised that, as far as it was aware, the loss/deletion was not the result of any conscious decision or policy to not retain it. In addition, as the loss was only discovered as a result of the request no previous consideration had been given to replacing/updating the document. Finally, the Welsh Government advised that it was awaiting the outcome of the UK Government's consultation on the Gender Recognition Act before deciding on its next steps. It assured that an EIA would be prepared to inform any future work to update or replace the plan and it would ensure the EIA was accessible.
8. On 8 May 2019 the complainant requested an internal review of the Welsh Government's handling of the request.
9. The Welsh Government provided the outcome of its internal review on 6 June 2019 and upheld its position that it did not hold a copy of the EIA in question and all reasonable steps had been taken to locate it.

## Scope of the case

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10. The complainant contacted the Commissioner on 12 August 2019 to complain about the way his request for information had been handled.
11. The scope of the Commissioner's investigation into this complaint is to establish whether the Welsh Government holds the requested information.

## Reasons for decision

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### Section 1 – general right of access

12. Section 1 of the FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to him.
13. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held, and she will consider any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held; she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
14. The Welsh Government confirmed that on receipt of the initial request searches were conducted by officials within the Equality team for electronic records of the EIA and Transgender Action Plan in various combinations and formats such as "EIA". Searches were also conducted of the Welsh Government's *"current webpages and an older web site page and of documents held in the electronic files 'Lesbian, Gay & Bi-Sexual & Transgender – Transgender Action Plan – 2015 – 2020'"*.
15. The Welsh Government confirmed that additional searches were also conducted at the time of its internal review. These were carried out by different Operation/Business teams to search their electronic records for the document. The search terms used included variations of 'Equality Impact Assessment (EIA) for the Welsh Government Action Plan to advance equality for transgender people' and 'Welsh Government Action Plan to advice equality for transgender people – Equality Impact

Assessment (EIA)'. As well as interrogating its IT systems, key officials who were involved with the work/plan at the time were directly approached by officials in the current policy team. The searches carried out included both desktop computers and laptops, all of which are networked resources. The Welsh Government also confirmed that searches covered both electronic filing and email systems.

16. Prior to the Commissioner's involvement in this case, the Welsh Government advised the complainant that, at the time of the development of the Action Plan to advance equality for transgender people, an EIA was undertaken. It was intended that the EIA would be updated throughout the consultation process. A decision was taken not to publish the EIA until the consultation had been completed. It was only on receipt of the request of 6 March 2019 that the Welsh Government became aware of the fact that the EIA was not held. The Welsh Government stated that:

*"As far as we are able to determine, this loss was not the result of any conscious decision or policy not to retain the EIA. Similarly, since the loss was only discovered following your request, no consideration has been given until now to replacing it. Given the passage of time since the Action Plan was published in 2016, doing so would be both difficult and of limited value, since any retrospective action would inevitably be affected by subsequent developments.*

*We do, however, recognise that a review of the plan would be pertinent to ensure that it is up-to-date. As indicated in previous correspondence, we are presently awaiting the outcome of the UK Government's consultation on the Gender Recognition Act before deciding on the next steps the Welsh Government should take in this area. We will ensure that an EIA is prepared to inform any future work to update or replace the plan, and we will of course make sure that this new EIA is accessible"*

17. The Welsh Government advised the Commissioner that its records management policy sets out that information such as this EIA should be retained for a period of up to 15 years from the date that it was last used/updated. As the EIA requested in this case appears to have been lost or deleted in error, the Welsh Government confirmed that it did not hold a record of its destruction and it was unable to give any indication as to exactly when it was lost/deleted other than to confirm that the loss was only identified when searches for it were conducted in response to the request of 6 March 2019. The Welsh Government also confirmed that it did not pass copies of this type of information to any other organisations and there was no evidence to suggest that the EIA had ever been shared externally.

18. The Welsh Government also confirmed that searches were conducted by its Senior Cloud Infrastructure Engineer through backup storage facilities for the file name (and versions of it) but this did not identify any copies, draft or otherwise of the EIA. The engineer advised that documents could not be recovered if they had been deleted more than 90 days ago.
19. In view of the importance of the document in question, the policy process which it fed into and the likelihood that the document would have been updated/amended during the time it was produced, the Commissioner asked the Welsh Government for further information relating to the drafting process and the reason why no record whatsoever of the document in question was held, for example, early drafts/versions.
20. The Welsh Government confirmed that it had consulted with all relevant staff who had been involved in the Transgender Action Plan, consideration of its impact on equality and with responsibility for drafting the EIA template. To the best of the knowledge of these officials, they recalled an EIA template being started but it was not completed or published. As a draft document, it was not saved on the relevant electronic filing system (iShare), although the Welsh Government confirmed that it should have been, and this was an oversight on the part of the relevant officials. The Welsh Government confirmed that thorough searches of all drives had taken place in response to this request but the draft EIA template has not been found.
21. The official with responsibility for LGBT equality was responsible for undertaking the assessment of impact on equality and drafting the EIA template. The Head of Branch and Deputy Director would have been responsible for signing off the EIA. The Welsh Government advised that *the actions to assess equality were discussed with the Head of Branch and Deputy Director, but as the EIA was not finalised and populated, it was not agreed or signed off*". As the Welsh Government have been unable to find any drafts, early, incomplete or otherwise, of the document it is unable to confirm any dates that the document was drafted, accessed or updated other than confirming that it would have been sometime during 2015, whilst the Transgender Action Plan was being developed.
22. The Welsh Government advised that, to the best of official's recollection, the EIA template was started but not completed and it was at an early stage of drafting. However, it explained that:  
  
*"The impact on equality was integral to the development of the Action Plan and assessed through desk top research and analysis. This focused on the impact on equality for transgender people (LGB, BAME, younger or older, etc.), although this evidence at that time was very limited. The*

*research fed into highlighting the areas within Welsh Government that could contribute most to transgender equality and these then featured in the draft Action Plan. There was then a 12 week consultation on the draft Action Plan, including three focus groups with transgender people. There were 62 written responses, and a summary of the consultation was then published.*

*So, whilst an EIA template was not fully completed (and indeed to the best of officials' recollection was at an early stage of drafting), and was not saved and published (which we acknowledge it should have been), the impact on transgender equality was considered as part of developing the Action Plan".*

23. The Welsh Government's records management policy is that all documents that need to be retained are saved into iShare (which includes emails and drafts). Working practices sometime mean that early drafts are first stored in temporary areas or shared via email without them being saved into iShare. Documents on personal drives and desktops are regularly deleted to save space. This means that if action is not subsequently taken to save a version of a document into iShare then no copies will exist once the temporary storage area is cleared.
24. Since 2015 the Welsh Government's policy has been that emails are automatically deleted after 12 months, following good practice and in accordance with the recommendations of The National Archives in their 2014 Information Management Assessment.
25. As well as the searches undertaken of personal drives, iShare and backup storage, during the Commissioner's investigation into this complaint the Welsh Government's central information management teams conducted a final check, details of which are below:

*"The Records team undertook a search of iShare using administrator privileges and a wide search criteria to find any possible matches. The results of this search were reviewed by the policy team to confirm that no versions of the EIA were contained as documents or attachments to filed emails.*

*Team shared drives (P: drives) have historically been used to store documents. The records policy was to print to file (prior to 2011) or save into iShare (since 2011). Many of these P: drives have been made read only after 2011 and not open to storing new information, although some remained open. Welsh Government IT undertook a search of all P: drives to identify any that may contains documents related to the equalities policy area. P: drives that were identified were search by the*

*Welsh Government archives team using the Nuix eDiscovery tool. No copies of the EIA were found.*

*An email vault was in operation until late 2014 where emails would be automatically saved. This was purely a mechanism to avoid performance issues from an IT perspective and was not a part of the official records management policy – which was to save in iShare. Once this was no longer needed from a performance point of view it was closed at the end of 2014 and has been retained since purely to review in relation to the Independent Inquiry into Child Abuse. Although the vault closed just before work on the EIA is likely to have taken place, a search using the Nuix eDiscovery tool was undertaken by the Welsh Government archives team for emails from the relevant officials. No copies of the EIA were found”.*

### **Commissioner’s position**

26. It is clear from the Welsh Government’s responses that the information requested *should* be held, particularly as relevant officials recall the document being drafted and such documents are retained for 15 years in line with its retention policies. Given the importance of the document in question and the fact that it is referred to as having been drafted within advice to the relevant Minister, the Commissioner is satisfied that the document in question was held at some point and it should have been available at the time of the request of 6 March 2019.
27. However, it is not within the Commissioner’s remit to investigate what information a public authority *should* hold. The Commissioner is limited to assessing whether, on the balance of probabilities, a public authority held information relevant to a request at the time a request is made. Based on the extensive searches which the Welsh Government has conducted both prior to and during her investigation, the Commissioner is satisfied that it has carried out searches of all the places where relevant information would be held.
28. Requests made under FOIA apply to information held at the time that the request is received. So, if a public authority receives a request for information that it held in the past, but has since been destroyed, it no longer holds that information. In order to comply with FOIA the public authority can reply to the request stating that it does not hold the information.
29. The Commissioner would however expect that the public authority, as a matter of good records management practice, explain to the applicant when and why the information was destroyed. This conforms with the Lord Chancellor’s Code of Practice on the management of records (issued under section 46 of FOIA) which states at section 12 that,

*"authorities should define how long they need to keep particular records, should dispose of them when they are no longer needed and should be able to explain why records are no longer held."*

30. Taking account of all the circumstances of this case The Commissioner is prepared to accept the Welsh Government's position that the only explanation for the absence of document in question is that it has been inadvertently lost or deleted in error and this was only brought to light following receipt of the request in this case. As such, the Welsh Government is unable to explain why or when the information was lost or deleted in error.
31. The Commissioner has some sympathy with the complainant in this case as she considers it reasonable for an individual to assume that the document is held. However, based on the representations provided by the Welsh Government the Commissioner is satisfied that it has carried out searches of the places where relevant information would be held. There is no evidence of any inadequate search or grounds for believing there is a motive to withhold information. The Commissioner has also considered the Welsh Government's representations in relation to background information and explanations about the drafting of the document. Based on the searches undertaken and the other explanations provided, the Commissioner is satisfied that, on the balance of probabilities, the Welsh Government does not hold any recorded information relating to the request.

## Right of appeal

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32. 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)

33. 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.
34. 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 .....**

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