

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 November 2017

Public Authority: Welsh Assembly Government

Address: Cathays Park
Cardiff
CF10 3NQ

Decision (including any steps ordered)

1. The complainant has requested various items of information in respect of a Health Inspectorate Wales review of an Independent External Review commissioned by the then Cardiff Local Health Board into its care of the perpetrator of the murder of a named individual in 2003. The Welsh Assembly Government refused the request citing sections 38(1)(a) and 38(1)(b), and section 40(2) of the FOIA. The Commissioner's decision is that the Welsh Government has correctly relied on sections 38(1)(a) and 38(1)(b) of the FOIA in respect of this request. However, the Welsh Assembly Government's failure to send its refusal notice within the time required represents a breach of section 17(1) of the FOIA. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 28 September 2016, the complainant wrote to the Welsh Government and requested the following information in respect of an investigation into a review of an independent external investigation of the then, Cardiff Health Board's care of the perpetrator of the murder of a named individual in 2003:

"...all documents – including letters, emails, notes of meetings, notes of telephone conversations - between the then Chief Executive of NHS Wales and those advising her on this matter. The scope of this request relates to all such material generated between the date of the incident, the publication of the Health Inspectorate Wales, Health Commission Wales and Cardiff Local Health Boards' reports on the circumstances

surrounding the case and any subsequent responses from the Chief Executive of NHS Wales."

3. The Welsh Government responded on 22 November 2016. It confirmed that it held relevant information, but refused the request on the basis of sections 38(1)(a) and 40(2) of the FOIA.
4. Following an internal review the Welsh Government wrote to the complainant on 23 January 2017. It stated that the Welsh Government was satisfied with its reliance on the exemptions cited in its initial response.

Scope of the case

5. The complainant contacted the Commissioner 27 January 2017 to complain about the way his request for information had been handled. He was dissatisfied with the Welsh Government's reliance on the exemptions cited and informed the Commissioner of the highly personal background to his request.
6. The complainant has further informed the Commissioner that he is not interested in personal information, and merely wants to know what process was followed.
7. Whilst the Commissioner would like to take this opportunity to acknowledge the sensitive personal background to this request, she would point out that the scope of her role, and this investigation is limited to whether the information is appropriate for disclosure into the public domain.
8. During the course of the Commissioner's investigation, the Welsh Government has informed the Commissioner that it now wishes to rely on section 38(1)(b) of the FOIA, in addition to section 38(1)(a). The scope of the Commissioner's investigation has therefore included both limbs of section 38(1).

Reasons for decision

Section 38 health and safety

9. Section 38(1) of the FOIA provides that:

"Information is exempt information if its disclosure under this Act would, or would be likely to –

(a) endanger the physical or mental health of any individual, or

(b) *endanger the safety of any individual.*"

The prejudice test

10. To determine whether the application of section 38(1) in respect of the requested information was correct under the terms of the FOIA, the Commissioner has considered the 'prejudice test', in this case, whether disclosure of the information would cause the endangerment to the physical or mental health of any individual, or endanger the safety of any individual.
11. Unlike the other exemptions in the FOIA subject to the prejudice test, the word 'endanger' is used in section 38 rather than the word 'prejudice'. However, the Commissioner does not consider that the use of the term 'endanger' represents a departure from the test of prejudice to which section 38 is subject.
12. In *Hogan v the Information Commissioner and Oxford City Council* (EA/2005/0026 and 0030) the Tribunal stated that:

"The application of the 'prejudice' test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption ... Second, the nature of 'prejudice' being claimed must be considered...A third step for the decision-maker concerns the likelihood of occurrence of prejudice."
13. The Welsh Government has provided arguments in support of the exemption and its public interest test which it has asked the Commissioner to keep confidential. These details have therefore been discussed in the confidential annex accompanying this notice.
14. Subsequent to the issue of her decision notice, the Commissioner has received representations from the public authority in relation to paragraphs 14 to 20 of said notice. The public authority considers that these paragraphs contain personal information relating to third parties which could potentially cause damage or distress if published in the public domain. After considering the representations of the public authority, the Commissioner has agreed to redact those paragraphs from the version of the notice published here.
15. The complainant has further explained to the Commissioner that this continues to have a significant impact on his life and is seeking answers to his outstanding questions. Whilst the Commissioner is sympathetic to the complainant's very personal concerns, as outlined in the scope of her investigation, she can only consider whether the disputed information is appropriate for disclosure into the public domain.

16. The Commissioner has been unable to present the arguments of the Welsh Government in this open section of the decision notice, as the representations centre around sensitive personal data of a number of people that would be entirely inappropriate to simply relay into the public domain. However, for completeness, the arguments have been given due consideration within a confidential annex so that the relative weight and consideration can be demonstrated to have been applied. Following a balance of the arguments presented by the complainant, within this notice, and the Welsh Government in the confidential annex, the Commissioner considers that sections 38(1)(a) and 38(1)(b) are engaged in respect of this information and that the public interest favours maintaining the exemption.

Section 17 – refusal of the request

17. Section 17 of the FOIA concerns the refusal of the request and section 17(1) states that:

"A public authority which, in relation to any request for information, is to any extent relying on a claim ... that information is exempt information must, within the time for complying with section 1(1) give the applicant a notice..."

18. The Commissioner notes that the request was dated 28 September 2016, yet the Welsh Government did not issue its refusal notice until 22 November 2016. As this is in excess of the 20 working day timescale specified in section 10(1) of the FOIA, the Welsh Government has breached section 17(1) of the FOIA.

Right of appeal

19. 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

20. 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.
21. 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

David Teague
Regional Manager (Wales)
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Wycliffe House
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Wilmslow
Cheshire
SK9 5AF