

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 November 2018

Public Authority: Welsh Government

Address: Freedom.ofinformation@gov.wales

Decision (including any steps ordered)

1. The complainant requested copies of specific emails and meeting notes. The Welsh Government provided some information and withheld other information under sections 35(1)(c), 40(2) and 42 of the FOIA. The Commissioner's decision is that the Welsh Government has correctly applied section 35(1)(c) to the withheld information. She does not require any steps to be taken.

Request and response

2. On 6 December 2017 the complainant wrote to the Welsh Government and requested information in the following terms:

"Under the Freedom of Information Act, I am seeking copies of emails sent from the First Minister's Senior Private Secretary [redacted] to [redacted] on 4 December 2014 and the reply from [redacted] on 8 December 2014, and the email from [redacted] to the offices of the FM, Minister for Public Service and Counsel-General on 2 December 2014, together with any submission contained therein.

Also under the Freedom of Information Act I am seeking emails exchanged between [redacted] and the FM's SPS [redacted] on 15 December 2014 relating to London meetings, and [redacted] email to [redacted] dated 17 December 2014 on the same issues. These materials are directly relevant to the inquiry into whether the FM has

misled the National Assembly, particularly [redacted] email to [redacted].

..... I wish to have copies.

I would also request copies of any meeting notes and emails taken and or circulated by [redacted], in whatever format, of meetings that [redacted] had with the First Minister on 25 September, 6 November, and 19 November”.

3. The Welsh Government responded on 25 January 2018 and provided some information but withheld other information under sections 35(1)(c), 40(2) and 42.
4. On 26 February 2018 the complainant requested an internal review of the Welsh Government’s refusal to provide the information requested. Specifically, he disputed that the information requested constituted legal advice.
5. The Welsh Government provided the outcome of its internal review on 27 March 2018 and upheld its position that it had applied sections 35(1)(c) and 42 correctly to the withheld information.

Scope of the case

6. The complainant contacted the Commissioner on 11 May 2018 to complain about the way his request for information had been handled.
7. As the complainant has not disputed the Welsh Government’s application of section 40(2), the scope of the Commissioner’s investigation is to consider whether the Welsh Government correctly applied sections 35(1)(c) and 42 to the withheld information.

Reasons for decision

Section 35(1)(c) – Law Officer’s advice

8. Section 35(1)(c) provides that information held by a government department is exempt if it relates to the provision of advice, or any request for the provision of advice, by any of the Law Officers. As section 35 is a class-based qualified exemption, it is also subject to the public interest test.

9. The Law Officers are the government's most senior legal advisers. 'Law Officers' are defined in section 35(5) as the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland, the Counsel General of the Welsh Government and the Attorney General for Northern Ireland.
10. In its submissions to the Commissioner, the Welsh Government referred to the Commissioner's guidance on the section 35 exemption¹ (paragraphs 127-128) which states that the Law Officer exemption covers not only advice actually provided by the Law Officer, and requests for such advice, but also information which recounts or refers to Law Officer advice, for example discussions about how to react to Law Officers' advice will relate to that advice, and will be covered. The Welsh Government also referred to paragraphs 13 to 19 of the guidance concerning the meaning of 'relates to' in the context of this exemption.
11. The Welsh Government's position is that all of the withheld information is exempt under section 35(1)(c) of the FOIA. The withheld information does not comprise entirely of requests for and the provision of advice by the Counsel General. However, the Welsh Government considers that the withheld information has a 'significant link' to the Counsel General's advice, which is quoted directly within the withheld information.
12. Having considered the Welsh Government's explanations and inspected the relevant withheld information, the Commissioner has concluded that the information relates to the provision of advice by a Law Officer. As such, the Commissioner finds that the exemption at section 35(1)(c) is engaged in respect of the withheld information.

Public interest test

13. The exemption at section 35 is a qualified exemption. Therefore, the Commissioner has to next consider whether in all the circumstances of the case, the public interest in maintaining the exemption at section 35(1)(c) outweighs the public interest in disclosure.

¹ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

Public interest arguments in favour of disclosure

14. The Welsh Government accepted *that "the public interest in favour of disclosing this information relates to the general presumption of openness and transparency, which the Freedom of Information Act aspires to. To that end, the Welsh Government acknowledges the public interest in openness and transparency that release would engender"*.
15. The Welsh Government also acknowledges that disclosure would reveal to the public the considerations behind the drafting of the short title of a particular Bill to which the withheld information relates, and the drafting of titles of Assembly Bills in general.
16. The complainant considers that there is a public interest in disclosure of the emails *"given their relevance in the QC-led inquiry into the conduct of the First Minister in relation to the sacking of former Welsh Government Minister, the late Carl Sargeant, on 3 November 2017"*. He referred to a media article² about the inquiry in question.

Public interest in favour of maintaining the exemption

17. The Welsh Government argues that the convention that Law Officer's advice is confidential and not disclosed without his or her consent is integral to the workings of Government. This is reflected in the Welsh Government's Ministerial Code and the UK Cabinet Office Manual. In light of this the Welsh Government considers there is a strong public interest in maintaining the exemption.
18. The Welsh Government pointed out that, in this case, the Law Officer's convention is engaged because advice was provided by the Counsel General in confidence on a restricted circulation basis.
19. The Welsh Government explained that the substance of the advice in this case is capable of application in any future discussions on short titles of Bills. It believes that this militates further in favour of withholding the Law Officer's advice, and discussions relating to it.

² <https://www.itv.com/news/2017-11-10/welsh-first-minister-calls-for-independent-inquiry-into-his-actions-over-carl-sargeant-claims/>

Balance of the public interest test

20. The Commissioner recognises that there is a public interest in knowing that the Welsh Government acted in accordance with the rule of law, sought the appropriate professional advice and did not act unlawfully or in a legally questionable manner. The Commissioner accepts that, in this case disclosure of the withheld information would increase public understanding of the nature of the Law Officer's advice relating to the short title of a particular Bill and discussions relating to that advice.
21. The complainant states that there is a public interest in disclosure of the withheld information as it relates to the forthcoming inquiry into the conduct of the First Minister. Whilst the Commissioner does not dispute the complainant's assertion, she is not in a position to determine what information would be of relevance to a forthcoming inquiry. She understands that there are other avenues open to the inquiry, outside of FOIA, through which it would be able to access relevant information.
22. The exemption at section 35(1)(c) reflects the long-standing constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue, or the content of any advice. The underlying purpose of this confidentiality is to protect fully informed decision making by allowing government to seek legal advice in private, without fear of any adverse inferences being drawn from either the content of the advice or the fact that it was sought. It ensures that government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases.
23. Although not an absolute exemption, section 35(1)(c) contains a strong element of inbuilt public interest in terms of withholding from disclosure, advice obtained and provided by the Law Officers and information relating to the provision of such advice. In this respect, the exemption is closely related to the concept of legal professional privilege with which section 42 is imbued. The Commissioner has given appropriate weight in the circumstances of this case to the inherent strong public interest in maintaining the exemption. Moreover, the Commissioner accepts that the weight the exemption attracts is enshrined in the FOIA in that a specific exemption for this type of legal advice is provided for under section 35(1)(c).
24. Having carefully considered the balance of the public interest arguments in the circumstances of this case, the Commissioner finds that the public interest in favour of disclosure does not outweigh the strong public interest in maintaining the exemption at section 35(1)(c).

Right of appeal

25. 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

26. 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.
27. 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
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