

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 August 2021

Public Authority: Welsh Government

Address: Freedom.ofinformation@gov.wales

Decision (including any steps ordered)

The complainant requested information in respect of research undertaken on behalf of the Welsh Government into evictions relating to social housing, and reasons given for the non-participation of non-respondents. The Welsh Government refused to provide the requested information citing section 36(2)(c) (prejudice to the effective conduct of public affairs) of the FOIA and during the course of the Commissioner's investigation confirmed that it did not hold information in respect of reasons given for non-participation. The Commissioner's decision is that the Welsh Government has complied with its obligations under section 1(1) of the FOIA and that it was entitled to rely on section 36(2)(c) to withhold the requested information. The Commissioner does not require the Welsh Government to take any steps.

Request and response

1. On 22 August 2019, the complainant wrote to the Welsh Government and requested the following information:

"In regards to the published Welsh Government Research report titled 'Understanding Social Evictions in Wales', a version of Table 1 which includes in the names of Local Authorities (LA), Registered Social Landlords (RSL's) and LSVTs; the Local Authorities, RSLs and LSVTs who did not participate in the research and the reasons for their non-participation."

2. The Welsh Government responded on 14 October 2019. It confirmed that it held the information but refused to disclose it citing section 36(2)(c) of the FOIA.
3. Following an internal review the Welsh Government wrote to the complainant on 18 December 2019. It confirmed that it was satisfied it had correctly applied the exemption with its original response.

Scope of the case

4. The complainant contacted the Commissioner on 20 December 2019 to complain about the way his request for information had been handled. He disagreed with the Welsh Government's refusal to provide the requested information for the following reasons:
 - (a) the Welsh Government used to collect and publish the data broken down by landlord.
 - (b) Social landlords income is based largely, if not totally on public money.
 - (c) There is a public expectation that landlords of any sector, public or private, can and should be held accountable for their policies and actions.
 - (d) Landlords, particularly those receiving public funds or inheritors of public stock, should not have their track record screened behind government ensured secrecy.
 - (e) A number of social landlords have shown willing to provide their figures when approached individually.
 - (f) By enforcing these terms, the Welsh Government will shore up its weakness in this research instead of adopting a robust, pro-active engagement with social landlords.
5. As noted above, during the course of the Commissioner's investigation the Welsh Government amended its position by stating that it did not hold information in respect of reasons given for non-participation. The scope of the Commissioner's investigation is therefore to consider whether the Welsh Government has complied with its obligations under section 1 of the FOIA and whether it was entitled to rely on section 36(2)(c) to withhold the requested information.

Reasons for decision

Section 1 – General right of access to information held

6. Section 1(1) of the FOIA provides a general right of access to information held by public authorities and states:

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."

7. Under section 1(1), 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.
8. In scenarios where there is some dispute between the information held by a public authority and the information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
9. 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 where appropriate.
10. In this particular case, the Welsh Government has only recently confirmed that it does not hold information in respect of the reasons why the non-respondents of the research into evictions in the social housing sector chose not to participate.
11. The Welsh Government informed the Commissioner that it does not hold this information because it did not ask why the non-respondents did not participate. It explained that participation is voluntary and it would be contrary to its, and its contractors, professional codes to ask.
12. Based on the response above, the Commissioner accepts that it was not necessary to conduct a search for this information as she considers that it is highly unlikely that either the Welsh Government or its contractor would contact the non-respondents to ascertain their reason for not participating. She is therefore satisfied that the Welsh Government has complied with its obligations under section 1(1) of the FOIA.

Section 36 - prejudice to the effective conduct of public affairs

13. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information-

"(c) would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs."

14. In order to engage section 36(2), it is therefore necessary for a public authority to obtain the opinion of its 'qualified person' as to whether inhibition or prejudice relevant to the subsection cited would be at least likely to occur as a result of disclosure of the information in question.
15. The Welsh Government confirmed that the qualified person is its Counsel General (Mick Antoniw), as per section 36(5)(g) of the FOIA. The Welsh Government sought his opinion on 20 September 2020 and provided evidence that it had produced a document outlining the request, providing background information, and reasons why it was considered that section 36 was engaged. The Welsh Government also provided an email dated 26 September 2020 confirming that the Counsel General having considered the document, was satisfied that section 36 applied to the disputed information.
16. As a reasoning for section 36(2)(c) the Counsel General (CG) considered that disclosure of the information would be likely to impact on the Welsh Government's ability to conduct robust and effective research with which to base its policy making.
17. The evidence presented to the CG explained that the Welsh Government had commissioned Opinion Research Services Ltd (ORS) to undertake research to understand social evictions in Wales and how the system of social evictions operates in Wales. The contract confirmed the confidentiality of social research findings and the research itself included an online survey to collect evictions data from local authorities, Registered Social Landlords (RSLs) and Large Scale Voluntary Transfer Organisations (LSVTs).
18. ORS are signed up to the Market Research Society (MRS) Code of Conduct and operate within the Government Social Research (GSR) Ethics Guidance, both of which discuss the need for companies to ensure anonymisation. Section 26 of the MRS 2014 Code of Conduct states:

"Members must ensure that the anonymity of participants is preserved unless participants have given their informed consent for their details to be revealed or attributable comments to be passed on."
19. Similarly, Government Social Research Professional (GSRP) Guidance states:

"Even if research participants are not concerned about data disclosure, researchers should uphold principles of confidentiality and data protection and maintain the security of personal data and participants' anonymity (e.g.by ensuring that participants are not identified or identifiable in the outputs of the research)."

20. The MSR and GSR professional guidance has been developed over a lengthy period, with many of the fundamental principles, including anonymity put in place a long time ago. These principles were developed to ensure that those participating in research felt safe to express themselves frankly without the fear of being held to public scrutiny, through being identified.
21. Disclosure of the identities of participants, without their explicit consent, would be likely to undermine these general principles and inhibit participants from fully engaging in the research process and limit the ability of researchers to build as complete a picture as possible and thereby provide meaningful data to government that can be used to fully inform debate and the development of policies.
22. Furthermore, identifying those organisations who contributed to the research would be likely to have an impact on all future research carried out by, or on behalf of the Welsh Government. Anything that would dissuade participants, whether organisations or individuals, from responding because they think they will be identified, regardless of what assurances are provided at the time the data is collected, would put the conduct of future research at risk.
23. The Welsh Government confirmed that it struggles to get a good response rate to its research and is mindful that consideration needs to be given as to whether the data collected will be robust enough to be able to draw sound conclusions which can assist with policy making.
24. An inability to create robust and reliable data, would impair the quality of decision making when determining the most appropriate response and ultimately, would be likely to prejudice the Welsh Government's own strategic priorities.
25. Additionally, identifying those contributing to this research could risk the reputation and integrity of ORS as identifying participants is contrary to the professional code to which researchers sign up. This would be likely to make ORS and other research companies less likely to bid for future research contracts.
26. The qualified person considers that whilst no hard evidence can be identified that disclosure would prejudice future research, anything which undermines the principles that underpin research is very likely to have serious ramifications well beyond the specific research this request relates to, and as such, the qualified person would err on the side of caution. Once the element of trust which research is so dependent on is lost, it is much harder to regain.

27. In order to make a finding as to whether any of the subsections of section 36(2) is engaged, the Commissioner must consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion in a particular case. Neither does the opinion have to be the only reasonable opinion that could be held, or indeed the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, that it is an opinion that a reasonable person could hold.
28. The Commissioner is satisfied that the qualified person had knowledge of relevant matters in order to give his opinion. She is also satisfied that the prejudice that he envisaged is relevant to the subsection of the exemption being claimed.
29. The Commissioner notes that the qualified person is relying on the view that disclosure of the information 'would be likely' to prejudice the relevant matters. This is a lower level of probability than 'would', but one which is still significant. The Information Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006), stated "*We interpret the expression 'likely to prejudice' as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk.*"
30. With this view in mind, the Commissioner has considered the CG's opinion, and is satisfied that it was reasonable for him to hold the opinion that disclosure of the disputed information would be likely to prejudice the effective conduct of the Welsh Government's affairs in the ways envisaged.
31. Since she accepts that his opinion is reasonable, the Commissioner has determined that the exemption at section 36(2)(c) is engaged and as section 36 is a qualified exemption, will therefore need to consider the public interest test.

Public interest arguments in favour of disclosing the information

32. The Welsh Government acknowledges the inherent public test in openness and transparency that the release of this information would engender. Officials recognise that there is a public interest in disclosing information which has provided data regarding evictions. This would allow for a greater understanding of what data each of the organisations hold and how it contributes to the development of research data, which in turn assists the Welsh Government.

Public interest arguments in favour of maintaining the exemption

33. The Welsh Government is also mindful however, that in common with other government departments, it struggles to get good response rates to research across the organisation, which raises concerns regarding whether its research will be sufficiently robust to draw sound conclusions. Anything that could dissuade participants from responding because they may be identified at a later date, regardless of whether it was provided in confidence or not, would put the conduct of all future research at risk.
34. The Welsh Government has argued that lower response rates lead to findings which are less robust and potentially of little use to it in its policy making. Such an outcome would not be in the public interest.
35. As explained previously in this notice, the Welsh Government considers that contradicting the long established commitment to anonymity of the research companies would challenge the standing of those companies and could prevent them from bidding for future Welsh Government research contracts. This would be likely to reduce the quality of the research further which would not be in the public interest.

The balance of the public interest test arguments

36. The Welsh Government considers that on balance, any short term public interest in favour of disclosure, is not outweighed by the long term prejudice that would be likely to occur should the information be disclosed.
37. The Commissioner has considered the arguments put forward by both parties and is mindful that there is naturally some public interest in openness and transparency in respect of evictions from social housing and acknowledges the requirement to hold social landlords to account. However, she does not consider that the disclosure of information the respondents supplied on a voluntary basis is the only, or even the most appropriate channel via which to do so.
38. She has also taken into consideration the complainant's comments that the information used to be published, but would point out that her focus is solely in respect of this request, and the promises made to those who chose to participate in the research and also by default, those who did not.
39. The Commissioner would also point out that companies signing contracts with public authorities must be mindful of the requirements of the FOIA and acknowledge that it is not possible for a public authority to

guarantee that information will always be confidential, even when including confidentiality clauses within their contracts.

40. Similarly, the Commissioner is aware that the respondents (and non-respondents) in this case were organisations as opposed to private individuals, and many of those organisations are public authorities themselves and therefore fully cognisant of the potential for requests for information under the FOIA.
41. However, the Commissioner accepts that there was a relationship of trust between the participants in the research, that their participation was voluntary, and there was a clear expectation that their contributions would remain anonymous.
42. For this reason, the Commissioner agrees that disclosure of the names of the respondents and non-respondents would represent a breach of trust which is likely to damage not only the Welsh Government's relationship with the organisations themselves, but also with the research company in question and, indeed, other research companies. This damage of trust in the Welsh Government would be likely to lead to prejudice to its strategic priorities and ability to conduct robust and effective research with which to base its policy making.
43. Taking all of the above factors into consideration, the Commissioner is not persuaded that there is sufficient public interest in the disclosure of the information to outweigh the prejudice which has been identified as being likely to occur. She has therefore concluded that the balance of the public interest favours the exemption being maintained.

Other matters

The Welsh Government's engagement with the Commissioner

44. The Commissioner notes that her investigation letter to the Welsh Government dated 15 December 2020, requested a full response within 20 working days (15 January 2021) from its date.
45. However, whilst she is mindful of the Welsh Government's resource issues it was having at this time, she was concerned that no anticipated date for responding was provided despite her requests for an update. This left the Commissioner with no option but to serve an information notice (3 June 2021) on the Welsh Government, before it provided its

full response to her letter, and that its response even breached the specified 28 working day deadline of the information notice.

46. The Commissioner is disappointed with the level of engagement she received from the Welsh Government and trusts that it will engage with her more positively in future.

Right of appeal

47. 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: 0203 936 8963)

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.
49. 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
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