

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 March 2022

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

Decision (including any steps ordered)

1. The complainant requested information from the Welsh Government relating to the recall of ventilator devices. The Welsh Government refused to comply with the request citing section 12 (cost limit) of the FOIA.
2. The Commissioner's decision is that the Welsh Government was entitled to refuse to comply with the request in accordance with section 12(1) of the FOIA. He also finds that the Welsh Government met its obligations under section 16(1) of the FOIA to offer advice and assistance.
3. The Commissioner does not require the Welsh Government to take any steps.

Request and response

4. On 11 August 2021, the complainant wrote to the Welsh Government and requested information in the following terms:

"Just making an FOI request with regards to the Welsh Government health department and NHS Shared Service - and I'm [sic] looking namely for information about the Philips CPAP/Bipap/ventilator recall.

- 1) Firstly, how many of these devices are in circulation in Wales? Could you then also break that down into Health Board area, also by device model name (ie Dreamstation, Remstar SE, Remstar Pro etc) and also by how many are actually being used by patients.
- 2) The contract with Philips was signed on an All Wales basis. Could you detail the arrangement with the manufacturer, such as when that contract is due to end, as well as any cost-benefit analysis done at the time.
- 3) I'd like to see any documentation and correspondence between the Welsh Government/NHS Shared Services and the Health Boards regarding these devices since the arrangement with Philips began, prior to the recall. This could include the standard guidance on how frequently they should be checked and cleaned, or internal process documents about how pieces of this equipment are to be distributed between Health Boards.
- 4) I'd also like to request any communication between the Welsh Government [sic]/NHS Shared Services and the Health Boards since the recall, such as minutes of any meetings or other discussion and notification of Health Boards.
- 5) Since the recall, could you provide all correspondence between yourself and Philips in relation to this matter including the notification in April that they would not be selling you more of these devices?
- 6) The UK Department for Health has also set up an emergency response group which the Welsh Government has been attending and I'd also like to request minutes of the meetings from that as well as any correspondence regarding this group.
- 7) Philips has claimed that they have offered procurement to fund CPAPs from alternative suppliers and even to incur the cost of a patient helpline but this was not accepted. Can you provide any and all correspondence in relation to this and the rationale behind a decision to decline such an offer?

- 8) Finally could you provide a breakdown of Health Inspectorate Wales inspections of healthcare entities by how recently they were done, how many have never been inspected etc, and grades of how they've been classified."
5. The Welsh Government responded on 31 August 2021 and refused to provide the requested information on the basis that doing so would exceed the appropriate limit.
 6. On 31 August 2021, the complainant wrote to the Welsh Government to request an internal review.
 7. Following an internal review the Welsh Government wrote to the complainant on 28 September 2021. The Welsh Government maintained its position and clarified that it was citing section 12 (cost limit) as its basis for refusing the request.

Scope of the case

8. The complainant contacted the Commissioner on 3 October 2021 to complain about the way their request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if the Welsh Government has correctly cited section 12 of the FOIA in response to the request.

Reasons for decision

Section 12 – cost of compliance

10. Section 12(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit.
11. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £600 for central government public authorities such as the Welsh Government.
12. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours for the Welsh Government.

13. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it;
 - and extracting the information from a document containing it.
14. A public authority does not have to make a precise calculation of the costs of complying with a request; instead, only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal decision in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency* EA/20017/00041, the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”. The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
15. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under the FOIA to consider whether there is a public interest in the disclosure of the information.
16. Where a public authority claims that section 12 of the FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of the FOIA.

The Welsh Government’s position

17. As is the practice in a case in which the public authority has cited the cost limit under section 12 of the FOIA, the Commissioner asked the Welsh Government to provide a detailed explanation of its estimate of the time and cost of responding to the request.
18. In its submissions to the Commissioner, the Welsh Government maintained its reliance on section 12 of the FOIA and offered an explanation for how it had calculated that the request exceeded the cost limit.
19. The Welsh Government explained that in order to provide the requested information, it would have to search a number of files and documents held on its electronic filing system.

20. The Welsh Government explained that it had conducted a search of its electronic filing system using the following key words:

- Philips ventilator search
- Philips Bpap
- Cpap Philips
- Philips recall
- Philips Incident Management Team
- Philips Contract

21. This search returned a total of 6065 results. The Welsh Government confirmed that it had undertaken a sampling exercise to determine how long it would take to review the documents for information within the scope of the request. Based on that sampling exercise, the Welsh Government estimated that it would take approximately 45 seconds to review each document.

22. In total, the Welsh Government calculated that it would take 75.81 hours to retrieve the documents and determine whether they contained information that fell within the scope of the request (6065 documents x 45 seconds = 75.81 hours).

23. The Welsh Government explained that it held further information within the scope of the request within email mailboxes. The Welsh Government considers that it would have to search a total of 12 mailboxes for information within the scope of the request.

24. The Welsh Government confirmed that it had undertaken a sampling exercise of two mailboxes to determine how long it would take to search each mailbox for information within the scope of the request. When the search term 'Phillips devices' was used, the mailboxes returned 250 emails each. Therefore, the Welsh Government estimated that in total it would have to review approximately 3000 emails for information within the scope of the request (250 x 12 = 3000).

25. The Welsh Government estimated that it would take 45 seconds to review each email. It therefore calculated that it would take 37.5 hours to review the 12 mailboxes for the requested information (3000 x 45 seconds = 37.5 hours).

26. In total, the Welsh Government considers that it would take 113.3 hours to locate and extract information within the scope of the request (75.81

+ 37.5 = 113.3 hours). Therefore, the Welsh Government concluded that complying with the request would exceed the appropriate limit.

The Commissioner's position

27. The Commissioner considers the Welsh Government's estimate of 113.3 hours to locate and extract the requested information to be reasonable. This estimate was based on an appropriate sampling exercise. Even if the cost estimate provided by the Welsh Government was halved it would still be far in excess of the appropriate limit under the FOIA.
28. The Commissioner's decision is that the Welsh Government estimated reasonably that the cost of complying with the request would exceed the appropriate limit. Therefore, the Welsh Government was correct to apply section 12(1) of the FOIA to the request.

Section 16(1) – the duty to provide advice and assistance

29. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice¹ in providing advice and assistance, it will have complied with section 16(1).
30. The Welsh Government advised the complainant that they could reduce the scope of their request to bring it within the cost limit. The Welsh Government suggested to the complainant that they could narrow the scope of their request by limiting their request to a particular time period or by providing a more detailed description of the requested information.
31. The Commissioner considers that this was an appropriate response in the circumstances given the broad scope of the original request. He is therefore satisfied that the Welsh Government met its obligations under section 16(1) of the FOIA.

¹ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

Right of appeal

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

Website: 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

Michael Lea
Team Manager
Information Commissioner's Office
Wycliffe House
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