



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2018/0056

Before
Judge Stephen Cragg Q.C.

Between

Timothy Richards

Appellant

-and-

**The Information Commissioner
The Welsh Government**

Respondents

Sitting at Newport Court Centre on 14 November 2018

Representation: The Appellant represented himself

The Welsh Government was represented by Mr James

The Commissioner was not represented

DECISION AND REASONS

BACKGROUND, DECISION AND APPEAL

1. The essence of the case as presented at the hearing by the Appellant and Mr James (for the Welsh Government), is whether the Welsh Government had further information which it should have disclosed to the Appellant

in response to his request, or not. Although other issues have been considered by the Commissioner (see below), this judgment is limited, as far as is possible, to the dispute as it had eventually crystallised by time of the appeal hearing.

2. In refining a previous request for information, on 8 July 2016 the Appellant submitted a request for information to the Welsh Government as follows:

‘Please may I see copies of the emails between Ceri Breeze and Huw Lewis between May 1st 2011 and July 31st 2011 and also those between Ceri Breeze and Huw Lewis in the whole month of January 2012?’

3. The Welsh Government acknowledged the request and its scope as follows:-

‘We will now get on and process the request searching for e-mails, between those dates, where Huw Lewis or Ceri Breeze are the originator and the other party is the recipient or a copy recipient’.

4. As background to the request it is useful to note that this was a request for copies of correspondence between a Mr Lewis who was a former Minister for Housing, Regeneration and Heritage, and Mr Breeze who was Deputy Director of Housing.

5. There then followed a period during which the Welsh Government listed certain categories of information that might be relevant to the request, comprising 8106 documents in total, all of which it said would need to be examined. The Welsh Government estimated that such an inspection would take 108 hours, exceeding the appropriate limit of 24 hours.

6. The first of these categories was described as :

'Emails sent by Ceri Breeze i.e. as the "originator" or "sender" to Huw Lewis (to him personally or to him as Minister for Housing, Regeneration and Heritage).'

7. As a result of a further request for clarification, the Welsh Government told the Appellant that the number of documents in this category was 440. The Appellant thus submitted a further refined request for this information and the Welsh Government responded on 15 November 2016. It stated that, of the 440 emails identified as potentially relevant to the first category of documents, five emails had subsequently been established to be relevant to the request. The five emails were disclosed to the complainant.
8. The Appellant wrote to the Welsh Government on 21 November 2016 to challenge its response to his request. He did not accept the Welsh Government's explanation that only five of the 440 documents were in fact relevant to his request, and said that there was '...a clear refusal to supply the email correspondence that I was originally told was available'.
9. The Welsh Government provided the outcome of an internal review on 19 December 2016. It reiterated how it had searched for the requested information relevant to the first part of the request. The Welsh Government clarified that:

"The 440 records included internal and external emails saved to the system during the period, on any subject and to any person".

10. The Appellant complained to the Commissioner on 19 September 2016 about the way his requests had been handled, and subsequently told the Commissioner that he wished to challenge the Welsh Government's response which referred to the 440 emails, as he considered that the Welsh Government was refusing to let him see all but five of them. In the

decision notice of 21 February 2018 the Commissioner decided to consider this complaint in the context of the other, wider, requests that the Appellant had made. The Commissioner was critical of the Welsh Government's search processes in relation to these other requests. In relation to the specific request for the 440 documents in the Appellant's latest request the Commissioner said:-

52. The Welsh Government has maintained, both to the complainant and to the Commissioner, that it has provided the complainant with all of the information it holds that is relevant to this part of the request. According to the Welsh Government, the relevant information comprised only five emails.

53. The complainant has suggested that the remaining 435 emails have gone "missing" and that the Welsh Government is refusing to allow him to see them. However it appears to the Commissioner that the Welsh Government is saying that the 435 emails, whilst initially identified as being potentially relevant, do not in fact fall within the scope of the request.

54. The complainant has also pointed out that Mr Breeze, as a senior official, reported to Mr Lewis, the Minister, during the specified time periods. The complainant has questioned whether it is reasonable to accept that Mr Breeze only sent the Minister five emails during this time.

...

56. The first search identified 440 emails as having been saved by Mr Breeze within the two specified periods. The Welsh Government then inspected the contents of each email individually. From this inspection five emails fell within the description as provided by the complainant.

57. Given that the complainant did not accept the Welsh Government's assessment, the Commissioner asked for a copy of the 440 emails so that she could inspect their content. However the Welsh Government advised that it was unable to provide a record of the search results, and said that the search would need to be repeated if the Commissioner wished to see such evidence.

58. The Commissioner is obviously concerned that the Welsh Government was unable to provide relevant documentation concerning the 440 emails. The Welsh Government has provided an explanation as to how it conducted the search, but was unable to provide evidence of the search that the Commissioner could test. In the absence of supporting information it is difficult for the Welsh Government to satisfy the Commissioner that proper consideration was given at the time the request was originally handled. However the Commissioner is mindful that this request was handled in 2016, and the individual who conducted the original search has subsequently retired.

...

61.the Commissioner is unable to say whether or not the Welsh Government acted correctly in assessing that only five emails were relevant to the request. The Commissioner has considered whether she ought to specify remedial steps to be taken by the Welsh Government in this case. Given that the Welsh Government apparently failed to keep a detailed record of the search results that returned the 440 documents, the Commissioner could require further searches to be undertaken.

...

63. The Commissioner has therefore decided that the Welsh Government ought to conduct a fresh search for the requested information and issue a revised response to the complainant. The Commissioner understands that it is possible that the Welsh Government may still estimate that compliance would exceed the appropriate limit. However, if this is the case then she would expect the Welsh Government to provide a clear and detailed explanation in its refusal notice to the complainant.

11. The Welsh Government did not appeal the decision notice decision, however, the Appellant did. His main point is that, on the face of it, the Welsh Government has identified that there were 440 emails 'sent by Ceri Breeze... to Huw Lewis', in the timescale covering the request. The five emails that have been disclosed were not, in fact, directly from Mr Breeze to Mr Lewis (see further below). The Appellant states that 'my appeal to the ICO against the Welsh Government was directed at the 435 emails that

the Welsh Government did not supply ... I do think that a hearing might enable us all to clarify what I am asking to see as no-one has yet given me a clear and rational reason why I should not see the emails I have requested'.

12. The Commissioner's response to the appeal is that no one has challenged the Commissioner's decision that s12 FOIA (the appropriate cost limit for a search documents) did not apply, that a 'fresh search' should be carried out and that the Welsh Government should 'issue a response accordingly' to comply with s1 FOIA. However, the Commissioner also accepts that it is also now the Welsh Government's case that no further information is held and that it would be open to the Tribunal to consider this additional ground and to consider whether information in scope is held or not.
13. In relation to this, the Commissioner has now considered the witness statement of Mr Howells (see below) and has no reason to doubt either that the searches conducted were reasonable or that the remaining 435 emails do not fall within scope. On the balance of probabilities the Commissioner is satisfied that the Welsh Government did not hold further information within the scope of the request at the time the request was made.
14. The Welsh Government's response confirms that a further search was carried out using an enhanced search capability which has 'returned 613 emails with a total of 1210 attachments'. It is said that it is not known how many of these documents are within the scope of the request, but it is stated that the information has been withheld on the basis that the request was vexatious (see s14 FOIA). The Appellant would, of course, have had the opportunity to dispute that decision.
15. The Welsh Government says that it has not retained copies of the 435 emails, cannot provide witness evidence from Mr Breeze as he has retired,

and accepts that although Mr Breeze carried out the best search he could given the technology available at the time, it is likely that more emails would have been revealed once the software problems had been rectified. It is said that the records show that Mr Breeze reviewed all the emails revealed by the search and found that only five were within the scope of the request.

DISCUSSION AND DECISION

16. As there is no appeal concerning the Commissioner's decision on s12 FOIA, there is no further decision for the Tribunal to make on that issue. It is a matter between the Commissioner and the Welsh Government as to how that decision is acted upon, if at all. The Welsh Government says it has carried out a further search. Certainly, from the appeal document it does not appear to be matter of present concern to the Appellant, and both parties agreed at the start of the appeal hearing that the only matter to be decided was whether there had been further information within scope at the time of the request which should have been disclosed. In practical terms this meant whether the 435 emails identified by the Welsh Government were within the scope of the request.

17. The Commissioner has referred to the witness statement of Mr Howells. This is John Howells who is Director of Housing and Regeneration for the Welsh Government. Mr Howells also gave evidence before the Tribunal and answered questions both from the Appellant and the Tribunal.

18. Mr Howells explained that when the information about the 440 emails was initially provided to the Appellant the intention was simply to identify that this was the number of documents that would be scrutinised to see if any were relevant to the request, and not to say that all 440 were relevant.

He also explained that direct email contact between a senior civil servant and a minister would be rare given the way that their respective offices worked. He explained that Mr Breeze himself conducted the relevant searches of the relevant systems.

19. Mr Howells was asked about the correspondence sent to the Appellant which clearly states that there were 440 emails where Mr Breeze was the originator or sender which were sent to Mr Lewis (see letter 21 September 2016 from Mr Webb). We were referred to a letter from Mr Howells to the Appellant dated 19 December 2016 which stated that:-

‘The 440 records included internal and external email saved to the system during the period, on any subject and to any person. This strikes me as the source of possible confusion and I am sorry if this was not as clear as it should have been in our correspondence. The officials responsible were clear in their own minds that the figure of 440 referred to the total records identified in that specific search category whereas it is apparent from your complaint that you considered that figure to be referring more narrowly to the total number of emails between Ceri Breeze and Huw Lewis (to him personally or to him as Minister....’

20. In oral evidence Mr Howells stood by this explanation and suggested that the reference to ‘records’ meant that documents other than emails were included, although he accepted that this was not borne out by the sentence in the letter referring to the 440 records and which states ‘This is the number of emails he sent’.

21. Mr Howells explained that even though the five emails disclosed do not, in fact, fall within the scope of the request, they were disclosed is that they were emails to staff who ran the Minister’s outer office and provide ‘the typical route for email transmissions to the Minister’.

22. In the view of the Tribunal, it is understandable why Mr Richards has pursued this issue as the response from the Welsh Government has been

unclear. The Appellant's submission is that there has been a deliberate cover up by the Welsh Government to prevent the disclosure of emails which will reveal information about an unlawful sale of a land portfolio, about which he is concerned.

23. Public authorities are under a general duty to disclose information they hold where it is requested: section 1 FOIA. By s1(1)(a) FOIA any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request. By section 1(4) FOIA the information is the information in question held at the time when the request is received, and information itself means information recorded in any form: see section 84 FOIA.
24. When a public authority says that it does not hold the information requested (or any further information), the Commissioner (and now this Tribunal) has to consider the searches made by the public authority and the explanations given if it is said that information is not held and decide, on the balance of probabilities, whether the public authority is holding the information requested or not.
25. In this case the Tribunal has the evidence from Mr Howells about the searches carried out and what the correspondence to the Appellant was meant to convey to the Appellant about its contents. Mr Howells is the author of one of the letters in which an explanation, albeit somewhat confused, was given to the Appellant about the nature of the 440 documents. Mr Howells explained to the Tribunal what he was trying to tell the Appellant: that the figure of 440 related to documents generated by the search and not to specific emails from Mr Breeze, that these were then reviewed, and that everything relevant (and in fact more) had been disclosed. He denied that there had been a cover-up.

26. Although the correspondence with the Appellant is not helpful (as accepted by Mr James on behalf of the Welsh Government), in the end the Tribunal's view is that Mr Howells was a straightforward and honest witness and that the true position is that the figure of 440 did not relate to personal emails from Mr Breeze to Mr Lewis, but to the total number of documents that needed to be reviewed for relevance. It is noted that on the most recent search a similar approach consistent with Mr Howells' evidence has been taken: 619 emails have been returned but these have not been reviewed to see how many are actually within scope.

27. It is an unhappy feature of the case that the Welsh Government did not keep the other 435 documents so that the Tribunal could have been shown that this was the case, beyond doubt. However, on the balance of probabilities, and on the basis of Mr Howells' evidence about the searches carried out by Mr Breeze and the results of those searches, the Tribunal is satisfied that the Welsh Government did not hold further information within the scope of the Appellant's request. The Tribunal would note that there is no evidence at all of the kind of cover-up alleged by the Appellant which might have provided an explanation as to why the Welsh Government would deliberately withhold information to which the Appellant was entitled under FOIA.

CONCLUSION

28. On that basis the Tribunal dismisses the appeal, finds that no information within the scope of the request was held by the Welsh Government at the time of the request, and the Commissioner's decision notice is substituted by this decision accordingly.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 20 December 2018.

Promulgated: 20 December 2018.

