

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 November 2013

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

Decision (including any steps ordered)

1. The complainant requested notes and minutes of meetings of the Task and Finish Group, established to inform the development of the proposed Bill on Ending Violence against Women and Domestic Abuse. The Welsh Government withheld the information under sections 36(2)(b)(ii) and 36(2)(c) of the FOIA. During the course of the Commissioner's investigation, the Welsh Government sought to rely on section 35(1)(a) as the basis to withhold the information requested. The Commissioner's decision is that the Welsh Government was entitled to withhold the requested information on the basis of the exemption at section 35(1)(a). The Commissioner does not require the public authority to take any steps.

Request and response

2. On 22 March 2013, the complainant wrote to the Welsh Government in connection with the Task and Finish Group which was established to inform the development of the proposed Bill on Ending Violence against Women and Domestic Abuse and requested information in the following terms:

"Copies of the minutes of each of the meetings up to and including the 14 March 2013 together with the delegates of the meeting on the 14 March;

For this purpose I would like the term "minutes to include copies of any notes and action points made as a result of the meetings and which

were made to facilitate the Welsh Government in carrying out its duties and responsibilities in connection with these meetings”.

3. The Welsh Government responded on 8 May 2013 confirming that it held some information relevant to the request but it was considered exempt under sections 36(2)(b)(ii) and 36(2)(c) of the FOIA and the public interest favoured non disclosure.
4. On or around 26 June 2013, the complainant contacted the Welsh Government and asked for an internal review of its handling of the request.
5. The Welsh Government provided the outcome of its internal review on 24 July 2013 and upheld its decision that the information requested was exempt under sections 36(2)(b)(ii) and 36(2)(c) of the FOIA.

Scope of the case

6. The complainant initially contacted the Commissioner on 21 May 2013 to complain about the Welsh Government's refusal to disclose the information requested. The Commissioner advised the complainant that before accepting complaints, he generally expected complainants to have exhausted a public authority's complaints procedure. He advised the complainant to contact the Welsh Government and request an internal review of the handling of his request for information and to contact him again if he was dissatisfied with the outcome of the review.
7. Following receipt of the Welsh Government's internal review response, the complainant contacted the Commissioner on 24 July 2013 to complain about its refusal to disclose the information requested.
8. During the course of the Commissioner's investigation, the Welsh Government sought to rely on section 35(1)(a) in respect of all of the information held relevant to the request. It stated that, should the Commissioner find that section 35 was not engaged, it wished to revert to its original position that the information was exempt under sections 36(2)(b)(ii) and 36(2)(c) of the FOIA.
9. The scope of the Commissioner's investigation into this complaint is therefore to consider whether the withheld information should be disclosed, or whether the Welsh Government has appropriately applied the exemptions considered applicable.

Reasons for decision

Section 35 – formulation of government policy

10. Section 35(1)(a) of the FOIA provides that information held by government departments is exempt if it relates to the formulation or development of government policy. Section 35(1) is a class-based exemption, meaning that it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.
11. The Welsh Government introduced its reliance on section 35 during the Commissioner's investigation to all of the withheld information.
12. The FOIA does not define what is meant by the formulation or development of government policy. Although often used interchangeably, the Commissioner considers that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.
13. Also, in the Commissioner's view, the term 'relates to' should be interpreted broadly to include any information concerned with the formulation or development of the policy in question and does not specifically need to be information on the formulation or development of that policy.
14. The Welsh Government advised that the Task & Finish Group ('T&F Group') was appointed by the Minister for Local Government and Communities Minister to provide a report to inform the policy development in relation to the proposed "Ending Violence Against Women and Domestic Abuse (Wales) Bill" ('the Bill'). The Group members were appointed (without remuneration) by the Minister to share their personal knowledge and experience of this policy area, to help inform the development of the Bill. All members were asked to sign confidentiality agreements to ensure free and frank discussion at meetings. The withheld information comprises notes that were taken at

meetings of the T&F Group and reflect the candid discussions undertaken to rigorously explore policy options which later informed a report¹ from the T&F Group to the Minister in August 2012.

15. On 26 November 2012 the Welsh Government launched a 13 week White Paper consultation on legislation to end violence against women, domestic abuse and sexual violence. The T&F Group Report and engagement events held on the subject matter informed the development of the White Paper. A summary of the responses to the White Paper consultation was published in September 2013² and states that the outcome of the consultation "will be used to inform the development of the Bill".
16. The Commissioner notes that the report that the T&F Group submitted to the Minister confirms its terms of reference are to:
 - "Use their knowledge and expertise to support the Policy Lead in the development of the policy content of the Bill, including delivery and enforcement mechanisms;
 - Use their networks to consult as widely as possible on policy content of the Bill;
 - Provide and inform the commissioning (if appropriate) of a sound rationale and evidence base for any recommendations;
 - Prioritise the issues to be addressed by the Bill; and
 - Produce a report that will inform the drafting of the White Paper".
17. Having viewed the withheld information and considered the Welsh Government's representations the Commissioner is satisfied that the information can be considered to relate to the formulation and development of government policy relating to the Bill in question. As such, the Commissioner's decision is that section 35(1)(a) is engaged.

The public interest test

¹ <http://wales.gov.uk/docs/dsjlg/consultation/121126taskfingrouprepen.pdf>

² <http://wales.gov.uk/docs/dsjlg/consultation/131001vawsummaryreporten.pdf>

18. As section 35(1)(a) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

19. The Welsh Government acknowledges the general public interest in openness and transparency that disclosure would engender. It also recognises that disclosure may enhance the public's understanding of the matters which were addressed in the T&F Group Report presented to the Minister.

Public interest arguments in favour of maintaining the exemption

20. The Welsh Government has submitted the following arguments in favour of maintain the exemption at section 35(1)(a):

- Disclosure would lead to less rigorous and in-depth exploration of policy options going forward in relation to the Bill, at a point in time when different options are being explored and developed.
- The importance of a "safe space" which allows the Welsh Government to consider and explore different policy considerations, away from the public gaze. Without this safe space, it is likely that the views and opinions expressed would have been less robust and inhibited by organisational perspective or simply not expressed at all.
- Disclosure of such candid exchanges would be likely to severely damage the Welsh Government's relationships with senior stakeholders in relation to the development of the Bill. The Welsh Government took care to ensure the T&F Group was comprised of individuals with the right expertise drawn from personal and professional experience that would develop and create the maximum value from the opportunities offered by their meetings. Arrangements were designed to enable a safe, private and open forum in order to elicit a frank and honest discussion. This was supported by confidentiality agreements in order to provide individuals with assurance on the privacy of their discussions.
- Disclosure would be likely to hinder the on-going work in developing the policy relating to the Bill in that key individuals would be less likely to participate in any similar future discussions, task and finish groups etc. going forward.
- The development of Welsh Government policy in this and other areas is dependent on continued good working relationships with senior stakeholders across Wales, such as those who make up the

T&F Group. The disclosure of discussions, provided on a confidential basis would be likely to inhibit the Welsh Government's ability to engage such expert stakeholders in future policy and legislative development. The Welsh Government does not believe this would be in the public interest.

Balance of the public interest test

21. When assessing the public interest the Commissioner has given due consideration to protecting what is inherent in this exemption, which is essentially protecting the policymaking process. The key public interest arguments for this exemption usually relate to preserving a 'safe space' to debate live policy issues away from external interference and distraction, preventing a 'chilling effect' on free and frank debate in future, and preserving the principle of collective Cabinet responsibility.
22. The Commissioner considers that disclosure of the requested information would enhance the public's understanding of issues which were discussed and considered by the T&F Group in the early stages of development and formulation of the policy content of the Bill. He also considers that the Welsh Government's policy and legislative proposals for ending violence against women, domestic abuse and sexual violence are a matter of significant public interest. However, the Commissioner notes that, at the time of the request, there was a significant amount of information about the subject matter publicly available which would, to an extent, satisfy the public interest in the subject matter. This includes:
 - the T&F Group report to the Minister;
 - a report providing analysis of feedback obtained at a number of engagement events held with over 200 stakeholders across Wales on the proposed Bill; and
 - the White Paper consultation paper on the proposed Bill
23. The Commissioner considers that there is a strong public interest in protecting the safe space for the Welsh Government to be able to develop policy of a live issue away from external scrutiny. The safe space argument concerns the importance of government having the freedom to debate policy and make decisions without being hindered by external comment. In *Department for Education and Skills v the Information Commissioner and The Evening Standard*³ the Tribunal recognised the importance of this argument stating:

³ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i70/DFES.pdf>

“Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy.”

24. The Commissioner considers that significant weight should be given to the safe space arguments in cases where the policy making process is live at the time of the request, and the requested information relates directly to that policy making. In such scenarios the public interest is very unlikely to favour disclosure unless for example it would expose some level of wrongdoing. The Commissioner notes that this has not been suggested by the complainant, nor is there any suggestion of this in the withheld information. In this case, it is clear that the policy making process was live at the time of the request.
25. The withheld information reflects free and frank discussions of the T&F Group to explore the policy options which later informed a report to the Minister. The Commissioner notes that the individuals in question signed confidentiality agreements to help ensure the free and frank discussion of matters at meetings. The Welsh Government argued that disclosure would hamper the on-going work of developing the policy of the Bill as individuals would be less robust in expressing their views and would be less likely to participate in future discussions. These arguments are known as the ‘chilling effect’, and public authorities often argue that disclosure of internal discussions would inhibit free and frank discussion and that the loss of frankness and candour would damage the quality of advice, leading to poorer decision making.
26. The Commissioner is sceptical of broad arguments about a chilling effect on future unrelated discussions, but accepts that arguments about a chilling effect on on-going related discussions are likely to carry weight. Accordingly, in terms of any chilling effect the Commissioner considers that the timing of a request, whether the issue is still live and the content and sensitivity of the information are key factors to take into account in attaching weight to such arguments.
27. The timing of the request adds significant weight to the public interest in favour of maintaining the exemption in this case as the withheld information relates to a policy which was live and on-going at the time of the request. The Commissioner is therefore satisfied that the argument that a safe space was needed to protect the policy making process is a relevant one and he affords it considerable weight. He has also given weight to the Welsh Government’s arguments in terms of any chilling effect resulting from disclosure in view of the fact that the content of the Bill was a live matter at the time of the request.

28. The Commissioner considers that whilst there is a public interest in informing debate surrounding the issues to which the potential policy options relate, he considers that in this case there is a very strong public interest in allowing Ministers and officials the safe space to further develop the policy in question and to be able to continue to effectively discuss issues in a frank and open manner. The Commissioner therefore considers that the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption in this case.

Right of appeal

29. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

30. 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.
31. 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

Anne Jones
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