

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 February 2015

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

Decision (including any steps ordered)

1. The complainant requested the test data and test methodology used in determining broadband speeds of properties able to access fast fibre broadband as a result of the Superfast Cymru scheme. The Welsh Government withheld the information under section 22 of the FOIA. During the course of the Commissioner's investigation, the Welsh Government confirmed that some of the information had been published, namely the test methodology. In relation to the test data the Welsh Government withdrew reliance on section 22 but stated that it considered it to be exempt under sections 41, 43 and 44 of the FOIA. The Commissioner's decision is that the Welsh Government correctly applied section 41 to the information. He does not require any steps to be taken.

Request and response

2. On 7 May 2014, the complainant wrote to the Welsh Government and referred to a press release it had issued reporting that over 100,000 properties in Wales were able to access fast fibre broadband as a result of the Superfast Cymru project¹. He requested the test data and test methodology used in determining that the premises were able to access fast fibre broadband.

¹ <http://wales.gov.uk/newsroom/businessandeconomy/2014/8735335/?lang=en>

3. The Welsh Government responded on 30 May 2014 and stated that the information requested was exempt under section 22 of the FOIA as it was intended to be published in summer 2014.
4. On 30 May 2014, the complainant requested an internal review of the Welsh Government's refusal to disclose the information requested.
5. The Welsh Government provided the outcome of its review on 30 June 2014 and upheld its decision that section 22 of the FOIA applied to the request.

Scope of the case

6. The complainant contacted the Commissioner on 20 June 2014 to complain about the way his request for information had been handled.
7. During the course of the Commissioner's investigation, the Welsh Government confirmed that the test methodology was published on the Superfast Wales website on 19 June 2014². In light of this, the Commissioner has not considered the Welsh Government's application of section 22 to this information. In addition, the Welsh Government confirmed that it was withdrawing reliance on section 22 in relation to the test data. However, it introduced reliance on sections 41, 43 and 44 in relation to the information.
8. In light of the above, the scope of the Commissioner's investigation is to determine whether the Welsh Government should disclose the test data.

Reasons for decision

Background information

9. In July 2012, following a EU procurement exercise, the Welsh Government awarded a contract to British Telecom (BT) to deliver its next-generation broadband project, "Superfast Cymru". The project is intended to roll-out next-generation fibre-based broadband to 96% of properties across Wales by 2016.

² <http://www.superfast-cymru.com/testing-and-verification>

10. The withheld information in this case comprises the broadband speed test data for around 100,000 properties across Wales, as referred to in a press release issued by the Welsh Government on 30 April 2014. The press release stated that the properties were able to access fast fibre broadband, as a result of Superfast Cymru, having been tested and verified as being able to receive superfast speeds. The press release also stated that the average download speed of 61 Mbps for the properties was more than double the contractual minimum for the programme.

Section 41 – information provided in confidence

11. Section 41(1) of the FOIA provides an exemption for information that was obtained by the public authority from another person and where disclosure of that information would constitute an actionable breach of confidence. Consideration of this exemption is a two-stage process; first, the information in question must have been provided to the public authority by a third party. Secondly, the disclosure of this information must constitute an actionable breach of confidence.

Was the information obtained by the Welsh Government from another person?

12. The Welsh Government explained that, as part of its contract, BT provides a monthly submission to support claims for payment, which includes the withheld information ie the test data. The Welsh Government advised that BT is paid on the basis of the number of premises passed which are capable of exceeding the contractual speed thresholds and the submission is used as evidence that a payment can be made. Based on this, the Commissioner is satisfied that the withheld information constitutes information provided by a third party (BT) to the Welsh Government and he therefore accepts the first limb of section 41 is met.

Would disclosure constitute an actionable breach of confidence?

13. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
- Whether the information has the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.

14. In this case, the Welsh Government sought the views of BT and provided the Commissioner a copy of representations it received from BT regarding disclosure of the withheld information. BT's submissions are detailed in nature and include information which it considers to be confidential and commercially sensitive and encompass references to the withheld information. Therefore the Commissioner's analysis which is set out below does not include an explicit assessment of all of the reasons why BT and/or the Welsh Government consider the withheld information to be exempt from disclosure.
15. The Welsh Government advised that BT is subject to Undertakings³ made to Ofcom which prevent it from releasing certain information to the market unless such release is on an equivalent basis. This is because BT Openreach holds wholesale information about the market and the communication providers within that market (which includes BT's retail divisions and competitors such as Sky, Virgin, Talk Talk etc). The Undertakings in place with Ofcom are made pursuant to section 154 of the Enterprise Act 2002 and are legally binding on BT.
16. The industry standard approach for wholesale line speed that BT provides is released to the market via its equivalent channels such as the Public Checker facility on the Superfast Cymru website⁴. This is an example of how BT complies with its Undertakings to Ofcom.
17. The test data is information about the marketplace in which communication providers operate. If BT disclosed the information, it considers that it could place them in breach of their Undertakings to Ofcom as to do so would not be releasing information on an equivalent basis. The Welsh Government considers that disclosure of the withheld information would be likely to prejudice to BT's commercial interest.
18. In light of the above, the Welsh Government is of the view that the withheld information is more than just sensitive and it confirmed that it is not reasonable available to anyone by any other means. As such, the Welsh Government considers the information has the necessary quality of confidence.
19. The Welsh Government explained that BT's monthly submissions, which include the withheld information, are captured by a confidentiality agreement dated July 2012, which was agreed as part of the Superfast

³ <http://stakeholders.ofcom.org.uk/telecoms/policy/bt-undertakings/?a=0>

⁴ <http://www.superfast-cymru.com/where-and-when>

Broadband contract. Clause 29 of the confidentiality agreement states that:

"29. Confidentiality

29.1 General: Except to the extent set out in this clause or where disclosure is expressly permitted elsewhere in this Agreement, each Party must:

29.1.1 treat the other Party's Confidential Information as confidential and safeguard it accordingly; and

29.1.2 not disclose the other Party's Confidential Information to any other person without the owner's prior written consent".

20. In line with the provisions of the confidentiality agreement, in its dealings with the Welsh Government, BT provides sensitive commercial information with the expectation that it would be held in confidence. As the withheld information is provided pursuant to the confidentiality agreement, the Welsh Government considers that it was communicated in circumstances importing an express obligation of confidence.
21. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. After viewing the withheld information and taking into account the submissions made by the Welsh Government and BT he accepts that the test data is not available elsewhere and is clearly of importance to the confider. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.
22. In light of the existence of the confidentiality agreement and the clear expectations that BT had with regards to the withheld information in line with the provisions of the agreement, the Commissioner is satisfied that the information was supplied to the Welsh Government in circumstances importing an obligation of confidence.
23. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. The test under section 41 is whether disclosure would constitute a breach of confidence actionable by the person who provided the information or any other person.
24. As stated previously in this notice, the Welsh Government contacted BT to obtain their views on disclosure of the withheld information. It is clear to the Commissioner that BT has registered strong objections to disclosure. The Welsh Government explained that BT provides commercial information to customers/potential customers safe in the knowledge that its confidence will be respected, and that if BT lost faith

in the recipient's ability to respect that confidence, it would have a material impact on their readiness to bid for future contracts.

25. The Undertakings with Ofcom to which BT is subject are in place to prevent certain wholesale information being shared, and require certain marketplace information to be shared on an equivalent basis to the communication provider (retail level) to ensure that there is fair competition between communication providers for the benefit of the public. All communication providers (including the BT retail division) only receive access to the market information about line speeds at the same time via an agreed industry process, and on an equivalent basis. If the withheld information was disclosed, BT considers it could place them in breach of their Undertakings to Ofcom as to do so would not be releasing information in an equivalent basis. The Welsh Government and BT consider that disclosure of the withheld information would be likely to prejudice BT's commercial interests, as it would not be released on an equivalent basis, in line with BT's Undertakings to Ofcom.
26. Where commercial information is purported to have been imparted in confidence the Commissioner considers that there would have to be a detrimental impact to the commercial interests of the confider for section 41 to be engaged.
27. The Commissioner accepts that the withheld information forms part of the monthly submission that BT provides to the Welsh Government, in confidence, to support claims for payment. Based on the representations provided by BT and the Welsh Government, the Commissioner accepts the Welsh Government's contention that if the information were disclosed the commercial interests of BT would be compromised, potentially putting it at a competitive disadvantage and damaging their commercial relationships. The Commissioner is therefore satisfied that disclosure would be an unauthorised use of the information to the detriment of the confider.

Would a public interest defence be available?

28. The final step when considering if this exemption is engaged is to consider whether there would be a public interest defence to the breach of confidence that would result through the disclosure of the information in question. Such a defence would mean that this breach of confidence would no longer be actionable and so the exemption provided by section 41(1) would not be engaged.
29. The public interest test attached to duty of confidence assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The Commissioner has therefore gone on to consider whether there would be

a defence to a claim for breach of confidence. In taking this approach it is important to consider the consequences of disclosing confidential information in order to properly weigh the public interest in preserving the confidence against the public interest in disclosure. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected and not easily overridden.

30. In his internal review request the complainant said that disclosure was necessary to allow the public to scrutinise the public statements made about the number of properties able to access fast fibre broadband as a result of the Superfast Cymru project.
31. The Welsh Government acknowledges that there is a general public interest in openness and transparency within government, particularly in terms of ensuring transparent and accountable government by disclosing information about how it spends public money. The Welsh Government also recognises the level of public interest in the availability of fast fibre broadband across Wales and the public being informed about the availability of, and line speeds for their properties. The Welsh Government pointed out that any person can access information about their potential lines speed via an established regulated process (through Ofcom) that provides a range of line speeds for their property through the Public Checker facility on the Superfast Cymru website.
32. The Welsh Government is of the opinion that release of the test data would constitute an actionable breach of confidence. This would not be in the public interest because it would be likely to deter similar organisations from sharing confidential information with it in the future. The Welsh Government is also of the view that it is in the public interest not to incur costs of any legal actions that might arise if the information were disclosed.
33. The Commissioner acknowledges that the issue of broadband speeds is a matter of public interest, particularly in some of the more rural areas of Wales. The Commissioner also accepts that there is a general public interest in public authorities being open and transparent about contracts with private organisations particularly where they involve a significant amount of public money, as in this case. It follows that there is a public interest in scrutinising how the terms of the contract are being fulfilled and how the public is benefitting.
34. However, the Commissioner considers that this has to be weighed against the potential damage which disclosure in any particular instance might cause. On the basis of submissions the Commissioner is satisfied that BT has not provided consent for the Report to be disclosed and that disclosure has the potential to compromise its commercial interests.

35. In weighing the public interest arguments for and against disclosure, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong, since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.
36. Taking into account all the arguments, the nature of the relationship between the parties and the content of the withheld information the Commissioner does not consider that the public interest is sufficiently strong to justify the disclosure of the confidential information that the Welsh Government received from BT. He considers that it is very unlikely that the public interest defence would, in this case, be of sufficient strength to defend disclosure in the event that the breach resulted in legal action being taken. The Commissioner therefore finds that the Welsh Government correctly withheld the information under section 41 of the FOIA.
37. As the Commissioner has determined that section 41 applies to the withheld information, he has not gone on to consider the other exemptions applied by the Welsh Government to the information ie sections 43 and 44.

Right of appeal

38. 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

39. 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.
40. 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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SK9 5AF