

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 October 2015

**Public Authority:** Welsh Assembly Government

**Address:** Cathays Park  
Cardiff  
CF10 3NQ

### Decision (including any steps ordered)

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1. The complainant has requested a copy of legal advice the Welsh Government had received in relation to an issue between himself and the Welsh Government regarding its Welsh for Adults policy. The Welsh Government refused the request by virtue of section 42(1) of the FOIA. The Commissioner's decision is that the Welsh Government was correct to rely on section 42(1) of the FOIA. The Commissioner does not require the public authority to take any steps.

### Request and response

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2. On 18 October 2014, the complainant wrote to the Welsh Government and requested the following information in relation to a previous FOIA request to the Welsh Government, which had also been investigated and ruled on by the Commissioner under case reference FS50538947:  
  
*"...with reference to paragraph 11 of the Decision Notice, please let me have a copy of the Legal Advice your department now admits to having obtained after my Meeting on 13 November 2013."*
3. The Welsh Government responded on 17 November 2014. It confirmed that it held the information, however refused to disclose the information in reliance on section 42(1) of the FOIA.
4. Following an internal review the Welsh Government wrote to the complainant in January 2015. It stated that its application of section 42(1) and the withholding of the information was correct for the reasons outlined in the refusal notice.

## Scope of the case

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5. The complainant contacted the Commissioner 23 February 2015 to complain about the way his request for information had been handled. He was not satisfied that the Welsh Government had refused to provide the requested information.
6. The scope of the Commissioner's investigation is therefore to consider whether the Welsh Government correctly relied on section 42(1) of the FOIA.

## Reasons for decision

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### Section 42 – Legal professional privilege

7. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege.
8. Legal professional privilege (LPP) is not defined under the FOIA or in any other legislation but is a common law concept shaped by the courts over time.
9. LPP is intended to protect the confidentiality of communications between a lawyer and a client. In the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* the former Information Tribunal described LPP as:

*"...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers related communications and exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation..."*
10. A professional legal advisor for the purposes of LPP could be a solicitor, barrister, licensed conveyancer or a legal executive holding professional qualifications recognised by the Institute of Legal Executives (ILEX). The legal advisor can be either an external lawyer or an in-house lawyer employed by the public authority itself. This was confirmed in the former Information Tribunal's ruling in *Calland v Information Commissioner and FSA (EA/2007/0136; 8 August 2008)*.
11. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential

communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

12. The Welsh Government has confirmed that it is relying on advice privilege in respect of the disputed information, and that the sole or dominant purpose of the information was to provide legal advice for the purpose of ensuring its policy in terms of Welsh for Adults tutor training was legally compliant. It has further confirmed that the advice was created by a lawyer within the Welsh Government's Legal Services Division for policy officials responsible for the Welsh for Adults policy.
13. In respect of the confidentiality of the information, the Welsh Government informed the Commissioner that the advice has retained its confidential status, has not been distributed on an unrestricted basis within the Welsh Government, or shared with any third parties outside of the organisation.
14. The Commissioner is therefore satisfied that the information withheld is protected by LPP and that section 42(1) of the FOIA is engaged. He has therefore gone on to consider the public interest.

### **Public interest in disclosure**

15. The Welsh Government has acknowledged that there is a public interest in individuals being able to exercise their rights under the FOIA to enhance their understanding of the reasons for decisions taken by a public body.
16. The Welsh Government has also acknowledged an inherent public interest in ensuring that public authorities are transparent and accountable in the decisions they make.
17. The Commissioner would also point out the public interest in the disclosure of the information itself in that it would demonstrate that the Welsh Government was prepared to take advice to ensure that its Welsh for Adults policy is compliant.

### **Public interest in maintaining the exemption**

18. The Welsh Government considers that there is a public interest in safeguarding openness in all communications between a client and a lawyer to ensure access to full and frank legal advice. In support of

this, it has referred to the Commissioner's decision notice FER0220864 (dated 31 March 2010), which states:

*"Legal Professional Privilege (LPP) ... is intended to provide confidentiality between professional legal advisers and clients to ensure openness between them and safeguard access to fully informed, realistic, candid and frank legal advice, including potential weaknesses and counter arguments."*

19. The Welsh Government has referred to a strong element of public interest inbuilt into privilege itself, and highlighted the long established principle behind LPP, that legal advisors when providing advice to their clients are able to present the full picture, which may include any relevant counter-arguments as well as arguments in support of final conclusions.

20. It has further argued that if recipients or providers of legal advice believe it is likely that the legal advice will be published, then it is questionable whether comprehensive advice would be commissioned or provided. This may result in harm to the quality of decision making, since it would not be fully informed.

21. In support of this argument, the Welsh Government has referred to the Tribunal's decision in respect of *Bellamy v the Information Commissioner and DTI* [EA/2005/023] in which the Tribunal stated:

*"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."*

22. The Welsh Government also considers that disclosure of legal advice has a significant potential to prejudice its ability to defend its legal interests, both directly, by unfairly exposing its legal position to challenge, and indirectly, by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour.

### **The balance of public interest**

23. The Welsh Government has argued that in this instance, whilst the complainant might have a personal interest in obtaining the advice, it does not consider there to be any wider public interest in the advice that would be sufficiently strong enough to outweigh the significant inbuilt weight that is afforded to LPP.

24. The Commissioner acknowledges the general public interest factors in favour of transparency and accountability referred to in paragraphs 15 and 16 of this notice.
25. The Commissioner is also mindful of the general public interest in being able to demonstrate that the Welsh Government was prepared to take advice to ensure that its Welsh for Adults policy is compliant.
26. However, the Commissioner recognises the general principle that clients should be able to receive free and frank legal advice from their lawyers and acknowledges that this in itself is a strong public interest factor in maintaining the exemption, as confirmed by the Tribunal in the case of *Bellamy v the Information Commissioner* referred to in paragraph 21 of this notice and further reinforced in *Crawford v Information Commissioner & Lincolnshire County Council* (EA/2011/01445) in which the Tribunal states:

*"Our starting point, therefore is that the exemption is qualified, not absolute, but that ...must show clear, compelling and specific justification that at least equals the public interest in protecting the information in dispute.*

27. The Commissioner notes that factors which might suggest equally strong countervailing arguments include whether there is a large amount of money involved or a large number of people affected, lack of transparency in the public authority's actions, misrepresentation of advice given, or the selective disclosure of only part of that advice. The Commissioner notes that there is no evidence of any of these factors involved in this particular case.
28. He also notes that at the time of the request, the legal advice was recent and directly related to an on-going issue the complainant has with the Welsh Government's Welsh for Adults policy.
29. Having considered the relevant public interest factors both in favour of disclosure and maintaining the exemption, the Commissioner considers the weight of public interest is balanced in favour of maintaining the exemption.

## Right of appeal

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30. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

31. 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.
32. 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**  
**Assistant Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**