

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 18 June 2018

Public Authority: Welsh Government

Address: Freedom.ofinformation@gov.wales

Decision (including any steps ordered)

1. The complainant requested a copy of a review undertaken into Sport Wales. The Welsh Government provided a copy of the review in question and confirmed that some information had been withheld under section 40(2) of the FOIA. During the course of the Commissioner's investigation, the Welsh Government also sought to rely on sections 36(2)(b)(i) and 36(2)(c) in respect of the withheld information. The Commissioner's decision is that the Welsh Government has correctly withheld the information under section 40(2). She does not require any steps to be taken.

Request and response

2. On 20 June 2017, the complainant wrote to the Welsh Government and requested information in the following terms:

"Can you please let me have a copy of the internal review referred to in this link?"

<http://www.bbc.co.uk/news/uk-wales-polit...> "
3. The Welsh Government responded on 17 July 2017 and provided a link to a copy of the report which was available on its website. It confirmed that parts of the report had been redacted under section 40(2) of the FOIA.

4. On 18 July 2017 the complainant wrote to the Welsh Government and requested a review of its handling of the request, specifically, the information which had been redacted from the report as he considered the report had been "*over-redacted*".
5. The Welsh Government provided the outcome of its internal review on 8 August 2017 and upheld its decision that parts of the report were exempt under section 40(2) of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 8 August 2017 to complain about the way his request for information had been handled.
7. During the course of the Commissioner's investigation, the Welsh Government also sought to rely on section 36(2)(b)(i) and 36(2)(c) in respect of the withheld information.
8. The scope of the Commissioner's investigation into this complaint is to determine whether the Welsh Government should disclose the remaining information held relevant to the request.

Reasons for decision

Section 40 – the exemption for personal data

9. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
10. The Welsh Government considers that the information requested constitutes the personal data of the individuals concerned and that disclosure would breach the first data protection principle.

Is the requested information personal data?

11. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as data which relates to a living individual who can be identified:

- from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
12. In considering whether the information requested is “personal data”, the Commissioner has taken into account his own guidance on the issue¹. The two main elements of personal data are that the information must “relate to” a living person, and that person must be identifiable. Information will “relate to” a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts them in any way.
13. The terms of reference of the Sport Wales Assurance review are:
- *“to investigate and report upon the governance arrangements of the Sport Wales Board; and*
 - *To investigate and report upon the circumstances, background and issues relating to the recent vote of no confidence in the Chair by the Board of Sport Wales”.*

In conducting the review, all information held by Sport Wales, the Welsh Government, the National Assembly for Wales and the Independent Panel was considered as part of the desk exercise. In addition, the review team held over 40 discussions with members of the Board, senior Executive Team and other officers of Sport Wales, the Welsh Government, the Independent Panel Members and the Wales Audit Office.

14. The information withheld from the report refers to a number of individuals involved in the review process including the Chair and Vice Chair of Sport Wales. The Commissioner acknowledges that some small parts of the information which have been redacted from the review report, if read in isolation, may not constitute personal data. However, she considers that disclosure of the remaining withheld information will in the context of being held as part of the review disclose personal data about the Chair of the Board of Sport Wales and other individuals. The Commissioner is therefore satisfied that, in the context of the request, it

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx

falls within the definition of 'personal data' as set out in section 1(1) of the DPA.

Would disclosure breach one of the data protection principles?

15. Having accepted that the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. She considers the first data protection principle to be most relevant in this case. The first data protection principle has two components:

- personal data shall be processed fairly and lawfully; and
- personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

Would disclosure be fair?

16. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. She has then balanced against these the general principles of accountability and transparency as well as any legitimate interests which arise from the specific circumstances of the case.

17. Due to the circumstances of this case, and the Welsh Government's representations, the level of detail which the Commissioner can include in this notice about its submissions to support its position in respect of its application of this exemption and the Commissioner's consideration of those arguments is limited. This is because inclusion of any detailed analysis is likely to reveal the content of the withheld information itself. However, the Commissioner can confirm that she has taken into account all representations submitted by the Welsh Government in reaching a decision in this case.

Reasonable expectations

18. The Welsh Government advised that the trigger which prompted the assurance review was a vote of no-confidence in the then Sport Wales Chair by the Board. This resulted from concerns by board members which they felt placed the organisation at risk of governance

weaknesses. The Welsh Government confirmed that individuals who were interviewed as part of the review were informed that their information would be gathered and held in confidence. They were also assured that their conversations would be non-attributable. As a result interviewees were very open in their participation in the review about the events that lead to the suspension of the Chair and Vice Chair of Sport Wales.

19. The Welsh Government confirmed that it was the intention that the review document would be used for the sole purpose of allowing the Minister to take appropriate decisions concerning the governance arrangements for Sport Wales. The full report has not been released beyond the review team and the Director of Governance and no other Welsh Government officials nor Ministers have been informed of the content of the interviews.
20. Although the review focussed on senior staff/board members at Sport Wales, in light of the nature of the information which has been redacted from the report, and the fact individuals were assured that information they provided as part of the review would be held in confidence, the Welsh Government considers that they would have formed a reasonable expectation that their personal data would not be disclosed into the public domain. The Welsh Government confirmed that consent was not sought from the individuals concerned because in light of the content of the withheld information it was considered improbable that they would have wanted it to be put into the public domain.
21. The Commissioner is of the opinion that disclosing personal data is generally less likely to be considered unfair in cases where the personal data relates to an individual's public or professional life rather than their private life. In this case, the Commissioner accepts that the information relates to the public life of the individuals in question.
22. The Commissioner believes that an employee who makes decisions which involve expenditure of public funds should expect greater scrutiny about their decisions than junior colleagues; senior officials are paid out of public funds commensurate with their level of responsibility. In this case the Commissioner appreciates that the withheld information relates to senior individuals at Sport Wales. However, the Commissioner recognises that regardless of their seniority people have an expectation that certain information will not be disclosed and that its confidentiality will be respected. For example, the Commissioner considers that information relating to an internal investigation, a grievance or disciplinary hearing will carry a strong general expectation of privacy.
23. In this case, based on the nature of the withheld information, and the representations provided to the Commissioner by the Welsh

Government, the Commissioner is satisfied that the individuals would have had a reasonable expectation that the withheld information would be kept confidential and not disclosed into the public domain without their explicit consent.

Consequences of disclosure

24. In terms of the consequences of disclosure the Welsh Government considers that, based on the nature of the information and the circumstances in which it was obtained, disclosure would have a significant detrimental effect on the interests of the individuals concerned. The Welsh Government provided further detail about the consequences of disclosure, but as mentioned earlier in this notice, whilst the Commissioner has fully considered all the representations provided she has been unable to include any further detail as to do so would reveal the content of the withheld information.
25. In light of the nature of the information and the reasonable expectations of the individuals, as noted above, the Commissioner is satisfied that release of the withheld information would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the individuals in this case.

Balancing the rights and freedoms of the individuals with the legitimate interests in disclosure

26. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, depending on the circumstances of the case it may still be fair to disclose information if there is a more compelling public interest in disclosure. Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individuals. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
27. The Welsh Government has acknowledged the inherent public interest in openness and transparency that release of the withheld information would create. It also recognises that disclosure would provide further clarity on the reasons why a number of appointments at Sport Wales were terminated. The Welsh Government reiterated that the Assurance Review was triggered by the vote of no-confidence of the Chair of Sport Wales and did not centre on financial issues. The Welsh Government

also confirmed that there was no suggestion of financial impropriety or misuse of public funds

28. The Welsh Government confirmed that there has been extensive media coverage around the board of Sport Wales over several months. The Minister made decisions around the appointment of board members and these decisions have been made public and debated in the Assembly. The Welsh Government also took the decision to publish part of the Assurance review, subject to the information it considered to be exempt under section 40(2). The Welsh Government considers that the information which is already publicly available about the matter is sufficient to satisfy any legitimate interests of the public.
29. The Commissioner notes that issues around the subject matter of the request have been the subject of a number of media articles. She therefore accepts that disclosure of the withheld information would further enhance the public understanding of the matter and the decisions made in relation to the board of Sport Wales.
30. Having considered the nature of the withheld information and the facts of this case, the Commissioner does not consider that the legitimate interests of the public in accessing this information are sufficient to outweigh the individuals' right to privacy. The Commissioner considers that the individuals had a strong expectation of privacy in relation to the withheld information and that to release it would be unfair and likely to cause damage or distress to them.
31. In conclusion, the Commissioner finds that disclosure of the withheld information would be unfair and would therefore contravene the first data protection principle. The Commissioner therefore upholds the Welsh Government's application of section 40(2).

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@hmcts.gsi.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

Andrew White
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