

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2016

Public Authority: Wales Office
Address: Gwydyr House
London
SW1A 2NP

Decision (including any steps ordered)

1. The complainant has requested copies of all correspondence between Wales Office Ministers and the Welsh Government Minister for Health and Social Care and Deputy Minister for Health since January 2015. Whilst the Wales Office disclosed some information, it refused other items by virtue of section 35 of the FOIA on the basis that disclosure would be likely to prejudice the formulation of government policy. Following the Commissioner's investigation, the Wales Office subsequently changed its stance to rely on section 28 of the FOIA as it considered that disclosure would be likely to prejudice the relations between the UK government and the Welsh Assembly Government. The Commissioner's decision is that the Wales Office has correctly relied on section 28 in respect of the remaining withheld information. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 11 November 2015, the complainant wrote to the Wales Office and requested the following information:

"...all correspondence between Wales Office Ministers and the Welsh Government Minister for Health and Social Care and Deputy Minister for Health since January 2015."

3. The Wales Office responded to the request on 8 December 2015. It confirmed that it holds relevant information, some of which it considered

could be released and which it attached, however, it refused to disclose other parts of the information by virtue of section 35 of the FOIA.

4. Following an internal review the Wales Office wrote to the complainant on 5 January 2016. It upheld its original decision to refuse part of the information in reliance on section 35 of the FOIA.
5. During the early stages of the Commissioner's investigation, the Wales Office altered its position, now relying on section 28 of the FOIA on the basis that disclosure would be likely to prejudice the relations within the United Kingdom (UK).

Scope of the case

6. The complainant contacted the Commissioner on 6 January 2016 to complain about the way his request for information had been handled.
7. The Wales Office confirmed to the Commissioner that it held 13 items of correspondence falling within the scope of the request and confirmed that it had released two at the time of its original response on 8 December 2015. It now concluded that a further five letters subject to one minor redaction could be disclosed, and confirmed that it had sent these items of correspondence to the complainant.
8. However, the Wales Office informed the Commissioner that having reconsidered its response in relation to the remaining six items of correspondence, it was now seeking to rely on section 28(1) in respect of these documents on the basis that disclosure is likely to prejudice relations within the UK, and specifically between the UK government and the Welsh Assembly Government.
9. During the course of the Commissioner's investigation, the Wales Office disclosed one further item of correspondence, redacting one sentence. However, the complainant confirmed that he was not satisfied with the Wales Office reliance on section 28(1) in respect of the remaining correspondence.
10. The scope of the Commissioner's investigation is therefore to consider the Wales Office reliance on section 28(1) in respect of the remaining five items and the redacted part of the sixth letter.

Reasons for decision

Section 28 – prejudice to relations between UK administrations

11. Section 28 states that information is exempt if its disclosure would or would be likely to prejudice relations between any administration in the United Kingdom and any other such administration. The administrations referred to are the government of the United Kingdom, the Scottish Administration, the Executive Committee of the Northern Ireland Assembly and the Welsh Assembly Government.
12. Devolution is now an established part of the constitution of the United Kingdom with the Scotland Act, 1998, the Northern Ireland Act 1998, and the Government of Wales Act 1998 defining the respective functions of the UK government and the devolved administrations. The arrangements in place between the administrations provide for the disclosure of information in appropriate circumstances. The success of these arrangements requires the UK administrations to work together in an environment of mutual trust, co-operation and respect.
13. It is recognised however, that different administrations may take differing, and at times opposing views on a wide range of issues and policies, and that from time to time, these differences may give rise to disagreements which are the subject of negotiations.
14. The purpose of the exemption is therefore to protect good relations between the different administrations within the UK, and the Commissioner considers that the exemption will be engaged where the disclosure of the information would be likely to harm trust, openness and the free and frank exchange of views between any of the administrations.
15. Section 28 is a prejudice based exemption, and as with other prejudice based exemptions is therefore subject to the prejudice test. The FOIA does not give any guidance as to the meaning of the word 'prejudice', however in broad terms the Commissioner takes the view that 'prejudice' means 'harm' or 'damage' and that the term 'likely to prejudice' indicates a degree of probability where there is a very significant and weighty chance of prejudice to the subject matter of the exemption. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not. 'A public authority must therefore satisfy itself that the prejudice or harm that is specified in the exemption would, or would be likely to occur.

16. A disclosure which resulted in an administration refusing to share information necessary for the proper discharge of its functions with a counterpart administration would be likely to engage this exemption. On the other hand, mere political embarrassment is not a factor that can be taken into account.
17. Similarly, a disclosure which resulted in the administrations being more guarded with one another would erode co-operation which could be considered damaging to relations.
18. When considering section 28, a public authority should establish whether the information is shared between the administrations or internal. If shared, the public authority should consider whether the information was shared in circumstances giving rise to a reasonable expectation that it would remain confidential, the sensitivity of the information at the time of the request, and whether any damage would result if the information was released.
19. The Wales Office has applied the exemption on the basis that disclosure would be likely to prejudice relations between two or more United Kingdom administrations.
20. It has informed the Commissioner that the five items of correspondence and the redaction from letter six, express open and honest views between the UK Government and the Welsh Government Ministers, and disclosure would be likely to prejudice their ability to continue to write in these terms.
21. The Wales Office has also stated that one of the letters (dated 11 February) concerns a range of sensitive areas where the two Governments have had fundamental disagreements. It considers that in order for Ministers from both administrations to effectively discharge government business they must be able to express candidly their views on each other's policy decisions, handling and approaches and believes disclosure is likely to prejudice Ministers' willingness and ability to do so in future.
22. The Wales Office has stated that it has taken into account the need to maintain good relations between the two administrations by ensuring that the exchange of correspondence of this nature is based on mutual trust, which it argues flows from confidentiality.
23. The Commissioner has considered the arguments put forward by the Wales Office and notes that the withheld information consists of letters exchanged between the two administrations. Although this correspondence is shared between the two parties, the Commissioner

acknowledges that there would be a general expectation of confidentiality by the authors of those letters.

24. The Commissioner also accepts that the content of the letters are examples of the two administrations being critical of the other's handling and approach in a contentious and devolved area, with one letter in particular covering a range of sensitive areas where the two governments have had fundamental disagreements. The Commissioner has therefore concluded that disclosure of these documents would be likely to prejudice the willingness of Ministers to express candidly their views on each other's policy decisions in the future, and in so doing, that section 28(1) of the FOIA is engaged. As section 28 is a qualified exemption however, consideration of the public interest test is therefore necessary.

Public interest in disclosure

25. The Wales Office 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.
26. The Wales Office has also acknowledged an inherent public interest in ensuring that public authorities are transparent and accountable in the decisions they make.
27. In terms of section 28, the Wales Office considers there is also an argument for disclosing information which demonstrates that a candid discussion took place between the two administrations giving rise to various views regarding sensitive issues and policies such as are in the public domain.

Public interest in maintaining the exemption

28. However, the Wales Office considers that the disclosure of some of the correspondence serves to fulfil the arguments in favour of disclosure and that there are arguments in support of maintaining the exemption in respect of the remaining documents.
29. The Wales Office considers that as the withheld correspondence contains open and honest views between the UK Government and Welsh Government Ministers, the disclosure of which is likely to prejudice good relations between the two administrations; and that it is important to maintain these good relations by ensuring that the exchange of correspondence of this nature continues.

The balance of public interest

30. In its consideration of the balance of the public interest test, the Wales Office has informed the Commissioner that it has considered carefully the extent to which these letters further the understanding of the issues of the day and decisions taken by the administrations, against the need for the UK Government and Welsh Government Ministers to be able to exchange full, free and frank views in an uninhibited way in relation to policy development and considers that the balance is weighted in favour of maintaining the exemption.
31. The Commissioner has also considered the arguments put forward by the Wales Office, both in favour of disclosure and maintaining the exemption, and whilst she acknowledges the very important public interest in enhancing the understanding of the reasons for decisions taken by public authorities, and the desire for accountability and transparency, she considers in this case, that the balance is weighted in favour of maintaining the good relations between the two administrations so that the continued exchange of correspondence of this nature continues.

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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