

Freedom of Information Act 2000

Decision notice

Date: 2 April 2012

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

Decision (including any steps ordered)

1. The complainant requested information relating to the decision to bring in free admission to heritage sites to Welsh citizens under the age of 16 or over the age of 60. The Welsh Assembly Government ('the Welsh Government') disclosed some information but withheld other information under section 42 and 35 of the Freedom of Information Act 2000 ('the Act').
2. The Commissioner's decision is that the Welsh Government incorrectly withheld information which, although exempt, should be disclosed as the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - To disclose to the complainant the requested information which it has so far withheld, subject to the redactions as highlighted in the confidential annex.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 17 December 2010, the complainant wrote to the Welsh Government and requested the following information:

"Copies of all briefings given to any Ministers relating to the decision to bring in free admission to Cadw sites for Welsh citizens who are over 60 or 16 and under.

This is to include

- a) Briefings prior to the decision.
 - b) Any briefings since the decision relating to the impact of the decision and any proposals to vary the policy."
6. The Welsh Government responded on 14 January 2011 and disclosed some information relevant to part (a) of the request but withheld other information under section 42 of the Act. The Welsh Government stated that information held relevant to part (b) of the request was considered to be exempt under section 35 of the Act and it was currently considering the public interest test in relation to this exemption.
7. The Welsh Government issued a further response on 14 February 2011. It stated that the information held relevant to part (b) of the request was considered exempt under section 35 and the public interest favoured non disclosure.
8. Following an internal review the Welsh Government wrote to the complainant on 7 April 2011. It released some information relating to part (b) of the request, which had previously been withheld under section 35, with parts of the document redacted under section 42. The Welsh Government confirmed that its position was that the remaining withheld information was exempt under section 42 of the Act and the public interest favoured non-disclosure.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. She asked the Commissioner to investigate the withholding of information under section 42 and in particular, whether the public interest favoured disclosure or non-disclosure.

10. During the Commissioner's investigation, the Welsh Government sought to rely on section 35, in addition to section 42, as a basis for withholding some of the information.
11. The remaining withheld information in this case comprises parts of two briefings to Ministers relating to the decision to allow free entry to certain heritage sites in the care of Cadw (the Welsh Government's historic environment service) for Welsh citizens over the age of 60 or under the age of 16. In particular, the Welsh Government has withheld the following parts of these documents:
 - (i) Briefing dated 21 February 2008 – paragraph 12
 - (ii) Briefing dated 28 July 2010 – paragraphs 5 to 11

Reasons for decision

12. The Commissioner has considered whether the Welsh Government appropriately withheld the above information. Due to the circumstances of this case and the content of the withheld information, the level of detail which the Commissioner can include in this Notice about the Welsh Government's submissions to support its position and the Commissioner's consideration of those arguments is limited. This is because inclusion of any detailed analysis is likely to reveal the nature and content of the withheld information itself. The Commissioner has therefore produced a confidential annex which sets out his findings in detail. This annex will be provided to the Welsh Government but not, for obvious reasons, to the complainant.

Section 42

13. Section 42 of the Act states that information is exempt from disclosure if it is protected by Legal Professional Privilege ('LPP'). The principle of LPP is based on the need to ensure that communications between a client and his legal adviser will be treated in confidence and not revealed without the client's consent. It is considered to be a fundamental requirement of the legal system that a client can speak freely and frankly with his legal adviser in order to obtain appropriate legal advice based on full knowledge of all the relevant circumstances of the case.
14. 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 may apply where no litigation is in progress or being

contemplated. In order for information to be covered by LPP, the communications must be:

- confidential,
- made between a client and professional legal adviser acting in their professional capacity and;
- made for the sole or dominant purpose of obtaining legal advice.

Communications made between adviser and client in a relevant legal context will therefore attract privilege.

15. For the purposes of LPP, it makes no difference whether the legal adviser is an external lawyer or a professional in-house lawyer employed by the public authority itself. The Commissioner's view is that information which comments on legal advice or discusses the circumstances surrounding the obtaining of that legal advice is also capable of attracting LPP. However, this is only to the extent that the comment or discussion, if disclosed, would be disclosing legally privileged information.
16. Having viewed the information which the Welsh Government has continued to withhold in this case the Commissioner accepts that all of that information is subject to legal advice privilege.
17. Information will only be privileged so long as it is held confidentially and not disclosed. As far as the Commissioner can see, the legal advice remained confidential at the time of the request and there is therefore no suggestion that privilege had been lost. The Commissioner accepts that the withheld information is legally privileged and the exemption is engaged. He has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

18. The Welsh Government acknowledges there is a public interest in individuals being able to exercise their rights under the Act to enhance their understanding of the reasons for decisions or actions taken by a public body.
19. The Welsh Government also accepts there is an inherent public interest in ensuring that public authorities are transparent in the decisions they make in order to promote accountability and improve the quality of decision making. In this case, disclosure of the withheld information would assist the public in understanding any legal issues associated with the decision to allow free admission to certain heritage sites for persons over the age of 60 and under the age of 16, and the subsequent

withdrawal of the scheme, and whether any advice provided had been followed.

20. Further details about the factors in favour of disclosure are provided in the confidential annex.

Public interest arguments in favour of maintaining the exemption

21. The Welsh Government has submitted the following arguments in favour of maintaining the exemption.

- It is in the public interest that decisions are taken in a fully informed legal context. The Welsh Government requires high quality, comprehensive legal advice for the effective conduct of its business. Without such advice, the quality of its decision-making would be considerably reduced as it would not be able to make fully-informed decisions on the basis of the best advice available, and with a full appreciation of relevant facts.
- It is of vital importance for a legal advisor to present the full picture to his or her clients, which includes arguments in support of any final conclusions as well as counter-arguments. The nature of legal advice often sets out possible arguments for and against a particular view and weighs up their relative merits. This means that legal advice obtained will often set out the perceived weakness of the client's position.
- Disclosure of legal advice has a significant potential to prejudice its position to defend its legal interest – 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 of favour”. The former could result in serious consequential loss, or a waste of resources in defending unnecessary legal challenges.
- There is a risk that lawyers and clients will be deterred from making a permanent record of advice or only make partial records if legal advice was routinely disclosed. It is in the public interest that legal advice and the process of decision making that follows is recorded as fully and accurately as possible. At worst, there could be a reluctance to seek the legal advice at all.

Balance of the public interest arguments

22. In considering the balance of the public interest, the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege in order to protect the confidentiality of

communications between lawyers and their clients. However, he does not accept that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure.

23. In order to determine where the public interest lies in this case, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered whether the advice is likely to affect a significant number of people, the timing of the request and the status of the advice.
24. The Commissioner considers that there is a very strong public interest in promoting openness, transparency and accountability in the Welsh Government's decision making processes. In this particular case, disclosure of the legal advice would provide a greater degree of transparency in relation to the Welsh Government's decision to introduce the free admission scheme in September 2008, and the subsequent withdrawal of the scheme with effect from 1 June 2011.
25. The Commissioner understands that around 30,000 free entry passes were issued during the duration of the scheme. Around 39,000 visits were made using the free passes which accounted for around 1.5% of the 1.2 million people visiting Cadw sites with admission fees each year. According to statistics issued by the Office of National Statistics, around 590,000 (19.6%) of people living in Wales are aged 16 and under and around 748,000 (25%) are aged 60 and over. As such the free admission scheme had the potential to affect a significant proportion of people living in Wales. When the Scheme was introduced, the Welsh Government allocated a budget of £737,000 to fund the initiative in 2008/2009 and a further £653,000 for each of the following two financial years.
26. The Commissioner notes that, at the time of the request no decision had been taken about whether or not to continue with the free admission scheme. As such, the legal advice was still very much "live" and cannot be considered to have served its purpose. The Commissioner believes this adds weight to the arguments in favour of maintaining the exemption. However, on the other hand, the Commissioner considers the fact the scheme was still in operation at the time of the request also increases the public interest in disclosure. This is because any decision about the future of the scheme would have been of more significance to the public at the time and it could be argued that disclosure may also have allowed to public to participate or contribute to the decision making process.
27. The complainant has argued that it is important for the public to know what legal advice the Welsh Government obtained regarding the

scheme, and whether that advice was heeded. The Commissioner recognises the public interest in ensuring that public authorities do not unequivocally ignore any legal advice they obtain, or proceed with a particular action which is potentially unlawful. Whilst the Commissioner notes that the Welsh Government issued a statement regarding the withdrawal of the scheme explaining the reasons why it has been withdrawn, he believes that disclosure of the legal advice would provide further transparency for the basis of the decision.

28. The Commissioner accepts there is a very strong public interest in the Welsh Government being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have a negative impact upon the frankness of legal advice provided and may even have an impact upon the extent to which legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by the Welsh Government which would not be in the public interest. However the Commissioner does not accept that disclosure would lead to the Welsh Government or its legal advisers failing to record legal advice thoroughly in the future.
29. The Commissioner has considered the withheld information and the wider context that informs the public interest against the principles of transparency and accountability. For the reasons set out above, and detailed in the confidential annex, whilst this is a finely balanced case, the Commissioner considers that in all the circumstances of the case, the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

Right of appeal

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
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