

## Freedom of Information Act 2000 (FOIA)

### Decision Notice

**Date:** 21 February 2018

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

#### Decision (including any steps ordered)

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1. The complainant has requested copies of correspondence between a senior Welsh Government official and the then Minister for Housing, Regeneration and Heritage within specified periods. The Welsh Government provided the complainant with five documents, but the complainant was of the view that the Welsh Government had refused to provide him with all the relevant information. The Welsh Government also cited section 12 (appropriate limit).
2. The Commissioner's decision is that the Welsh Government has not satisfied her that it is entitled to rely on section 12 in this case. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Conduct a fresh search for the requested information and issue a response accordingly. If the public authority wishes to rely on section 12 it must explain to the complainant why this is the case.
3. 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 FOIA and may be dealt with as a contempt of court.

## Requests and responses

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4. On 15 May 2016 the complainant requested the following information from the Welsh Government (request 10540):

*"Please can I have copies of all the emails between Huw Lewis and Ceri Breeze between February 1<sup>st</sup> 2011 and February 1<sup>st</sup>, 2012?"*

5. Mr Lewis was a former Minister for Housing, Regeneration and Heritage, and Mr Breeze was Deputy Director of Housing.

6. The Welsh Government responded to the complainant on 30 June 2016. It advised that it had interpreted the request as relating to the Regeneration Investment Fund for Wales (RIFW) since the complainant had made a previous request on that topic. The Welsh Government stated that it did not hold any relevant information.

7. On 4 July 2016 the complainant advised the Welsh Government that his request did not relate to the RIFW.

8. On 6 July 2016 the Welsh Government reiterated that it had interpreted the request in the context of the complainant's previous request. Given the complainant's clarification, the Welsh Government advised the complainant that Mr Breeze, as a senior official, covered many areas of policy. For this reason the Welsh Government was concerned that the breadth of the request may result in compliance with that request exceeding what it described as "the 24 hour rule".

9. The Welsh Government suggested that the complainant consider limiting his request to a particular topic or area, since this may make it easier to provide him with information of value to him. The Welsh Government pointed out that the complainant was not required to disclose the intent behind his request, but said that it wanted to help him set out his request *"in a way which improves the usefulness of the information you get back"*.

10. On 8 July 2016 the complainant submitted a refined request (request 10560):

*"Please may I see copies of the emails between Ceri Breeze and Huw Lewis between May 1<sup>st</sup> 2011 and July 31<sup>st</sup> 2011 and also those between Ceri Breeze and Huw Lewis in the whole month of January 2012?"*

11. The Welsh Government acknowledged the request and checked its interpretation with the complainant as follows:

*"We will now get on and process the request searching for e-mails, between those dates, where Huw Lewis or Ceri Breeze are the originator and the other party is the recipient or a copy recipient."*

12. The complainant confirmed that this was an accurate interpretation of his request.

13. The Welsh Government responded to request 10560 on 4 August 2016. It advised that it had identified four categories of information that might be relevant to the request, comprising 8106 documents in total:

*"(i) Emails sent by Ceri Breeze i.e. as the "originator" or "sender" to Huw Lewis (to him personally or to him as Minister for Housing, Regeneration and Heritage).*

*(ii) Emails sent by Ceri Breeze where Huw Lewis or the Private Secretary for Housing, Regeneration and Heritage is a cc recipient.*

*(iii) Emails sent to Ceri Breeze by Huw Lewis personally or as Minister i.e. where he was the originator/sender. This included emails sent from the Private Secretary's email address.*

*(iv) Emails sent by Huw Lewis/Minister/Private Secretary Minister to third parties where Ceri Breeze was also copied in. These would include new emails generated by the Minister or his Private Office but also emails where the Minister/Private Office responded to an email sent to him by a third party - as the Minister would be the originator of the responding email."*

14. The Welsh Government explained that, although the complainant had narrowed the time period of the request, it remained broad in that relevant information could be on a wide number of topics. In order to comply with the request the Welsh Government would therefore need to inspect each of the 8106 documents to ascertain if it was relevant to the request. The Welsh Government estimated that such an inspection would take 108 hours, exceeding the appropriate limit of 24 hours.

15. The complainant requested an internal review of request 10560 on 13 August 2016. The complainant argued that category (iv) as described by the Welsh Government was *"bizarre and clearly an incorrect interpretation"* of his request. The complainant expressed concern that the scope of the request had been enlarged by the Welsh Government in order to avoid responding.

16. The complainant submitted a further request to the Welsh Government on 23 August 2016 (request 10712). The first part of the request asked for clarification about the handling of requests 10540 and 10560, rather than asking for recorded information.

17. The second part of request 10712 referred to the four categories of documents as set out at paragraph 13 above:

*"2. How many documents come within each of the sections (i) to (iv) below?"*

18. The third part of request 10712 was as follows:

*"Please can I see the emails in the first category which, I assume, would bring the documentation below the level of cost for 24 hours of work? Also emails sent by Huw Lewis as Housing Minister to Ceri Breeze as Deputy Director of Housing on the dates between May 1st 2011 and July 31<sup>st</sup> 2011 and also those between Ceri Breeze and Huw Lewis in the whole month of January 2012? I am not interested in any copies to other people. I simply want email correspondence between them."*

19. The Welsh Government provided the outcome of the internal review of request 10560 on 8 September 2016, which upheld the handling of that request.

20. On 21 September 2016 the Welsh Government responded to request 10712, providing explanatory information in respect of the first part of the request. With regard to the second part of the request the Welsh Government provided the following figures:

- (i) 440 records returned
- (ii) and (iii) combined - over 5000 records returned
- (iii) only - 2212 records returned

21. The Welsh Government clarified that the searches for category (ii) and (iii) were not mutually exclusive.

22. The Welsh Government estimated that compliance with the third part of the request would take 68 hours, thus exceeding the cost limit. It suggested that the complainant refine his request to the first category (ie the first question in the third part of the request).

23. The complainant duly submitted a further refined request (request 10862) and the Welsh Government responded on 15 November 2016. It stated that, of the 440 emails identified as potentially relevant to the first category of documents, five emails had subsequently been established to be relevant to the request. The five emails were disclosed to the complainant.

24. The complainant wrote to the Welsh Government on 21 November 2016 to challenge its response to request 10862. The complainant did not accept the Welsh Government's explanation that only five of the 440 documents were in fact relevant to his request. The complainant interpreted the Welsh Government's response as

*"...a clear refusal to supply the email correspondence that I was originally told was available".*

25. The complainant also complained that the Welsh Government had failed to provide him with any emails as described in the third part of the request, ie those sent by Mr Breeze to Mr Lewis within the periods specified.

26. The Welsh Government provided the outcome of the internal review of request 10862 on 19 December 2016. It reiterated how it had searched for the requested information relevant to the first part of the request, and referred to the explanations provided in previous correspondence as to its records management systems. The Welsh Government clarified that:

*"The 440 records included internal and external emails saved to the system during the period, on any subject and to any person".*

27. The Welsh Government further explained that Mr Breeze had not sent any emails to Mr Lewis personally, since communications would generally go through the Personal Secretaries and Diary Secretaries.

## **Scope of the case**

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28. The complainant originally contacted the Commissioner on 19 September 2016 to complain about the way his requests had been handled. The complainant subsequently told the Commissioner that he wished to challenge the Welsh Government's response to request 10862, since he considered that the Welsh Government was refusing to let him see the 440 emails.
29. The Commissioner has considered all of the correspondence provided by the complainant. She concludes that request 10862 cannot be taken in isolation, and it is necessary to consider the handling of previous requests where appropriate to inform her understanding of the handling of request 10862.

## Reasons for decision

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### Section 12: the appropriate limit

30. Section 12(1) of the FOIA provides that a public authority is not obliged to comply with a request for information if the authority estimates that complying with the request would exceed the appropriate limit, known as the cost limit (£600 for central government, £450 for all other authorities). A public authority may rely on section 12 in respect of the duty to confirm or deny that the requested information is held, or the duty to communicate information to the applicant.
31. Section 12 of the FOIA should be considered with the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. When estimating whether complying with a request would exceed the cost limit, the public authority may only consider the time taken for the following activities:
- (a) determining whether it holds the information,
  - (b) locating the information, or a document which may contain the information,
  - (c) retrieving the information, or a document which may contain the information, and
  - (d) extracting the information from a document containing it.
32. Regulation 4(4) states that the authority should calculate the cost of complying with a request by multiplying the time estimated by £25 per hour. If the authority considers that complying with the request would therefore cost more than the appropriate limit, it is not obliged to comply with the request. In the case of the Welsh Government, the £600 limit applies, which equates to 24 hours.
33. Following the First-Tier Tribunal's finding in the case of Randall<sup>1</sup>, the Commissioner considers that a sensible and realistic estimate must be informed by the circumstances of the case. A public authority is not required to work up to the cost limit before refusing a request under section 12, but must be able to demonstrate how the estimate has been calculated.
34. In the case of multi-part requests for similar information an authority can legitimately refuse the entire request under the cost limit, even if

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<sup>1</sup> Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency, appeal no EA/2007/0004

compliance with one or more parts of the request would not themselves exceed the cost limit.

### **Handling of request 10560**

35. The Commissioner understands that request 10862 followed on from the Welsh Government's response to request 10560. Since the complainant is dissatisfied with the response to request 10862 the Commissioner considers it appropriate to look at the response to request 10560 first.
36. The Commissioner asked the Welsh Government to explain how it handled the request. The Welsh Government provided the Commissioner with two file notes created by the individual who conducted the search, as well as copies of internal emails. The Welsh Government said that, since this individual had retired, it could only provide general rather than specific answers to the Commissioner's enquiries.
37. The Welsh Government explained that emails were saved or archived to its electronic records management system, iShare. iShare may be searched by various criteria, including the originator or sender, the date the information was saved, and key words contained within the information.
38. The Welsh Government set out that the iShare searches would return emails sent by the Minister (or his Private Office) to Mr Breeze's teams where Mr Breeze was copied in. However it would not return emails where the Minister (or his Private Office) had responded to different teams or policy areas.
39. In addition iShare recorded the date that a document was saved to the system, rather than the date of the specific document. This meant that the Welsh Government was unable to exclude the possibility that information was held that is relevant to the first part of the request, but that was saved outside the time periods specified. However the Welsh Government considered that this would have a "marginal" impact on the amount of relevant information identified. The Welsh Government said that it had considered extending the time period captured by the search, but concluded that this would be likely to result in a large volume of irrelevant information being identified as potentially relevant.
40. As set out above, the Welsh Government said it identified four categories of information that might be relevant to request 10560, comprising 8106 documents in total.

a) Search for documents where Ceri Breeze was the originator of the record

41. In respect of the two time periods specified by the complainant, Ceri Breeze was recorded as the originator of 440 documents. The Commissioner understands that the 440 documents comprised emails sent by Mr Breeze during the time periods specified, including but not limited to those emails sent to Mr Lewis.

b) Search for documents including the text "Minister for Housing, Regeneration and Heritage".

42. This search aimed to identify emails sent or received by Mr Lewis as Minister. Emails which needed to be retained were saved to iShare by the relevant policy division, rather than the Minister himself. The Welsh Government used a keyword search using the terms "Minister for Housing, Regeneration and Heritage". This search returned 5424 documents in total.

c) Search for documents including the text "Ceri Breeze".

43. As with b) above, this search aimed to identify emails sent or received by Mr Breeze, as opposed to emails saved to iShare by Mr Breeze. The search returned 2242 documents in total across the time periods specified.

d) Search for documents including the text "Minister for Housing".

44. The Welsh Government conducted this search using the broader term "Minister for Housing". However this search greatly increased the number of documents returned. At the time the request was received iShare displayed a maximum of 2000 search results and in this case it returned the maximum 2000 documents for each of the time periods specified. The Welsh Government concluded that this search was not therefore a viable way of identifying relevant information.

e) Search for documents including the text "PS Minister for Housing".

45. The Welsh Government conducted a search using this search term for one of the time periods specified by the complainant. The search returned the maximum 2000 documents.

f) Search for documents including the text "Minister for Housing Regeneration".

46. Similarly, this search returned 5589 documents across the time periods specified by the complainant.

### Searching the returned documents

47. In respect of each of the searches set out above, the Welsh Government explained that it would then need to conduct a further search of the returned documents in order to ascertain what was actually relevant to the request. The Welsh Government said that it would be able to rule out some documents without opening them (for example, from the title of the document) but in many cases it would be necessary to open the document and check its contents.
48. The Welsh Government said that it had taken into account the fact that some documents could be quickly scoped out, and others would require further examination. It estimated that it would take approximately 15 seconds to decide that a document could be scoped out without needing to be opened and read. It estimated that it would take at least one minute to open and read a document in order to decide whether it was relevant. The Welsh Government estimated that on average it would take around eight minutes to consider ten documents. Applying the Welsh Government's formula to the 8106 documents included in searches a) to c) above results in an estimate of 108 hours.
49. It appears to the Commissioner that the Welsh Government's search strategy was extremely time-consuming in terms of the work required to identify relevant information. The Commissioner is also concerned that the searches described could not guarantee that all of the relevant information would be identified. The sheer volume of documents returned means it is extremely likely that the Welsh Government would exceed the cost limit in attempting to determine what information is held that is relevant to the request. That said, it is not clear to the Commissioner whether this was the only, or indeed the most appropriate, search strategy that could have been employed.
50. The Commissioner has gone on to consider request 10862 and has then set out her conclusions with regard to both requests.

### **Request 10862**

51. Following the Welsh Government's refusal of request 10560 the complainant submitted the refined request 10712 and then the further refined request 10862. The complainant clarified to the Commissioner that he wished her to investigate the Welsh Government's response to request 10862:

*"As the Welsh Government has identified 440 documents that were potentially relevant to my request and has sent me only the irrelevant emails which do not answer my specific request then effectively they are refusing my request".*

52. The Welsh Government has maintained, both to the complainant and to the Commissioner, that it has provided the complainant with all of the information it holds that is relevant to this part of the request. According to the Welsh Government, the relevant information comprised only five emails.
53. The complainant has suggested that the remaining 435 emails have gone "missing" and that the Welsh Government is refusing to allow him to see them. However it appears to the Commissioner that the Welsh Government is saying that the 435 emails, whilst initially identified as being potentially relevant, do not in fact fall within the scope of the request.
54. The complainant has also pointed out that Mr Breeze, as a senior official, reported to Mr Lewis, the Minister, during the specified time periods. The complainant has questioned whether it is reasonable to accept that Mr Breeze only sent the Minister five emails during this time.
55. As set out in respect of request 10560, the Welsh Government has explained that iShare could not facilitate a search which would have conclusively identified emails sent by Mr Breeze to Mr Lewis within the time periods specified by the complainant. In order to comply with request 10862 the Welsh Government conducted a number of searches which it considered would be most likely to return relevant information.
56. The first search identified 440 emails as having been saved by Mr Breeze within the two specified periods. The Welsh Government then inspected the contents of each email individually. From this inspection five emails fell within the description as provided by the complainant.
57. Given that the complainant did not accept the Welsh Government's assessment, the Commissioner asked for a copy of the 440 emails so that she could inspect their content. However the Welsh Government advised that it was unable to provide a record of the search results, and said that the search would need to be repeated if the Commissioner wished to see such evidence.
58. The Commissioner is obviously concerned that the Welsh Government was unable to provide relevant documentation concerning the 440 emails. The Welsh Government has provided an explanation as to how it conducted the search, but was unable to provide evidence of the search that the Commissioner could test. In the absence of supporting information it is difficult for the Welsh Government to satisfy the Commissioner that proper consideration was given at the time the request was originally handled. However the Commissioner is mindful that this request was handled in 2016, and the individual who conducted the original search has subsequently retired.

## Conclusion

59. The Commissioner is mindful that the key question for her to determine is whether the Welsh Government has produced a reasonable cost estimate, based on an appropriate and proportionate search strategy. The Commissioner is not required to determine conclusively that the estimate is strictly accurate since it is an estimate rather than a quotation.
60. However the Commissioner is concerned that she is unable to test the Welsh Government's search strategy. The Welsh Government has been unable to expand on the file notes created by the individual who initially dealt with the request. This makes it extremely difficult for the Commissioner to be satisfied that the search strategy was indeed appropriate.
61. In light of the above the Commissioner is unable to say whether or not the Welsh Government acted correctly in assessing that only five emails were relevant to the request. The Commissioner has considered whether she ought to specify remedial steps to be taken by the Welsh Government in this case. Given that the Welsh Government apparently failed to keep a detailed record of the search results that returned the 440 documents, the Commissioner could require further searches to be undertaken.
62. The Welsh Government has explained that it has made significant changes to iShare and its records management processes in the period between the request being refused, and the Commissioner's consideration of the complaint. The Welsh Government is unable to confirm whether this means that it is now able to comply with the request without relying on section 12.
63. The Commissioner has therefore decided that the Welsh Government ought to conduct a fresh search for the requested information and issue a revised response to the complainant. The Commissioner understands that it is possible that the Welsh Government may still estimate that compliance would exceed the appropriate limit. However, if this is the case then she would expect the Welsh Government to provide a clear and detailed explanation in its refusal notice to the complainant.
64. The Commissioner would also remind public authorities of the importance of keeping adequate records of the way information requests are handled. If a public authority cannot demonstrate to the Commissioner that a request has been properly dealt with, she is more likely to uphold a complaint against that authority.

## **Section 16: advice and assistance**

65. Where section 12(1) is engaged, section 16 imposes a duty on a public authority to provide advice and assistance to an applicant in order to help them access at least some of the information they seek. In these circumstances the Commissioner would expect a public authority to consider ways in which an applicant could refine their request to enable it to be brought under the appropriate limit.
66. The Commissioner is mindful that the complainant in this case has submitted a number of revised and refined information requests. The complainant argued that this was necessary because the Welsh Government failed to provide him with an adequate response. The Commissioner has some sympathy with the complainant's frustration in this regard, since she notes that he first requested emails between Huw Lewis and Ceri Breeze on 15 May 2016. The Welsh Government assumed that the complainant's request related to a particular topic, which was not the case.
67. On 6 July 2016 the Welsh Government notified the complainant that the breadth of his request may result in compliance with that request exceeding the cost limit. The complainant duly refined his request and on 4 August 2016 the Welsh Government issued a refusal notice citing section 12. The Welsh Government set out the four categories of information, 8106 documents in total. It explained that compliance with the request would take 108 hours.
68. The Commissioner considers that it would have been more helpful had the Welsh Government provided the complainant with a breakdown of the time required to search each category of information. It could also have provided a more detailed explanation as to how it stored emails on iShare. This may have assisted the complainant in revising or rewording his request by subject or keyword.
69. The complainant has alleged that the Welsh Government has acted deliberately to frustrate his requests. The Commissioner can confirm that she has not seen any evidence to support this allegation.

## Right of appeal

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70. 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)

71. 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.
72. 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 .....

**David Teague**  
**Regional Manager (Wales)**  
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