

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 December 2021

Public Authority: Welsh Government

Address: freedom.ofinformation@gov.wales

Decision (including any steps ordered)

1. The complainant requested information in respect of a meeting which took place between HRH the Prince of Wales and the late Rhodri Morgan, the then First Minister of the Welsh Government on 11 February 2008. The Welsh Government refused the request on the basis of section 12(1) (cost of compliance) of the FOIA. The Commissioner's decision is that the Welsh Government was entitled to rely on section 12(1) to refuse to provide the information. However, in its failure to offer advice and assistance to help refine the request, the Commissioner has recorded a breach of section 16(1) of the FOIA.
2. The Commissioner requires the Welsh Government to take the following steps to ensure compliance with the legislation.
 - Contact the complainant and provide advice and assistance about how to refine his request to bring it within the cost limit.
3. The Welsh Government 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

4. On 23 November 2020, the complainant wrote to the Welsh Government and requested the following information in respect of a meeting which took place between HRH the Prince of Wales and the late Rhodri Morgan, the then First Minister of Wales on 11 February 2008:

"1. Can you provide a list of those present at the meeting of 11 February 2008.

2. Was an agenda (or similar) prepared in advance of the meeting. The agenda may have been an formal document, or it may have been an informal affair. It may have produced by the Prince's team. OR it may have been approved by staff working for the First Minister and the Welsh government. I am interested in receiving copies of all agendas produced. Can you also provide a list of topics discussed at the meeting?

3. Prior to the meeting taking place did Mr Morgan write to the Prince of Wales about the meeting or the issues to be discussed at the meeting. If the answer is yes can you, please provide copies of this written correspondence and communication.

4. Prior to the meeting taking place did the Prince of Wales write to Mr Morgan about the meeting . If the answer is yes can you, please provide copies of this written correspondence and communication.

5. After the meeting took place did Mr Morgan write to the Prince about the meeting or the issues discussed at the meeting or issues emanating from the meeting. If the answer is yes can you, please provide copies of this written correspondence and communication.

6. After the meeting took place did the Prince write to Mr Morgan about the meeting or the issues discussed at the meeting or any issues emanating from the meeting. If the answer is yes can you, please provide copies of this written correspondence and communication.

7. During the material did the Prince present Mr Morgan with any visual or written material. If so, can you please provide copies of this material.

8. Prior to the meeting taking place were any briefing notes produced for Mr Morgan. If so, can you please provide copies of these briefing notes.

9. If information relevant to points 1 to 8 of this request has been destroyed can you please provide the following details.

a. Can you identify which information has been destroyed and why. In the case of each destroyed document can you state when it was destroyed.

b. In the case of each piece of destroyed correspondence and communications can you please provide details of the author(s), recipient(s) and date generated.

c. If destroyed documentation of any kind continues to be held in another form can you please provide copies of that destroyed information."

5. The Welsh Government responded on 29 December 2020. It stated that to comply with the request would exceed the appropriate limit and refused the request on the basis of section 12(1) FOIA.
6. Following an internal review the Welsh Government wrote to the complainant on 17 March 2021. It upheld its original response.

Scope of the case

7. The complainant contacted the Commissioner 24 March 2021 to complain about the way his request for information had been handled. He stated that he did not believe that the information cannot be provided within the time and cost limits laid down by the FOIA.
8. The scope of the Commissioner's investigation is to consider whether the Welsh Government was entitled to rely on section 12(1) FOIA to refuse this request and whether it has complied with its obligations under section 16(1) to provide advice and assistance.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

9. Section 12(1) of the FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

10. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Regulations') sets the appropriate limit at £600 for the public authority in question. Under these Regulations, a public authority can charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 24 hours work in accordance with the appropriate limit set out above.
11. A public authority is required to provide a reasonable estimate of the cost of a request and in putting together its estimate it can take the following processes into consideration:
 - (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.
12. The Welsh Government informed the complainant that following a search of the First Minister's email archive it had not been possible to identify or locate an agenda for the meeting, therefore it was unable to confirm the nature or subject of the discussions that took place. It added that in the absence of confirmation of issues on the agenda, in order to meet the terms of the request, it would be necessary to request that every Welsh Government department undertake a search of their electronic and hard copy records to establish if they hold any information in relation to the meeting, and whether they hold any correspondence or other communications that fall within the scope of the complainant's request.
 13. It further stated that information could be held in different formats, for example, by a specific subject or theme. It concluded that in the light of the number of areas within the Welsh Government that would be required to locate, extract and retrieve any information, it was content that the appropriate limit would be exceeded as set out in its original response.
 14. Having contacted the Welsh Government for further details of what would be involved in a search of its records, the Commissioner was informed that it had again contacted the Head of Cabinet Division, the current Senior Private Secretary to the First Minister and the Director General for the Office of the First Minister who has also held the post of Principal Private Secretary to the First Minister in the past.
 15. The Welsh Government also provided some context to the nature of the bilateral meetings between the Prince of Wales and the First Minister and the process adopted in relation to those meetings.
 16. It informed the Commissioner that the meetings are largely a personal and informal catch up between the parties, covering key topical issues of the time and are instigated by Clarence House. It further informed the Commissioner that the meetings are held in person, and due to the number of people who have access to the First Minister's digital diary and security considerations in relation to the Prince of Wales, processes are in place to restrict the number of people who were aware when and where the meetings were taking place. Additionally, until the day of the meeting, the diary entry would not specify that there was a meeting with the Prince, but would show as a 'keep free' slot. The diary would then be edited to give a formal record on the day of the meeting.
 17. The Commissioner was also informed that arrangements for the meetings would be conducted between the Principal Private Secretaries

in the Welsh Government and Clarence House, usually by telephone. The First Minister would be well versed in issues of the day and would not usually require briefing to conduct the catch up. However, in the event that there was an issue that required briefing, a commission would be sent to the relevant official, but it would not specify that the briefing was for a meeting with the Prince of Wales, again, for security reasons.

18. The Welsh Government further stated that in considering the initial request, the electronic mailboxes of the First Minister's private secretary and diary secretary were searched for the date of the meeting and the preceding week to ascertain whether they held material relevant to the request. However, no emails relating to this meeting were found. It stated that the lack of a trail does not allow it to conclude that there is no papers, but equally it means that there is no trail to follow to identify any relevant records.
19. The Welsh Government also stated that a search would necessitate asking every policy head of division in the organisation to search their files for meeting requests from the First Minister for the same period of time. It further informed the Commissioner that it now has a centralised electronic filing system which allows a single search across all the organisation's records. However, this did not exist at the time of the meeting, with electronic files held and organised at Departmental level. The search would require each division to undertake a search of their archived files. Given the security around the meetings, the officials would not have known the purpose of the meetings therefore they would need to conduct a broad search for any briefing provided to the First Minister in that week.
20. The Commissioner was further informed that there are currently more than 150 divisions within the Welsh Government and accessing historic files would not be a straightforward task. The Welsh Government has estimated that a middle manager in each division would spend around 30 minutes determining how to approach the task and an administrative officer in each division would spend in excess of one hour searching for files. It further stated that since these are archived files, it is unlikely that the administrative officers would be familiar with the file structures making this a more time consuming task.
21. The Welsh Government therefore considers that a conservative estimate of the cost of a thorough search would be 75 hours of a grade 7 officer at £43.10 per hour and 150 hours of a team support officer at £16.39 per hour, totalling £5690. Without undergoing this search, the Welsh

Government has stated it is not possible to determine what it holds within the scope of request.

22. The Commissioner would remind the Welsh Government that the fees limit referred to in paragraph 10 of this notice confirms that a public authority must calculate its cost estimated at the rate of £25 per hour, with the appropriate limit for the Welsh Government set at £600 which equates to 24 hours work. The Commissioner has therefore disregarded the Welsh Government's financial estimate of £5690, but has focused on its estimate of time needed to comply with the request.
23. The Commissioner has considered the Welsh Government's estimate of 30 minutes per middle manager to determine how to approach the task and notes she has not been provided with any further detail of the options that would need to be considered. The Commissioner has therefore had to decide whether the estimate provided appears reasonable. In her view, 30 minutes appears on the generous side as she believes it is likely that each, or at least most managers would delegate the task to an appropriate officer with the most knowledge of its archived records. Time would therefore need to be allowed for the manager to read the request, consider who the most appropriate person for the task, and brief that individual. In the Commissioner's view, this would take no more than 10 minutes per middle manager x 150 departments which would equate to 25 hours as opposed to the estimated 75 hours.
24. The Commissioner also notes that the Welsh Government did not provide any details regarding the options or processes the administrative officers would need to follow to search their departmental records and has again had to rely on whether she considers the estimate of one hour per administrative officer as reasonable. The Commissioner notes that the individual would be looking for briefings to the First Minister within a defined period of one week in the run up to the meeting in question and would anticipate that an electronic search of its archived records would yield results in a relatively short amount of time, and therefore considers 15 minutes more reasonable. Taking the 15 minutes for each of the Welsh Government's 150 departments into account would therefore equate to 37.5 hours.
25. Adding the revised 25 hour estimate for middle managers with the 37.5 hour estimate for administrative officers together gives a revised total estimate of 62.5 hours which is considerably lower than the 225 hours estimated by the Welsh Government, but still in excess of the 24 hours provided for under the fees regulations. Based on this revised estimate, the Commissioner has therefore concluded that the Welsh Government was entitled to rely on section 12 of the FOIA in response to this request for information.

Section 16 – duty to provide advice and assistance

26. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request, so far as it would be reasonable to do so. Paragraph 2.10 of the section 45 Code of Practice takes this further and explicitly states that where a public authority has estimated that the cost of answering the request would exceed the cost limit, that public authorities should:

"...provide applicants with advice and assistance to help them reframe or refocus their request with a view to bringing it within the cost limit."

27. The Commissioner notes that the Welsh Government has made no reference to its duty under section 16 in either its original response letter or its internal review. The Commissioner therefore asked the Welsh Government to consider what advice and assistance it could offer to the complainant about bringing his request within the cost limit.
28. The Welsh Government informed the Commissioner that it considered that the request was broad in scope and that without clarity about what was discussed at the meeting, it was not possible to apply these.
29. The Commissioner disagrees. His view is that it would have been entirely possible for the Welsh Government to have advised the complainant of how to restrict their request by, for example, reducing how many parts it had or relevant topics of the day. She has therefore recorded a breach of section 16(1) of the FOIA and requires the Welsh Government to now contact the complainant with advice and assistance about refining his request.

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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: 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

**Catherine Dickenson
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