

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 9 May 2022

Public Authority: Welsh Government
Address: Cathays Park
Cardiff
CF10 2NQ

Decision (including any steps ordered)

1. The complainant has requested information shared with the Welsh Government by the UK Government relating to international travel restrictions in response to the Covid-19 pandemic. The Welsh Government initially withheld the requested information under section 35(1)(a) (formulation or development of government policy). It subsequently disclosed some information, and withheld the remainder under section 35(1)(a), section 35(1)(b) (ministerial communications), section 27(1) (prejudice to international relations) and section 28(1) (prejudice to relations between different UK administrations).
2. The Commissioner's decision is that the Welsh Government was entitled to rely on the exemption at section 28(1) in respect of the requested information. No steps are required.

Request and response

3. On 26 July 2020 the complainant submitted the following request for information to the Welsh Government:

"In a written statement 'International Travel Regulations' made by 1st Minister Mark Drakeford on the 9th July 2020¹ the 1st Minister referred to 'The UK Government has shared its methodology with us and this has been reviewed by the Chief Medical Officer'. Please supply me with the documents supplied by the UK Government that

¹ <https://gov.wales/written-statement-international-travel-regulations>

formed the methodology referred to by the 1st Minister and subsequently reviewed by the Chief Medical Officer of Wales. Please supply the review findings to the methodology of the Chief Medical Officer to the Welsh Government generally and between the 1st Minister and the Chief Medical Officer specifically.”

4. The Welsh Government responded on 26 August 2020 and stated that it considered the section 35 exemption to apply to the information requested. However it advised that it needed more time to consider the public interest test and a further response would be issued by 4 September 2020.
5. On 26 August 2020 the complainant requested an internal review of the Welsh Government’s handling of the request. He stated that he did not consider section 35 to apply as the policy in question had already been enacted.
6. The Welsh Government provided the outcome of its internal review on 4 September 2020. It upheld its decision that the information requested was exempt under section 35 of the FOIA. It also set out its position that the public interest lay in maintaining the exemption.

Scope of the case

7. The complainant contacted the Commissioner on 22 September 2020 to complain about the handling of his request. Given that the complainant had already requested an internal review the Commissioner accepted the complaint for investigation.
8. During the course of the Commissioner’s investigation the Welsh Government reconsidered the request and determined that some of the requested information could now be disclosed to the complainant.
9. On 21 June 2021 the Welsh Government issued a revised response to the complainant. It disclosed a paper that had been published under the Joint Biosecurity Centre (JBC) section of the gov.uk website in September 2020, but which had since been revised and updated.² The

² <https://www.gov.uk/government/publications/data-informing-international-travel-traffic-light-risk-assessments>

Welsh Government also referred to a summary of key data used to inform international risk assessments also published by the JBC.³

10. The Welsh Government maintained that the remainder of the requested information was exempt by virtue of the exemption at section 35 of FOIA. In addition the Welsh Government now sought to rely on section 28 (prejudice to relations between different UK administrations), section 27 (prejudice to international relations) and section 35(1)(b) (ministerial communications) of FOIA.
11. The Commissioner acknowledges that public authorities may seek to rely, at a late stage of his investigation, on an exemption not previously claimed. This was confirmed by the Upper Tribunal in the case of *McInerney v IC and Department for Education* [2015] UKUT 0047 (AAC).⁴ However the onus remains on the public authority to provide full details in support of any exemptions claimed, at whatever stage they are claimed.

Reasons for decision

Section 28(1): prejudice to relations between UK administrations

11. Section 28(1) of FOIA states that information is exempt if its disclosure would or would be likely to prejudice relations between any administration in the UK and any other such administration. The administrations referred to are the Government of the United Kingdom, the Scottish Government, the Executive Committee of the Northern Ireland Assembly, and the Welsh Government.
12. The arrangements in place between the four UK administrations provide for the sharing of information between them 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.

³ <https://www.gov.uk/government/collections/data-informing-international-travel-risk-assessments>

⁴ <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=4420>

13. 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.
14. The Welsh Government has relied on section 28(1) on the basis that disclosure of the requested information would be likely to prejudice good working relationships between the Welsh Government and the UK Government.
15. In order for a prejudice based exemption, such as section 28(1), to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm or prejudice which the public authority alleges would, or would be likely to, occur has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between disclosure and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied on by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
16. In relation to the threshold of "would be likely to prejudice" the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. However the anticipated prejudice does not need to be more probable than not.
17. When considering the exemption at section 28, the Commissioner further considers that a public authority should establish whether the information is shared between the UK administrations or internal to one UK administration. 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.

18. In the Commissioner's opinion, a disclosure which may result in a UK administration being reluctant to share information necessary for the proper discharge of its functions with a counterpart UK 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. Similarly, a disclosure which may result in the UK administrations being more guarded with one another would erode co-operation, which could also be considered damaging to relations.
19. Although international travel is not a devolved matter in the UK, public health is. Consequently Ministers in Scotland, Wales and Northern Ireland may take their own approach if they so wish. The Welsh Government explained that, in order to facilitate a four nations approach to restrictions on international travel in the context of the Covid-19 pandemic, the UK Government and the JBC shared with the Welsh Government a wide range of sensitive analysis around the risks of international travel. These analyses changed regularly as the impact of the pandemic evolved over time. For example, the Welsh Government pointed out that lockdowns had been reintroduced and international borders closed at various points since July 2020.
20. The Welsh Government confirmed that information provided by the UK Government was shared with a limited number of Welsh officials and Welsh Ministers. Decisions on international travel were taken by UK Government Ministers informed by evidence, including the JBC risk assessments alongside other wider public health factors. There was an expectation that this sensitive information would remain limited to key decision makers. As such the information was shared without the fear of adverse consequences arising from such information being disclosed while it remains sensitive.
21. The Welsh Government emphasised that maintaining good relations between the UK administrations is predicated on ensuring that the exchange of information is based on mutual trust. Such trust flows from the approach to limiting the access to the information to key decision makers. It advised the Commissioner that it had consulted with a number of UK Government departments, all of whom had expressed the view that the withheld information should not be disclosed.
22. The Welsh Government further advised that it had made significant efforts to build relations with the UK Government in the context of the pandemic. This had resulted in a senior Welsh Government official now working within the former JBC structure and in Welsh Ministers being invited to attend UK Government Cabinet Committee discussions on

international travel. The Welsh Government said that this assisted Welsh Ministers in accessing the necessary evidence to inform their decision making.

23. The Commissioner accepts that the withheld information was shared with the Welsh Government by the UK Government, with the expectation that any further sharing by UK administrations would be strictly controlled. The Commissioner does not believe that the Welsh Government is suggesting that the UK Government would cease co-operating or providing relevant information, particularly on an important public health matter. Rather, the Commissioner accepts that disclosure of the requested information at the time the request was refused would have been likely to have the effect of damaging relations between the Welsh Government and the UK Government. It would have been likely to harm the relationship of mutual trust and make co-operation more difficult in the context of sharing sensitive information.
24. The Commissioner finds that the exemption at section 28(1) of FOIA is engaged. Section 28 provides a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosure

25. The Welsh Government recognised a general public interest in transparency regarding the processes leading up to a decision being made. It also accepted the public interest in being better able to understand the way in which government works and how or why decisions were made.
26. Finally, the Welsh Government set out that if the public were better informed, people could be better placed to engage in debate on the issues associated with Covid-19 related travel restrictions.

Public interest in maintaining the exemption

28. The Welsh Government set out that there was a strong public interest in ensuring a close and effective working relationship between the Welsh Government and the UK Government during the pandemic. It added that there was a clear argument for avoiding the disclosure of information where to do so would have a detrimental effect on relations between the Welsh Government and the UK Government.

29. The Welsh Government said that the complainant's request had been made at a critical point in the pandemic, which strengthened the public interest in favour of maintaining the exemption. The complainant's request referred to a decision having been taken, but further decisions would need to be taken using similar data.

Balance of the public interest

12. The Commissioner recognises that Covid-19 has had, and continues to have, an unprecedented social and economic impact across all parts of the UK. This includes measures which have impacted substantially on people's freedoms, such as lockdowns and travel restrictions. In this context there is clearly a significant public interest in the public being informed as to the evidential basis for these decisions and how the decisions were taken.
13. However the Commissioner also accepts that disclosure of the withheld information would be likely to prejudice relations between the Welsh Government and the UK Government. The Commissioner understands that the Welsh Government consulted the UK Government, who asked that the information be withheld. The Commissioner considers this relationship to be of paramount importance given the threat of Covid-19, and the difficulties faced by all parts of the UK in managing its transmission.
14. The Commissioner understands that discussions relating to the extent of international travel remained live and ongoing at the time of the complainant's request. He notes that some of the requested information was initially withheld, but disclosed during the course of his investigation. For this reason the Commissioner accepts that the Welsh Government was mindful of the public interest and the need to ensure that relevant information was disclosed whenever appropriate.
15. The Commissioner concludes that, at the time of refusing the complainant's request, there was a stronger public interest in not prejudicing relations between the Welsh Government and the UK Government. Accordingly the Commissioner finds that the public interest in maintaining the exemption at section 28 outweighs the public interest in disclosure of the withheld information. Given that the Commissioner's decision relates to all of the withheld information he has not gone on to consider the other exemptions claimed.

Right of appeal

16. 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

17. 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.
18. 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

Sarah O’Cathain
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SK9 5AF