



Llywodraeth Cymru
Welsh Government

9 August 2022

Dear ,

Complaint in respect of Request for Information – reference ATISN 16360

Thank you for your email of 13 July in which you request an internal review on the above case. As noted by yourself and the Information Commissioner's Office (ICO), our original response to you did not contain an adequate refusal notice for information we sought to withhold, and also omitted a paragraph regarding your right to request an internal review. I apologise for these oversights.

In your request for an internal review you make the following points concerning our handling of the request:

1. More information is being withheld than was disclosed.
2. That our response to you was not timely considering the lack of information disclosed.

You also have made comments about the policy itself. These are not questions regarding our handling of the request, and thus not the subject of this review. I understand you have been in discussion with colleagues regarding the nature of the policy and they have replied on these points.

On your first point, I note that your original request asked for the following information with respect to the Welsh Government's decision not to make changes to the long-standing rabies quarantine requirements for pets coming into Wales from Ukraine.:

All meeting minutes, risk assessments and other documentation (including evidence relating to home quarantine in Wales) considered when the decision was made not to change the requirements.

In our original response, we stated that this was exempt information under the Formulation of Government Policy exemption (Section 35 of the Freedom of Information Act 2000 (FOIA)). Our response to you was deficient in that it did not set out the case for applying this exemption, nor was there a suitable consideration of public interest arguments.

Moreover, in my review, I have taken the view that the exemption was misapplied. Section 35 of the FOIA is designed to create a safe space for the formulation of policy, but it does not usually apply to information once a policy is made. In this case, as the ministerial decision on this policy had already been made at the time of your request, my view is that the Section 35 exemption does not apply to the whole of the information caught by your request. I apologise for this error on our part.

I have therefore asked policy officials to look again at this and to gather all the information that was considered when the decision was made. This information is being disclosed as per the schedule in Annex 2 to this letter.

Nevertheless, there is some information in the documents that we are disclosing that is exempt for other reasons. Some information is being redacted from these documents under FOIA:

- Section 40(2) – personal data,
- Section 43 -commercial interests
- Section 42 – legal professional privilege

I have further decided that two of the documents considered by the Minister remain exempt under Section 35 of the FOIA because they are policy documents shared with us by Defra and refer to policy work in other administrations where the policy is not settled. My reasoning for applying these exemptions is given in full in Annex 1 to this letter.

You also asked for risk assessment documentation. An updated risk assessment was produced (and is owned) by Defra for the specific situation for pets entering GB from Ukraine with refugees fleeing the warzone.

We stated that we are not at liberty to share this information as it was prepared by Defra. However, this was a further error on our part. The FOIA provides you with a right to all recorded information that we hold at the time the request was received. We should, therefore, have considered this information for release and having now consulted with Defra, they have indicated they do not object to release of the information and it is attached.

You also asked for costs to Welsh Government and UK tax payers per day per animal kept in quarantine. As per our original response, this information is not held by Welsh Government.

The FOIA gives a right of access to recorded information held by an authority, but does not require an authority to create new information where no such recorded information exists.

Welsh Government does not hold information that could be used to calculate those costs.

You asked for statistics around the number of animals who develop rabies:

- a) in months 1,2, 3 and 4 after leaving a non-listed country
- b) after having passed titre tests, ELISA tests, and both in combination, and
- c) in England and Scotland since being released to home isolation in 2022.

I can confirm Welsh Government does not hold this information.

Finally, you asked us to furnish you with detailed examples of cases where animals released to home quarantine have been later documented as a contributing factor to a public health outbreak.

I can confirm Welsh Government We does do not hold recorded information of this description.

On the second matter you raise, you say that this request was not handled in a timely manner as information was not disclosed. However, regardless of the final response, in order to prepare it officials made searches to discover what information is held and in scope of the request, and where information is not held. These searches are necessarily carried out by policy teams that may be very small, and the searches can be time consuming.

In this case you received a response within the statutory timescale, and officials carried out a number of searches to establish where information was held. Some information was provided to you, and some information, it was established, was

not held by Welsh Government. I am therefore satisfied that there was no breach of the FOIA regarding the time taken to handle your request.

Yours sincerely

Steve Hudson

**Deputy Director of Finance
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Welsh Government
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If you remain dissatisfied with this response you have the right to complain to the Information Commissioner at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Tel: 01625 545 745
Fax: 01625 524 510
Email: casework@ico.gsi.gov.uk

Also, if you think that there has been maladministration in dealing with your request, you have the option to make a complaint to the Public Services Ombudsman for Wales who can be contacted at:

Public Services Ombudsman for Wales
1 Ffordd yr Hen Gae
Pencoed
Bridgend
CF35 5LJ

Telephone: 0845 6010987 (local rate)
Email: ask@ombudsman-wales.org.uk

Annex 1

Application of exemptions/exceptions

The Freedom of information Act provides a right for anyone to ask a public authority to make requested information available to the wider public. As the release of requested information is to the world, not just the requester, public authorities need to consider the effects of making the information freely available to everybody. Any personal interest the requester has for accessing the information cannot override those wider considerations.

I have decided to withhold the following information:

1. Information provided to us by Defra that forms part of policy discussion for policy in development in other administrations (section 35)
2. Personal data of individuals identified directly or indirectly in the released information (section 40)
3. Information that is subject to Legal Professional Privilege (section 42)
4. Information that is commercially sensitive (section 43)

This Annex sets out the reasons for the engagement of section(s) **35, 40, 42 and 43** of the **Freedom of Information Act** and, where relevant, our consideration of the Public Interest Test.

Engagement of section 35 (Government Policy) of the Freedom of Information Act

The Welsh Government believes that two papers considered by the Minister that were provided by Defra should be exempt from disclosure. We have had representations from Defra that disclosure of this information relates to the formulation of government policy in other administrations.

The Ukraine crisis is an ongoing and evolving picture and Defra continue to review and amend their policy included in that paper to reflect the current situation. Defra policy is not made but remains in development.

Information provided to Welsh Government on 7 April reflect a moment in time of evolving policy. Since that point the policy and flowchart has been modified to respond to new issues and increased understanding of the process and the situation.

As information requested under the FOIA is released to the world and not just to the requestor, release of this information would put information into the public domain that no longer reflects the evolving Defra policy, and would damage the safe space created for policy development as protected by Section 35 of the FOIA.

Public Interest Test

In order to satisfy the public interest test in relation to the exemption(s), it is necessary to conclude that the public interest arguments in favour of withholding the information are sufficient to *outweigh* the public interest arguments in favour of release.

Public interest arguments in favour of disclosure

We recognise that there is a strong public interest in the openness and transparency of decision making, and in allowing the public to be understand the evidence base upon which public policy is made.

Public interest arguments in favour of withholding

It is not in the public interest that information on a policy in development be placed in the public domain as though it were settled policy when it does not reflect current thinking. The safe space for creation and revision of public policy safeguards the process by which policy is made.

There are also operational and reputational risks associated with releasing the detailed operational process into the public domain where those processes are

not fixed but evolving, the matters are not settled, and without taking into account wider considerations (disease risk, capacity, staff resourcing).

Balance of public interest test

In this case we are able to share the Defra risk assessment, which we believe contains all the substance of the Defra advice upon which the Welsh Government policy was made. It is our belief that in providing you with the Defra Risk Assessment, that the information being withheld is not required to understand how discussions with Defra influenced Welsh Government policy, which is the heart of your information request. Therefore because of the strong public interest in maintaining the safe space for consideration of policy of another UK administration, I have decided that the balance of the public interest is that this information should be withheld.

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Engagement of section 40(2) (Personal Information) of the Freedom of Information Act

Section 40(2) of the FOIA together with the conditions in section 40(3)(a)(i) or 40(3)(b) provides an absolute exemption if disclosure of the personal data would breach any of the data protection principles.

'Personal data' is defined in sections 3(2) and (3) of the Data Protection Act 2018 (DPA 2018) and means any information relating to an identified or identifiable living individual. An identifiable living individual is one who can be identified, directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

We have concluded that, in this instance, the information requested contains third party personal data.

Under Section 40(2) of the FOIA, personal data is exempt from release if disclosure would breach one of the data protection principles set out in Article 5 of the General Data Protection Regulation (GDPR). We consider the principle being most relevant in this instance as being the first. This states that personal data must be:

"processed lawfully, fairly and in a transparent manner in relation to the data subject"

The lawful basis that is most relevant in relation to a request for information under the FOIA is Article 6(1)(f). This states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".

In considering the application of Article 6(1)(f) in the context of a request for information under FOIA it is necessary to consider the following three-part test:

- **The Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- **The Necessity test:** Whether disclosure of the information/confirmation or denial that it is held is necessary to meet the legitimate interest in question;
- **The Balancing test:** Whether the above interests override the interests, fundamental rights and freedoms of the data subject.

Our consideration of these tests is set out below:

1. Legitimate interests

We accept you have a personal interest in obtaining information relating to the decision on this policy. There is a legitimate interest in knowing who has made a decision on the policy, but in this case the decision is made by the Minister, who considered the information set out in what we are disclosing to you. We do not believe there is a legitimate interest in the disclosure of personal data contained within it, as the identity of those providing specific advice was not relevant to the consideration of the Minister.

2. Is disclosure necessary?

We do not believe disclosure of third party personal data is necessary in this case as the information requested is about the nature of the arguments for and against the policy. In some cases the position occupied by an individual may be relevant to their level of expertise, so this has been preserved in what we are releasing to you. This provides information necessary to understand the context of the advice, and the actual name of the individual is not then necessary.

3. The balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

Our view is that releasing the information, with the redaction of third party personal data, achieves an appropriate balance between the legitimate interest in its content with the fundamental rights and freedoms of the data subjects.

Further, even if release of the information were considered to be lawful, we believe that the 'fair' requirement of the above principle would not be satisfied. This is because those contributing on this matter would have no reasonable expectation that their personal information would be put into the public domain.

Thus, we believe release of this information into the public domain would be unfair and incompatible with the purpose for which the data was originally obtained.

As release of the information would not be legitimate under Article 6(1)(f), and as no other condition of Article 6 is deemed to apply, release of the information would not be lawful within the meaning of the first data protection principle. It has therefore been withheld under section 40 of the Freedom of Information Act. Section 40 is an absolute exemption and not subject to the public interest test.

Engagement of section 42 (Legal Professional Privilege) of the Freedom of Information Act

The Welsh Government believes that legal advice supplied to the Minister from Welsh Government legal service is legal advice that is exempt under section 42 of the FOIA.

This exemption states:

1) *Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.*

Legal professional privilege (LPP) covers communications between lawyers and their clients for the purpose of obtaining legal advice, or documents created by or for lawyers for the “dominant” (main) purpose of litigation. The information in question was advice provided by the Welsh Government's legal services and we believe that LPP attaches to this information.

Public Interest Test

The section 42 exemption is qualified, which means that it is subject to a public interest test. That there is a public interest served in public authorities being able to access advice which benefited from professional legal privilege was noted in *Bellamy v the Information Commission and DTI* [EA/2005/0023] in which the tribunal, on the subject of LPP said:

"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...".

The Welsh Government is of the firm view that it is highly important to maintain legal professional privilege and that, in the absence of at least equally strong countervailing considerations, any attempt to undermine the principle of legal professional privilege would result in substantial prejudice.

Legal advisers need to be able to present the full picture to their client, which includes arguments in support of final conclusions and any relevant counter-arguments. This is the purpose behind the long-established principle of legal professional privilege.

It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view. If recipients or providers of legal advice believe that it is likely that the legal advice would be published, especially in a complex

political environment, then it is unlikely that comprehensive advice would be commissioned or provided. This would be likely to result in substantial harm to the quality of decision-making since it would not be fully informed. It would also undermine the ability of legal advisers and their clients to rely confidently on the protection afforded by the principle of legal professional privilege.

Moreover, disclosure of legal advice has a significant potential to prejudice the governments' ability to defend its legal interests - 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 or favour.

Balance of public interest test

In weighing up the arguments for and against release, we consider that the public interest in withholding the information is sufficient to outweigh the public interest in its disclosure. To that end, the information has been withheld under s42.

Engagement of section 43 (Commercial Interests) of the Freedom of Information Act

The Welsh Government believes that the name of one organisation that was consulted on the availability of kennel space should be exempt from disclosure.

The reason for this is that they have expressed concern that were it to be known that they had been consulted on this matter by Government and that they had assisted Welsh Government by providing details of their available kennel space, the information would be likely to be used against them by competitor services. The information gives indications of their kennel capacity, which is commercial information that could be used by others to establish rival services. It would also be likely that competitors would use the information against them in terms of negative publicity.

Public Interest Test

In order to satisfy the public interest test in relation to the exemption, it is necessary to conclude that the public interest arguments in favour of withholding the information are sufficient to *outweigh* the public interest arguments in favour of release.

Public interest arguments in favour of disclosure

There is a public interest in accountability of government and transparency in decision making. In releasing information about this decision, there is a public interest in knowing who provided evidence that was relied upon by the Minister when making a decision.

Public interest arguments in favour of withholding

It is not in the public interest that organisations be subjected to commercial harm through their interaction with government. Indeed, the ability of government to seek advice from organisations would be undermined if such organisations expected that, in giving advice, they would suffer commercial loss.

Balance of public interest test

There is a very strong interest in ensuring that organisations are not unnecessarily disadvantaged commercially merely for advising government, and so the public interest in disclosure would need to be sufficiently great to necessitate such disclosure. In this case there is sufficient context provided in what is being released to understand the nature of the advice given, and there does not appear to be a suitable countervailing argument for disclosure. I therefore find that the balance of public interest lies with withholding the name of the organisation.

Annex 2

Schedule of Information Being Released in Following Documents

1. MA-LG-1420-22 – Ministerial Advice for the Decision on the Use of Home Containment for pets from Ukraine
2. Annex 4 of MA-LG-1420-22
3. Annex 5 of MA-LG-1420-22
4. Defra Risk Assessment on quarantining pet animals belonging to Ukraine evacuees