



**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Appeal Reference: EA/2018/0285

**Decided without a hearing
On 16 August 2019**

Before

**JUDGE HAZEL OLIVER
MRS JEAN NELSON
MR MIKE JONES**

Between

MR MCTIGHE

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE WELSH GOVERNMENT

Second Respondent

DECISION

The appeal is dismissed

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 7 December 2018 (FS50719028, the “Decision Notice”). It concerns information sought from the Welsh Government about the routing of the T3 TrawsCymru bus service in Wales.
2. A transport review was commissioned by the Welsh Government in 2013, called the Bevan Foundation Review. This was conducted by a Dr Winckler and reported in January 2014. The report included a recommendation that further work should be done in advance of the

introduction of the T3 service on the feasibility of its operation to Aberystwyth rather than Barmouth. The appellant says that the Welsh Government failed to address this recommendation. The particular issue in this case arises from a letter from the Cabinet Secretary for Economy and Transport to Mr Williams, Ceredigion County Councillor, dated 14 November 2017 (the "Letter"). The Letter contains the sentence, "*I have also been reassured by officials that Dr Winckler's suggestion that consideration should be given to routing some Trawscymru T3 journeys between Aberystwyth and Wrexham as well as between Barmouth to Wrexham was discussed in 2014 when Gwynedd Council was preparing the tender for the T3 service. A decision was taken at the time not to pursue this option.*" The appellant says that this statement is a lie.

3. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

4. On 22 November 2017 the appellant made the following request for information (the "Request"):

*"(1) Could you please tell me on which page of the Bevan Foundation report I can find the phrase you attribute to Dr Winckler...I **suggest that consideration should be given to routing some Trawscymru T3 journeys between Aberystwyth and Wrexham as well as between Barmouth and Wrexham..?***

*(2) Could you please tell me whether your copy of the Bevan Foundation report contains the following phrase in paragraph 2.12 in the words of Dr Winckler...I **recommend that further work be done in advance of the introduction of the proposed T3 service on the feasibility of its operation to Aberystwyth rather than Barmouth...***

(3) Could you please tell me on what dates(s) in 2014 was routing the T3 from Wrexham to Aberystwyth discussed as you state in your letter?

(4) Could you please tell me the name/job title of the Welsh Government official(s) who were involved in the discussions regarding routing the T3 from Wrexham to Aberystwyth?

(5) Could you please tell me the name/job title/organisation of the officials from external organisations to the Welsh Government (Local Authorities and Bus Service Providers) who were involved in discussions regarding routing the T3 from Wrexham to Aberystwyth?

(6) Could you please tell me what documentation the Welsh Government holds relating to discussions regarding routing the T3 from Wrexham to Aberystwyth. For example memos, emails, meeting notes, personal notes, reports, etc?

*(7) Could you please tell me the conclusions that resulted from discussions regarding routing the T3 from Wrexham to Aberystwyth and the reason that, as you state in your letter,..**decision was taken not to pursue this option..?***

(8) Could you please tell me whether the conclusions and decision (after discussions regarding routing the T3 from Wrexham to Aberystwyth) were shared with partners to the T2/T3 contracts ie Local Authorities and Bus Service Providers?

(9) *Could you please tell me the name/job title/organisation of the officials in those partner organisations who were informed on the conclusion and decision not to pursue routing the T3 from Wrexham to Aberystwyth?*

(10) *Could you please tell me whether your ..high level.. review will consider the remit from Dr Winckler ie...**I recommend that further work be done in advance of the introduction of the proposed T3 service on the feasibility of its operation to Aberystwyth rather than Barmouth...** ?*

(11) *Could you please tell me whether your ..high level.. review will consider the remit **“amended”** and provided by your ..reassuring officials.. which is vastly different to the recommendation from Dr Winckler...**I suggest that consideration should be given to routing some TrawsCymru T3 journeys between Aberystwyth and Wrexham as well as between Barmouth and Wrexham..?***

5. The Welsh Government responded to five of the requests which they regarded as requests for information on 20 December 2017. They responded to questions 3, 4, 5, 7 and 9 from the list above. They provided job titles and organisations for the key individuals asked about in questions 4, 5 and 9 – but not names on the grounds this was exempt as personal data. The appellant complained about the handling of the response on 6 and 11 February 2018. The Welsh Government responded on 6 March, stating that the remaining questions were not asking for recorded information, and they did not hold recorded information that would answer those questions.

6. The appellant complained to the Commissioner on 5 March 2018. He accepted that the Welsh Government did not hold relevant information in relation to items 6 and 8 of his request, but he was not satisfied with how the rest of his requests were handled. This is the Disputed Information.

7. The Commissioner issued her Decision Notice on 12 December 2018, as follows:

- a. Items 3 and 7 – the Commissioner concluded that the Welsh Government had provided all information relevant to these items.
- b. Items 1 and 2 – the Welsh Government provided an amended response to these requests during the investigation, citing section 21 FOIA (information reasonably accessible by other means). The Commissioner concluded that the provision of a link to the relevant report on the Welsh Government’s website would allow the complainant to access the report and answer the questions for himself.
- c. Items 10 and 11 – the Commissioner concluded that these questions had been answered during the course of responses to other FOIA requests from the appellant.
- d. Items 4, 5 and 9 - During the investigation, the Welsh Government released the name of one of its Deputy Directors which had previously been withheld. The Commissioner concluded that the names of individuals constitute personal data, and disclosure would breach the first data protection principle. The individuals would not reasonably expect their names to be disclosed as their roles are neither senior nor outward facing, disclosure was likely to cause significant distress to the individuals as they may be targeted, and these considerations outweighed any legitimate interest in disclosure.

- e. The Welsh Government's failure to respond to all items of the request within the appropriate timescale was a breach of sections 1(1) and 10(1) of FOIA.

The Appeal

8. The appellant appealed against the Commissioner's decision on 18 December 2018. The appeal provides some detailed background to the requests. In summary, the appeal is put on the following grounds:

- a. The release of names is not personal data, and he disputes any reference to targeting of local Council officials.
- b. Section 21 was only introduced by the Commissioner, and it is not unusual for the Welsh Government to have different copies of the same document.
- c. The appellant has new background on the personnel, events and discussion in 2013/14.
- d. The Commissioner did not investigate the content of the recorded meeting on 21 January 2014.
- e. It is overly lenient to say the public authority does not have to take any steps in relation to multiple breaches of FOIA.
- f. Specifics items of disagreement with paragraphs in the Decision Notice.

9. The Commissioner's response maintains that sections 21 and 40(2) of FOIA were applied correctly. The Welsh Government has also provided a response which maintains that sections 21 and 40(2) FOIA apply. The appellant has provided responses to both of these documents, and an additional submission on 16 June 2019. We have considered all of these documents and the submissions from the parties, as summarised in the discussion below.

Applicable law

10. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (1) *Any person making a request for information to a public authority is entitled—*
 - (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - (b) *if that is the case, to have that information communicated to him.*

.....

21 Information accessible to applicants by other means.

- (1) *Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.*

.....

40 Personal information.

- (1) *Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*
- (2) *Any information to which a request for information relates is also exempt information if –*
 - (a) *it constitutes personal data which do not fall within subsection (1), and*
 - (b) *either the first or the second condition below is satisfied.*
- (3) *The first condition is –*

(a) *in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –*

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress...

.....

58 Determination of appeals.

(1) *If on an appeal under section 57 the Tribunal considers—*

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

11. Section 1(1) of the DPA defines “personal data” as data which relates to a living individual who can be identified from those data, or from those data and other information in the possession of the data controller. The first data protection principle (Paragraph 1 Schedule 1) provides that data must be processed fairly and lawfully.

Evidence

12. We had an agreed bundle of open documents, all of which we have read. We also had a small closed bundle containing some of the Disputed Information (relating to personal data of third parties).

Discussion and Conclusions

13. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner’s Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision as to whether or not the Welsh Government was entitled to refuse to provide the Disputed Information. Our role does not involve addressing detailed criticisms of the Commissioner’s investigation. We may or may not agree with the Commissioner’s conclusions.

14. Requests (1) and (2) – Information about the Bevan Foundation report. The Commissioner found that this information was reasonably accessible to the appellant.

- a. The Commissioner’s decision on this point is based on the fact that the Welsh Government provided a link to the Bevan Foundation report on its website. Requests (1) and (2) asked questions about this report, and the appellant has access to the internet and so is able to answer the questions for himself.

- b. The appellant says that this does not answer his questions, because the statement made in the Letter uses distinctly different wording to that used in the Bevan Foundation recommendation. He says it is not unusual for the Welsh Government to have copies of the same document which differ in a substantial way, and provides an example of documents relating to a “high level review”.
- c. The Welsh Government says that the Bevan Foundation is an independent think tank, and any misquoting in the Letter is irrelevant to determining whether section 21 applied. There is only one version of the Bevan Foundation review, which is as it appeared at the time of publication. A short addendum was added in 2014, but no changes were made to the report and its recommendations.
- d. We find that this information was reasonably assessable to the appellant, and so the Welsh Government was entitled to rely on section 21. We accept the submissions from the Welsh Government that there is only one version of the Bevan Foundation report, which has not been materially changed since publication. We also note that this is a report from an independent think tank, and it is implausible that the Welsh Government would hold a different version of the report. The appellant has asked questions about the content of this report, which is available at the website link already provided to him.

15. Requests (3) and (7) – dates and conclusions of discussions about routing the T3 from Wrexham to Aberystwyth in 2014. The Commissioner found that the Welsh Government had provided all information relating to this issue.

- a. The Commissioner’s decision is based on information provided by the Welsh Government. In relation to request (3) (dates of discussions), the Commissioner accepted that the only recorded and dated minute was for a meeting in January 2014, and dates of other discussions were not recorded. In relation to item (7) (conclusions from discussions), the Commissioner accepted the Welsh Government’s explanation that there is no record of these conclusions or the reason the decision was taken not to pursue the other routing option.
- b. The appellant says that the Commissioner should have asked the Welsh Government to supply the minutes for the 2014 meeting, and asked for evidence from the participants about the discussions and whether they held documentation. He says it is improbable that a major decision on a strategically important new long-distance route would not be subject to a recorded decision.
- c. The Welsh Government’s response states that, apart from the information already provided or withheld under sections 40(2) and 21, it does not hold any information within the scope of the appellant’s request.
- d. As noted by the Commissioner, it could have been anticipated that the Welsh Government would hold additional information in relation to this decision. However, we accept the evidence from the Welsh Government that other discussions were not recorded, and all information within the scope of the Request has been provided. We have also seen in the closed bundle the minutes of the meeting held on 29 January 2014 (wrongly dated 21 January by the Commissioner). This does not record any discussions regarding routing the T3 from Wrexham to Aberystwyth, or the reason that

a decision was taken not to pursue this option. The legal test for whether further information is held is the balance of probabilities. On the evidence we have, we find on the balance of probabilities that no further information is held in relation to requests (3) and (7).

16. Requests (4), (5) and (9) – names, job titles and organisations of various officials.

The Commissioner found that these names were personal data and should not be released.

- a. The Commissioner found that disclosure would not be fair taking into account the reasonable expectations of the data subjects, the consequences of disclosure, and the legitimate interests of the public. Although the information related to the data subjects' professional lives, there could still be an expectation of privacy, taking into account a greater expectation of disclosure the more senior the role. The relevant individuals are not senior or in public facing roles. The Welsh Government Officer whose name has been disclosed had been subject to frequent unnecessary, unfair and biased comments, often circulated to a wide audience, which has led to significant distress. Disclosure of the other names could lead to these individuals being targeted for similar criticism which is likely to cause them significant distress, and this outweighs any legitimate interest in disclosure.
- b. The appellant says that releasing a name is not personal data, and he objects to the inclusion of "targeting Local Government officials" (section 40(2)) being used in place of section 40 – personal data. His legitimate interest in the information is to restore the connectivity of bus services in Aberystwyth, which have been affected by the Welsh Government ignoring the recommendation of the Bevan Foundation review.
- c. The Welsh Government says that it has a real and genuine concern for the welfare of the six officials involved, based on the experience of another official connected with this matter who has been subject to unfair comment and criticism in the public arena which has caused him distress.
- d. It appears that request (4) has now been answered, as the Welsh Government has released the name of the one Welsh Government official who was involved in the meeting on 29 January 2014. The remaining names are of individuals from other organisations. Names are personal data, as they are "data which relate to a living individual who can be identified" (section 1(1) DPA). Having considered the matter carefully, we find that disclosure of these names would not be fair and lawful processing of personal data.
 - i. The individuals involved were acting in a professional rather than personal capacity, which limits their expectation of privacy. However, some expectation of privacy can still apply, which varies depending on the seniority and type of professional role. The evidence indicates that they are not senior officials, and do not have public facing roles. These individuals would not expect that their names would be publicly released in this context.
 - ii. We accept the evidence from the Welsh Government that the official whose name has been released has been subject to unfair comment and criticism in the public arena, and that this has caused him distress. We also accept that it is likely the same targeting for unfair public comment would happen to these other individuals

if their names were released under FOIA. We note in particular the information provided by the Welsh Government in their letter to the Commissioner of 3 August 2018, which refers to comments and criticisms that the appellant has directed publicly at particular named officials, including in the media.

- iii. There is some legitimate interest in this information. There is always some public interest in understanding who has made decisions on issues of public importance, so that they can be held to account. The appellant's interest is in understanding why particular decisions have been made about bus services which affects connectivity in Aberystwyth, and we can see that this is also an issue of public interest. Knowledge of the names of everyone involved in this decision would increase transparency of decision-making. However, the Welsh Government has released the job titles and organisations of the individuals involved, which already provides some transparency. The additional public interest in knowing the names is outweighed by the risk of distress to those individuals.
- iv. We therefore find that release of these names would breach the first data protection principle as it would not be fair and lawful processing, and so the information can be withheld under section 40(2).
- e. We note that the appellant has objected to the use of section 40(2) "targeting Local Government officials", rather than section 40. We can clarify that section 40(2) is the section of FOIA which provides an exemption for disclosure of personal data if it would contravene the data protection principles. It is not a separate section on "targeting" of officials. The issue of targeting of individuals was considered by the Commissioner because it is relevant to whether disclosure would comply with the data protection principles.

17. Requests (10) and (11) – what will be considered by the "high level review". The Commissioner found that this information had been provided in a response to a different FOIA request.

- a. The Commissioner found that these were valid requests for information, but had been answered by a subsequent FOIA response which provided the following:
"Dr Winckler suggested that the Welsh Government may wish to review the feasibility of rerouting the key east to west T3 service which currently links Barmouth to Wrexham to operate between Aberystwyth and Wrexham instead. Welsh Government is currently reviewing this suggestion and expects to report the findings to Ministers towards the end of May this year."
- b. The appellant says that this does not answer his requests. It does not address the exact wording of his questions – which contrast the wording in the Bevan Foundation report with the wording in the Letter. He says that the remit for the review must have been recorded.
- c. The Welsh Government said this was not a valid request for information, as they did not hold recorded information which would answer these questions. It is not clear to the Tribunal that these are necessarily requests for information held by the Welsh Government, as opposed to simply questions. In any event, we agree with the Commissioner that the paragraph set out above from the subsequent FOIA response

provides confirmation that the recommendation in the Bevan Foundation report will be reviewed. This uses the wording “suggestion” rather than recommendation, but it is clear from this answer that the remit is to review what was set out in the Bevan Foundation report. On the balance of probabilities, we find that there is no more recorded information to be disclosed on this point.

18. The other points raised by appellant are outside the scope of this appeal – i.e. the appellant’s complaints about no further action having been taken against the Welsh Government for breaches of FOIA, the Commissioner’s investigation, and preparation of the bundle for this hearing. As explained above, we have considered whether the Commissioner’s decision was in accordance with the law, and made our own decision on the evidence.

19. We uphold the decision of the Commissioner and dismiss the appeal.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 20 August 2019
Promulgation date: 22 August 2019