



First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights

Appeal Reference: EA/2017/0046

Heard at Cardiff Civil Justice Centre  
On 2<sup>nd</sup>. August, 2017

Before

JUDGE

DAVID FARRER Q.C.

TRIBUNAL MEMBERS

NARENDRA MAKANJI

AND

JOHN RANDALL

Between

HUW ONLLWYN JONES

Appellant

and

THE INFORMATION COMMISSIONER ("THE ICO")

Respondent

Dr. Jones appeared in person

The ICO did not appear but made written submissions.

### DECISION AND REASONS

The Tribunal finds that the exemption provided by FOIA s.44(1)(a) was correctly invoked by Cardiff City Council, having regard to the prohibition on disclosure of information contained in s.22(1) of the Welsh Language (Wales) Measure, 2011 (“The 2011 Measure”). This appeal is therefore dismissed.

*References in the form s.22(1) are to that numbered provision in the Measure. Provisions of the Freedom of Information Act, 2000 are preceded by “FOIA”*

1. This appeal turns on the interpretation of “the *Commissioner's functions*” in s.22(2)(a) of the 2011 Measure. No factual issues arise.
2. By virtue of s.145 of the 2011 Measure, the Welsh Language Commissioner (“the WLC”) assumed the functions of the Welsh Language Board, which the Measure abolished, subject to a wide range of amendments which have no bearing on this appeal. Her principal aim in the exercise of her functions, as enacted in s.3(1), is to promote and facilitate the use of the Welsh language in every significant area of Welsh life. Those functions are set out in a series of provisions identified later in this decision.
3. In November, 2014 the WLC, exercising her powers under ss. 61 – 64, conducted a draft Welsh language standards investigation into a group of public bodies including Cardiff Council, which duly submitted its response.
4. On 11<sup>th</sup>. December, 2015, writing in Welsh, Dr. Jones requested from the WLC a copy of Cardiff Council’s reply to her Investigation. She responded on 7<sup>th</sup>. January, 2016, stating her reliance on the exemption enacted in FOIA s.44(1)(a) because disclosure was prohibited by s.22(1). She maintained her refusal on the same ground following an internal review. Dr. Jones complained to the ICO on 26<sup>th</sup>. September, 2016, setting out his case with care and moderation. Whilst the identity of the requester is irrelevant to the ICO’s or the Tribunal’s decision, it is right to observe that Dr. Jones, in his

career as a Welsh civil servant, advised Welsh ministers on the drafting of the 2011 Measure and was closely involved in its enactment.

5. In her Decision Notice, dated 16<sup>th</sup>. February, 2017, the ICO ruled that Cardiff Council's reply was information obtained in the exercise of the WLC's functions. She rejected the argument that responding to FOIA requests was also a function of the WLC so that the exception to the prohibition in s.22(1) contained in s.22(2) permitted disclosure. She relied on the FTT decision in *Slann v the Information Commissioner and the Financial Services Authority EA/2005/0019*. She upheld the WLC's refusal.
6. Dr. Jones appealed.
7. In written and oral submissions, Dr. Jones advanced, expressly or by implication, the following propositions –
  - (i) The ICO placed an unduly narrow construction on "functions" in s.22(2).
  - (ii) Whether or not the WLC's "functions" in s.22(2)(a) include her functions under FOIA s.1(1)(b), s.22(2)(a) permits the WLC to disclose the requested information. It refers to functions in the plural, which include the promotion and facilitation of the use of Welsh.
  - (iii) S.22(2)(a) in its reference to her "functions", as set out in s.4, provides a wide range of exceptions to the s.22(1) prohibition, within which an exception to the s.22(1) prohibition, applicable to the requested information, can be found
  - (iv) "Functions" in s.22(2)(a) includes the WLC's functions under FOIA, specifically her duties under FOIA s.1.
  - (v) The addition of the WLC to Schedule 1 to FOIA ( in substitution for the Welsh Language Board) demonstrates a parliamentary intention to ensure that her functions under FOIA overrode any restrictions enacted in the 2011 Measure.
  - (vi) The *Slann* decision is not properly applicable to the interpretation of FOIA s.44(1)(a) in the context of the Measure.
  - (vii) The WLC has published material on her website of a kind similar to that requested here.

#### The reasons for the Tribunal's decision

8. So far as material, the cited provisions read as follows –

**FOIA s.44(1)**

*Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-*

*(a) Is prohibited by or under any enactment, . . . .*

## **The Measure**

### **Part 2 THE WELSH LANGUAGE COMMISSIONER**

#### **Functions**

#### **4 Promoting and facilitating use of Welsh and treating Welsh no less favourably than English**

*(1) The Commissioner may do anything that he or she thinks appropriate—*

- (a) to promote the use of the Welsh language,*
- (b) to facilitate the use of the Welsh language, or*
- (c) to work towards ensuring that the Welsh language is treated no less favourably than the English language.*

*(2) That includes, but is not limited to, doing any of the following things—*

- (a) promoting the provision of opportunities to use the Welsh language;*
- (b) encouraging best practice in relation to the use of Welsh by persons who deal with, or provide services to, other persons;*
- (c) keeping under review the adequacy and effectiveness of the law relating to the Welsh language;*
- (d) producing and publishing reports;*
- (e) carrying out, or commissioning others to carry out, research;*
- (f) carrying out, or commissioning others to carry out, educational activities;*
- (g) giving assistance (including financial assistance) to any person;*
- (h) making recommendations in writing to the Welsh Ministers;*
- (i) making representations to any person;*
- (j) giving advice to any person.*

#### **Section 22**

*(1) Information which has been obtained by the Commissioner in the exercise of any of the Commissioner's functions must not be disclosed unless the disclosure is authorised by subsection (2).*

*(2) The Commissioner may disclose the information—*

*(a) for the purpose of the exercise of any of the Commissioner's functions;*

*.....*

*(e) if the information is to the effect that a person is likely to constitute a threat to the health or safety of one or more persons, and the disclosure is to a person to whom the Commissioner thinks it should be disclosed in the public interest;*

*...*

*(g) if the disclosure is to a permitted person, and the Commissioner is satisfied that the public interest condition is met;*

## **Section 61**

*(1) In this Measure "standards investigation" means an investigation carried out in relation to a person (P) for the purpose of determining one or more of the following questions—*

*.....*

*(e) any other question which the Commissioner considers to be relevant to the extent to which P may be subject to the duty in section 25(1) to comply with standards.*

*(2) A particular standards investigation may be carried out in relation to—*

*(a) a particular person, or*

*(b) a group of persons.*

9. The prohibition in s.22(1) applies only to information obtained by the WLC in the exercise of any of her functions. It was not and could not be argued that a s.61 investigation, which is referred to in s.7 was not such a function. So the prohibition applied unless one of the s.22(2) exceptions met the case or the duty to provide information under FOIA s.1(1)(b) overrode this prohibition, notwithstanding FOIA s.44(1)(a).

10. FOIA s.1 and s.22(2) are quite different in their legal effects. The former confers a right on the requester (subject to exemptions), hence a duty on the public authority. S.22(2) empowers the WLC to communicate information obtained in the exercise of her functions; it imposes on her no duty to do so. Such a duty could only arise when a request for information is made under FOIA s.1 and would be subject to any relevant FOIA exemptions.
11. We can find no s.22(2) gateway which could overcome the prohibition in s.22(1).
12. Part 2 is entitled "Functions". S. 4(1) gives the WLC three fundamental and related functions, namely to promote and facilitate the use of Welsh and to ensure that it is treated no less favourably than English. A series of specific functions, ancillary to the principal trio, are then set out at ss. 4(2) – 7 and ss.18 and 19 and in Chapter 8, "Standards, Investigations and Reports", at s.61. Those listed in s.4(2) are expressed to be inclusive, not exhaustive. The WLC has a range of powers to enable her to fulfil those functions. S.11 provides very general powers, whilst ss.8 and 9 enact specific powers to intervene and/or fund relevant litigation and s.62 creates powers relative to the production of annual reports.
13. In summary, the Measure defines in considerable detail the functions of the WLC designed to fulfil the basic objectives.
14. Clearly, a reply to a s.61 investigation could be quoted in whole or in part in the WLC's annual report, if it promoted the basic objectives (s.4(2)(d)). It could be disclosed in a written recommendation to Welsh ministers. (s.4(2)(h)). It may well be that it could be disclosed in whole or in part to an individual academic who was carrying out research on behalf of the WLC (s.4(2)(e)). All these examples would involve a planned initiative taken by the WLC for the fundamental purposes spelt out in s.4(1).
15. A FOIA request made by an individual member of the public of his own volition raises very different issues, It is most unlikely to fulfil the requirements of any of the specific functions in s.4(2), s.18, s.19 or s.61. Of course, the s.4(1) functions are not confined to those set out in s.4(2) but it is very difficult to see how communicating Cardiff Council's reply to any member of the public who happened to request it would foster the three purposes of the 2011 Measure. Dr. Jones was unusually well informed about the 2011 Measure and evidently deeply concerned for its objectives. There was, however, no evidence that communication to him would further them in any way. His argument was on a much more general level and he made no such claim.

16. S.22(1) has a very clear purpose, which is to encourage cooperation from those from whom the WLC requires or requests information for the performance of her functions by providing some reassurance as to how it will be used. Investigated bodies such as Cardiff Council will often have a legitimate interest in a degree of confidentiality when submitting replies. They will do so confident in the protection provided by the prohibition to those who assist the WLC in performing her functions, namely that evidence, which they are obliged to supply, will not lightly be passed on to every curious inquirer, however sincere and well – intentioned. Of course, if so minded, an investigated body can provide a copy of its reply to a requester or publish it on its website. However, that is a decision for that body, not the WLC.
17. Despite its attractive presentation, the argument that s.22(2) provides an exception to the s.22(1) prohibition, independently of any consideration of FOIA, fails.
18. We turn to the second main submission – the claim that the duty to disclose information pursuant to FOIA s.1(1)(b) is a function within s.22(2)(a), which creates a gateway to escape the prohibition.
19. The WLC is now included in Schedule 1 to FOIA as a public authority subject to FOIA, as was the Welsh Language Board. We are prepared to accept for present purposes the proposition that s.1 of FOIA created a function of all Schedule 1 bodies. Whether it is a function for the purposes of s.22 is quite another matter.
20. We are satisfied that it is not.
21. “The Commissioner’s functions” are set out in the sections of the 2011 Measure referred to in §12, most relevantly in s.4, with considerable particularity, as already noted and it is to them only that s.22(2) refers. It is plain that the term does not include her many other routine functions, shared with a host of other public bodies, outside the framework of the 2011 Measure. So her FOIA functions will only find a s.22 (2) gateway, if they fall within the ambit of s.4.
22. The 2011 Measure, as indicated above, makes clear that all the specific functions share the objectives set out in the three fundamental s.4(1) functions (see §§12 and 13) which closely follow the WLC’s Principal Aims (s.3). FOIA functions, in particular responding to requests under FOIA s.1,

are not specified in s.22(2) and do not serve any of the three fundamental s. 4(1) objectives. They request disclosure of information which the WLC already holds and is empowered to use in the lawful discharge of her functions. In the context of s.22, her FOIA functions are no different from the WLC's functions of paying her electricity bill or operating the PAYE system for her salaried staff.

23.If "the Commissioner's functions" in s.22(2) included the general function of responding to s.1 FOIA requests, the s.22(1) prohibition would be valueless. It could be circumvented quite simply by extracting information obtained by the WLC in the exercise of her functions by a FOIA request, which could not be met by any sustainable exemption.

24.If the FOIA s.1 function fell within s.22(2), its exercise would be subject to all the FOIA exemptions, absolute and qualified, hence to FOIA s.44(1)(a). FOIA s.1 cannot be approached for the purposes of this argument on the footing that it confers a free - standing unqualified right to information. It does not.

25.The amendment of FOIA by statutory instrument to replace the Welsh Language Board with the WLC as a FOIA Schedule 1 authority merely denotes that, like her predecessor, she is subject to FOIA. It says nothing about the relationship between FOIA and the 2011 Measure. It would be most surprising if the WLC were not a Schedule 1 FOIA authority. There is a wide range of legitimate requests for information as to her activities, which would not involve s.22(1); how much did she spend on this investigation? Who did she consult? What organisations did she investigate? What is the ethnic breakdown of her staff? How many of them speak, read or write Welsh as their first language?

26.For these reasons we reject the argument that s. 22(2) applies to the s.1 FOIA functions.

27.We therefore rule that Dr. Jones request was rightly refused by the WLC because disclosure was prohibited by s.22(1) and FOIA s.44(1)(a) therefore exempted it from the right to disclosure. Since it is an absolute exemption, questions of the balance of public interests do not arise.

28. In deference to Dr. Jones detailed submissions, we deal finally with two subsidiary points and make a related observation



29. The Tribunal has not seen on the WLC website information of the kind requested by Dr. Jones. However, assuming that such information has appeared there, it could be posted there in the proper exercise of the WLC's functions, if she decided that publicity would further the Principal Aims.
30. It was also suggested that, if the ICO was right, the WLC would be precluded from disclosing to the public any part of the Cardiff Council reply. That is, with respect, not so. As indicated earlier in this decision, she could, if she deemed it appropriate, include such information in her annual report or in some other public statement.
31. That leads to the obvious point that, if the WLC receives a FOIA request which is caught by s.22(1), she will, if this decision is correct, refuse it by reference to FOIA s.44(1)(a). If, on reflection, she judges that, despite the fact that it was obtained in the exercise of her functions, publication of the requested information in some form would further her Principal Aims, hence fall within her s.4(1) functions, she could decide to publish it. But she would do so, not in discharge of her duties under FOIA s.1 but in the exercise of her discretionary s.4(1) powers. Such a consideration would, plainly, not arise in this case.
32. For these reasons we dismiss this appeal, whilst acknowledging the assistance that we received from Dr. Jones' expertise and the realistic and constructive presentation of his case.
33. This is a unanimous decision.

David Farrer Q.C.

Judge of the First-tier Tribunal

Date: 15<sup>th</sup> August, 2017

Date Promulgated: 24 August 2017