

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 February 2022

Public Authority: Senedd Cymru

Address: Cardiff Bay
Cardiff
CF99 1SN

Decision (including any steps ordered)

1. The complainant requested copies of investigation reports in respect of Julia Davies, the wife of Andrew RT Davies (the leader of the Welsh Conservative party), regarding allegations about her employment as her husband's personal assistant. The complainant also requested any correspondence between the Senedd Commission and the Commissioner for Standards regarding the alleged referral of Mr Davies to the Commissioner for Standards as a result of any investigation into the allegations about his wife. Senedd Cymru relied on section 40(2) of FOIA (third party personal data), section 31 of FOIA (law enforcement) and section 41 of FOIA (information provided in confidence) to withhold the information.
2. The Commissioner's decision is that all the withheld information engages section 40(2).
3. The Commissioner does not require Senedd Cymru to take any steps.

Request and response

5. On 29 January 2021 the complainant requested information in the following terms:

“In the light of various Freedom of Information requests and information coming from inside the Conservative group, did Commission staff investigate allegations that Julia Davies, employed as personal assistant to her husband Andrew RT Davies MS, did little or no work for him? If so, I seek disclosure of the relevant reports.

Was the matter referred to the Standards Commissioner? If so, I seek disclosure of the relevant correspondence between the Commission and the Standards Commissioner. Anticipating that the Commission will apply a public interest test, I would argue that this is a matter of strong public interest - even more so given Mr Davies' recent return to the role of group leader.”

6. Senedd Cymru responded on 17 February 2021 and explained that the information requested was exempt under section 40 of FOIA as it was personal data related to another person or persons, risked the identification of individuals and as such was exempt from release.
7. This approach was upheld in the internal review decision dated 9 April 2021.

Scope of the case

8. The complainant contacted the Commissioner on 30 May 2021 to complain about the way his request for information had been handled.
9. The Commissioner commenced his investigation with a letter to Senedd Cymru on 7 December 2021 in which he asked a series of questions about the application of section 40 of FOIA
10. Senedd Cymru responded on 21 January 2022 maintaining its position as regards the application of section 40 of FOIA (third party personal data) but also citing section 31 of FOIA (law enforcement) and section 41 of FOIA (information provided in confidence) as applicable exemptions.
11. The Commissioner wrote to Senedd Cymru on 26 January 2022 requesting a copy of the withheld information in order to review the case further.

12. Senedd Cymru provided a copy of the withheld information to the Commissioner on 27 January 2022.
13. The Commissioner considers that the scope of his investigation is to determine the extent to which the withheld information engages the absolute exemption at section 40(2) of FOIA. If some of the withheld information does not engage that exemption, he will then go on to consider whether the section 31 and/or section 41 exemptions are engaged.

Reasons for decision

Section 40 personal information

14. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
15. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UKGDPR').
16. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of FOIA cannot apply.
17. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

18. Section 3(2) of the DPA defines personal data as:
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¹ As amended by Schedule 19 Paragraph 58(3) DPA.

“any information relating to an identified or identifiable living individual”.

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
21. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
22. In the circumstances of this case, as the request identifies both Mr and Mrs Davies, the Commissioner is satisfied that all the withheld information both relates to and identifies Mr and Mrs Davies otherwise it would not fall within the scope of the request. The information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
23. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
24. The most relevant DP principle in this case is principle (a). Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.
25. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

27. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.

28. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which 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”².

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

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

30. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

31. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a

² Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

wide range of interests may be legitimate interests. The interests may be public or personal, broad or narrow, compelling or trivial. However, the narrower and less compelling the interest, the less likely it is that such an interest will outweigh the rights of the data subjects.

32. Senedd Cymru has identified a legitimate interest in disclosure as:

"general requirements for accountability and transparency in public life".

33. The Commissioner recognises that there is a legitimate interest that would be served by disclosure of the withheld information. He has therefore gone on to consider the necessity test.

Necessity

34. Senedd Cymru argued that disclosure was not necessary to satisfy the legitimate interest in this case because any legitimate interest could be achieved by the oversight provided by the Commissioner for Standards and the Senedd's Standards of Conduct Committee. It noted that:

"Specifically, the Commissioner for Standards is required to investigate the complaint and report the outcome of that investigation to the Senedd, unless the case is summarily dismissed and section 10(3) of 2009 Measure is engaged. These reports are considered by the Senedd's Standards of Conduct Committee and published as part of the relevant report by that Committee. Normal practice is to attach the Commissioner's report as an annex to the Committee's report.

The Committee itself is obliged to report to the Senedd in accordance with the Welsh Parliament's Standing Order 22.9. A report by the Commissioner for Standards on the outcome of an investigation may not include any recommendation as to what sanction, if any, should be imposed on the Member of the Senedd in question (section 10(4) of the 2009 Measure) but a report of the Standards of Conduct Committee may do so (Standing Order 22.10).

The Committee's reports are made available on the Commissioner for Standards website and are also published as part of the Plenary agenda when the Committee's is considered and debated by the whole Senedd.

Therefore, the legitimate interest identified above is achieved by the process described above and by relevant publications attached

to complaints investigated and reported by the Commissioner for Standards.”

35. Therefore, if a referral had been made to the Commissioner for Standards in respect of Mr Davies and accepted for investigation, the outcome of any investigation by the Commissioner for Standards would have been published and debated by the Senedd. In this case, no such outcome has been published.
36. Whereas the Commissioner would, with more junior employees, take the view that a public authority’s internal investigatory processes, coupled with independent oversight, is sufficient to meet any interest in disclosure, that is not the case here.
37. Mr Davies is a very senior figure in Senedd Cymru. Whilst he is accountable to the Standards of Conduct Commission and the Commissioner for Standards – like all other Senedd members – his seniority and influence may make it more difficult for the Commissioner for Standards to carry out an investigation that is demonstrably independent than would be the case for more junior members. It is the Commissioner’s view that disclosure is more likely to be necessary to satisfy the legitimate interest in transparency as regards the investigation of senior figures than with more junior ones.
38. Therefore, the Commissioner is not satisfied that this legitimate interest can be met by less intrusive means and therefore disclosure is necessary.

Balance between legitimate interests and the data subject’s interests or fundamental rights and freedoms

39. Before personal data can be disclosed, it is necessary to balance the legitimate interests in disclosure against the data subject’s interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
40. In considering this balancing test, the Commissioner has considered the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;

- whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
41. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
 42. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
 43. In respect of Mrs Davies, in its internal review response, Senedd Cymru argued that:

"individuals not in a public facing role would have no reasonable or fair expectation that personal data relating to their employment would be made public".
 44. In the Commissioner's view, Mrs Davies cannot be viewed as simply an employee in a non-public facing role, as she was being employed as her husband's assistant and paid using public funds. This would not be considered desirable modern business practice and the Independent Remuneration Board of the Senedd has since agreed that "Senedd Commission funding will not be given for employment of family members who were not already employed before 1 April 2019."
 45. Senedd Cymru went on to explain that the annual staffing expenditure of each Member of the Senedd and the Register of Members' Interests, containing details of Mrs Davies' employment, are published on the Senedd website and that this, and the system of oversight by the Commissioner for Standards, is a proportionate way of meeting the public interest and protecting the rights of the individual.
 46. As a public facing figure, Mr Davies would not have as high a general expectation of privacy as his wife. However, in this case the personal data of Mr Davies is intertwined with that of his wife and disclosure of Mr Davies' personal data would lead to the disclosure of the personal data of Mrs Davies.
 47. Furthermore, both Mr and Mrs Davies have expressed concerns that disclosure would cause them both significant distress.

The Commissioner's view

48. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The data subjects (particularly Mrs Davies) have a reasonable expectation that sensitive details about her employment and job performance would not be published. Whilst Mr Davies has less of an expectation of privacy due to his public role, because his personal data in this case is inextricably linked to that of his wife, it would be distressing and intrusive into their family life to disclose the information. There is no compelling public interest reason to override the data subjects' fundamental rights and freedom. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
49. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
50. In this instance, the Commissioner has decided that Senedd Cymru has demonstrated that the exemption at section 40(2) applies to all the withheld information.
51. As such, the Commissioner has not gone on to consider the section 31 (law enforcement) and section 41 (information provided in confidence) exemptions.

Right of appeal

52. 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

53. 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.
54. 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

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