



Ein cyf/Our ref ATISN 13375

16 October 2019

Dear ,

Request for Information – ATISN 13375

I wrote to you on 1 October in response to your complaint about your Freedom of Information request.

I have conducted an internal review of your request in accordance with the procedure outlined in the [Welsh Government's Practical Guide for Making Requests for Information](#) which is available by post on request, or via the Welsh Government website.

I note that on 28 August, you asked for a copy of Cell Therapy Limited's application for a £148,712 Single Investment Fund grant in April 2011, as referred to in response to another FOI request, [ATISN 10552](#).

In your request, you explained that you wanted to “... *check the application for fraudulent claims and plagiarised and/or misrepresented data. As explained in the attached report, CTL has a history of such activities and it is important to know if public money was awarded under false pretences*”.

Your request was acknowledged on 28 August and a response was sent to you on 26 September. I note that all of the information was withheld under Section 43 of the Freedom of Information Act (FoIA), prejudice to commercial interests.

In your subsequent e-mail of complaint dated 26 September, you stated:

“Cell Therapy Ltd (CTL), now known as Celixir, has engaged in openly fraudulent activities and poses a serious risk to vulnerable patients and financial investors.



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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding .

Around the time that the grant in question was submitted to the Welsh Government in 2011, CTL submitted a fraudulent patent to the European Patent Office which contained false claims along with plagiarised and misrepresented data from a research group that was unconnected to the Company. I strongly suspect that the grant application will likewise contain false claims, plagiarised and misrepresented data. It is therefore in the public interest for the grant application to be made available, because the public has a right to know if public money has been allocated to a company on the basis of false claims and fraudulent research”.

I have noted your original request, the response that issued and your subsequent complaint.

According to the Code of Practice issued by the Lord Chancellor under Section 45 of the FOIA, public authorities must consult anyone whose interests may be affected by disclosure of information. Officials therefore consulted with Cell Therapy Ltd (trading as Celixir) to seek its views on releasing the grant application form into the public domain. The company was of the view that disclosure would damage its commercial position by releasing trade secrets and prejudicing its commercial interests.

As part of my review, advice was sought from our internal technical experts who work in the area of cell therapy. The relevant documentation, including the grant application form, was shared with them. Having considered the date of the application form, the Welsh Government is of the view that the grant application still contains implicit and in some cases explicit commercial procedures, targets and costings which would be classed as commercially sensitive and releasing this information would disclose into the public domain commercial practices bespoke to the company. The application form also references external skills and resources as well as the names of individuals who carried out research on behalf of Cell Therapy, which again could undermine any commercial activity.

With the above in mind, the Welsh Government is of the view that it was correct to withhold the grant application form under Section 43(2) of the FOIA, prejudice to commercial interests, for the reasons outlined in the response of 26 September.

The Welsh Government is also of the view that some of the information constitutes a Trade Secret and as such is exempt from disclosure under Section 43(1) of the FOIA.

Section 43(1) – Trade Secrets

This exemption states:

43. - (1) Information is exempt information if it constitutes a trade secret.

The Information Commissioner’s [guidance](#) provides examples of what a business secret might be. It also makes reference to a discussion by the First Tier Tribunal regarding the definition of a Trade Secret:

<p>The Tribunal therefore noted that a trade secret was information, which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. This assumed that the information was used in a trade or business and that the owner had either limited the dissemination of the information or at least not</p>
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encouraged or permitted widespread publication. The Tribunal also noted that the concept of a 'trade secret' was one that related to a particular kind and quality of information. As regards kind, it considered this suggested "something technical, unique and achieved with a degree of difficulty and investment". As regards quality, the Tribunal indicated that the term 'trade secret' suggested the "highest level of secrecy".

Having considered the information and the views of the business, the Welsh Government is satisfied that some of the information constitutes a Trade Secret.

As explained in our response of 26 September, Section 43 is a qualified exemption which means the public interest must be taken into consideration when reaching a decision to place the information into the public domain, or not. I have considered the public interest arguments already presented in relation to Section 43(2) and am of the view there is a natural overlap with regards the information caught by Section 43(1). Whilst your allegations and research have been noted, the Welsh Government is not a Court of Law and we remain of the view that the public interest is best served by not releasing information that would amount to a trade secret so as not to compromise or prejudice the company's standing, as the information is still very much live and relevant information.

In addition, the personal data contained within the application form should be withheld from disclosure under Section 40(2) of the FOIA, personal data.

Section 40(2) – Personal Data

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 1998 ('the 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, 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.

The Welsh Government has concluded that, in this instance, some of the information contained within the information caught by your request contains third party personal data. Specifically, this relates to the names of individuals who carried out research on behalf of Cell Therapy and also the personal data of the company's employees (their names, e-mail addresses and direct telephone numbers).

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 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:

1. The Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
2. The Necessity test: Whether disclosure of the information/confirmation or denial that it is held is necessary to meet the legitimate interest in question;
3. 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 Interest Test

The Welsh Government recognises there is a legitimate interest in being able to identify the parties involved in any communication in order to follow the flow of that communication and to understand the position of each party. We do not believe, however, there is any legitimate reason why the personal data would need to be released in order to follow and understand these communications. The personal data is irrelevant to the information caught by your request. The Welsh Government cannot identify any other legitimate interest in you or the public receiving the personal data captured by your request.

2. Is disclosure necessary?

The Welsh Government is of the view that it is not necessary to disclose the personal information caught by your request. It is straight forward, even when withholding the personal data, to identify the position of each organisation. As such we do not believe it is necessary to disclose the personal data in order to understand the information.

Nor do we believe it is necessary to disclose the personal data in order to allow members of the public to contribute to this, or future discussions on this or any other matter. There are mechanisms by which the public can contact the relevant organisations such as generic mailboxes.

3. The Balancing Test

As it has been concluded it is not necessary to disclose the identity of the individuals concerned, there is no requirement to balance the rights and interests of those individuals against the rights, under FOIA, of the requester.

To conclude, 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.

To conclude, your complaint is not upheld as the Welsh Government is of the view it was correct to withhold the information under Section 43(2) of the FoIA. Some of the information is also being withheld under Section 43(1) of the FoIA and personal information is being withheld under Section 40 of the FoIA.

The Welsh Government can only comment on your FOI request to disclose the grant application form. You may wish to pursue the allegations you have presented using other channels.

If you remain dissatisfied with this response you also 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.org.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

Yours sincerely

Sioned Evans
Director Business and Regions