

Archwilydd Cyffredinol Cymru
Auditor General for Wales

Access rights of the Auditor General for Wales



WALES AUDIT OFFICE
SWYDDFA ARCHWILIO CYMRU

- 1 The Auditor General for Wales (Auditor General) is the statutory auditor and inspector of public sector bodies across Wales. In order to exercise his audit and inspection functions effectively, he has, like public sector auditors in other parts of the UK, comprehensive statutory rights to access documents and information relating to the bodies that he audits and inspects. These rights are critical for enabling public bodies to be held to account for the use of public money. For this reason, it is extremely important that the Auditor General is able to exercise his access rights without obstruction. Such obstruction drives up the cost of audit and is unlawful; in many cases it will constitute a criminal offence.
- 2 Given the importance of the Auditor General's access rights, the Auditor General and staff and contractors of the Wales Audit Office will take a rigorous approach to address any obstruction. However, the Auditor General and auditors acting on his behalf will always consider whether the timing of any access request is reasonable, and will consider the proportionality of access where rights under the European Convention on Human Rights are involved.
- 3 This leaflet explains the access rights and addresses some common queries associated with them. It also sets out the considerations that the Auditor General and auditors acting on his behalf will have regard to when seeking to exercise and enforce such rights.

The Statutory Framework

- 4 The Auditor General's statutory rights of access to documents and information are set out in the Government of Wales Act 2006 (GOWA 2006), the Public Audit (Wales) Act 2004 (PAWA 2004) and the Local Government (Wales) Measure 2009 (LGWM 2009).

The Government of Wales Act 2006

- 5 This Act provides the Auditor General's right of access to documents and information that relate to the exercise of many of his core functions, including:
 - the statutory audit of accounts (except in relation to the audit of local government bodies - see below); and
 - value for money examinations and improvement studies (except in relation to studies of local government bodies - see below).
- 6 Paragraph 17 of Schedule 8 to GOWA 2006 states that the Auditor General has a right of access to every document relating to a 'relevant person' that appears to the Auditor General to be necessary for the discharge of any of these functions.
- 7 In the context of the audit of accounts, the 'relevant person' means the person to whom the accounts relate (e.g. the Welsh Ministers) or the person who prepares the accounts for audit. In the context of examinations or studies, the 'relevant person' is the person to whom the study or examination relates.
- 8 Paragraph 17(3) also requires *any person* that the Auditor General thinks has information related to the discharge of his functions to give the Auditor General any assistance, information and explanation which the Auditor General thinks is necessary. It also requires such persons to attend before the Auditor General and to provide any facility that he may reasonably require, such as accommodation and computer system access. The access rights apply to, among others, suppliers of the relevant person and those who receive grants from the person.

The Public Audit (Wales) Act 2004

- 9 PAWA 2004 provides for the Auditor General to undertake audits, studies and other functions in respect of local government bodies. Section 52 of the Act gives the Auditor General rights of access to documents and information required to discharge these functions.
- 10 Section 52(1) states that the Auditor General has a right of access to every document relating to a local government body in Wales which appears to him necessary for the purposes of his functions under the Act.
- 11 Section 52(4) allows the Auditor General to require a person whom he thinks has information to give him any assistance, information and explanation that he thinks is necessary for the purposes of his functions under the Act. Section 52(5) states that information means information that relates to a local government body in Wales in relation to which the Auditor General has functions under the Act.
- 12 Section 53 states that a person commits a criminal offence if without reasonable excuse he fails to comply with a requirement imposed by the Auditor General under section 52(4).
- 13 Section 64B of PAWA 2004 provides that the Auditor General may require a local government body or Welsh NHS body or any officer or member of such a body to provide the Auditor General or a person acting on his behalf with such data (and in such form) as the Auditor General or that person may reasonably require for the purpose of conducting data matching exercises. Section 64B(3) states that a person commits an offence if without reasonable excuse he fails to comply with a requirement imposed by the Auditor General.



The Local Government (Wales) Measure 2009

- 14 Section 26 of the Local Government (Wales) Measure provides an “inspector” undertaking work under the local government assessment and inspection regime created by that Measure with rights of access to the premises of a Welsh improvement authority. It also grants access to any document relating to that authority that appears to the inspector to be necessary for the exercise of any of his inspection functions. The Auditor General is an inspector who undertakes work under this regime, as are persons acting on his behalf.
- 15 The local government assessment and inspection regime includes:
- improvement information and planning audits;
 - improvement assessments; and
 - special inspections.
- 16 Section 26(3) allows an inspector to require a person holding or accountable for any document relating to a Welsh improvement authority to give him such information or explanation as the Auditor General thinks is necessary.
- 17 Section 26(7) provides that a Welsh improvement authority must provide an inspector with every facility and all information that the inspector may reasonably require for the purposes of the inspection or assessment.
- 18 Section 26(9) states that a person commits a criminal offence if without reasonable excuse he obstructs the use of any power granted by s26, or if he fails to comply with a requirement imposed by the Auditor General under s26.

Common queries about the extent of auditors' powers

19 Often queries are raised over the extent of access rights. Despite the fact that the following types of information are usually protected from disclosure, if access to them is necessary for an audit or inspection, auditors will have a right to access:

- confidential information, such as submissions to ministers;
- personal information as defined by the Data Protection Act 1998;
- information that is subject to legal privilege;
- personal information and sensitive personal information that may otherwise be subject to protection under the European Convention on Human Rights;
- information held by third parties; and
- electronic files and IT systems.

20 Essentially, whenever the access is *necessary* to exercise the auditor's functions from the point of view of the auditor, the auditor will have a right of access.

21 Furthermore, if an auditor believes it is necessary to copy or take away the information for an audit or inspection, then he will have the right to do this.

22 *Re Hurle-Hobbs* (1944) and *R v Hurle-Hobbs, ex parte Simmons* (1945) established the principle that the auditor's need to gain access to relevant documents extends beyond documents of the body under audit. Therefore, access rights extend to information held by third parties. This is explicitly recognised in the 2006 Act by way of non-exclusive examples.

23 The Data Protection Act 2018 and the General Data Protection Regulation do not prevent disclosure of personal information or sensitive personal information to the Auditor General, if he thinks access to that information is necessary for the exercise of any of his functions. This is because data protection legislation permits the processing of personal data and sensitive personal data if that processing is necessary for the exercise of statutory functions.

24 Similarly, the Auditor General's rights can provide justification for interference with an individual's right to respect for their private and family life, under Article 8 of the European Convention on Human Rights, incorporated into UK law by the Human Rights Act 1998. There will only be justification if the interference with the right is a proportionate response to the audit or inspection need. As described below, auditors acting on behalf of the Auditor General will consider the proportionality of any exercise of access rights where European Convention rights are involved.

Legal professional privilege

25 Legal professional privilege is the right of a person not to have their correspondence with legal advisors disclosed to the general public, whether in judicial proceedings or otherwise.

26 The Auditor General's rights of access extend to documents covered by legal professional privilege. Authority for this can be found in *Parry-Jones v Law Society* (1968), as interpreted by *R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner* (2002). The latter case holds that legal professional privilege is not infringed when a body exercises statutory powers to access a document subject to that privilege. The Auditor General is therefore entitled to access documents subject to privilege for the purpose of his statutory audit and inspection functions. The Auditor General will seek to protect this legal professional privilege, and as such will not make the information publicly available or use it for any improper purposes.

Access subject to agreement

- 27 Occasionally audited bodies will request that the Auditor General signs an agreement detailing the terms on which he is to have access to information. These are sometimes referred to as “access agreements” or “binding access protocols”. Regardless of how they are described, it is unlawful for the Auditor General to sign any agreements that make his powers of access subject to any conditions. To do so would fetter the discretion of the Auditor General to exercise such powers as he sees fit, and this would be contrary to the general principles of public law.
- 28 In addition, third parties such as actuaries, other auditors and pension fund managers sometimes put audited bodies under pressure to require a “hold harmless” agreement to be signed by an auditor before the audited body will allow access to advice or reports of that third party. Again, it is unlawful for the Auditor General to sign such “hold harmless” agreements. The Auditor General’s right of access will still be effective despite not signing such an agreement, even if the audited body is under a contractual obligation to ensure that an agreement is signed.



The Auditor General’s approach to exercising and enforcing his access rights

- 29 The provisions of GOWA 2006, PAWA 2004 and LGWM 2009 make it clear that it is for the Auditor General (or person acting on his behalf) to determine whether or not the information requested is necessary for the performance of his functions under the relevant Act or Measure. The Auditor General and auditors acting on his behalf will have regard to the following considerations when deciding whether to enforce their access rights.

Timing

- 30 Auditors will determine whether or not the timing of their request is reasonable. In some circumstances, it may be necessary for the audit or inspection that the auditor receives access to information without delay, and without giving notice to the audited body, for example where fraud is alleged. In other cases, the need will not be so pressing, and the auditor will generally give at least two weeks’ notice of the need for the information.



Proportionality

31 When it is clear that access to certain information will involve interference with a right under the European Convention on Human Rights, auditors will determine whether or not their request is proportionate. This involves determining whether or not the benefits that will be gained from using the information outweigh the negative impact of collecting the information that is placed on an individual. Usually, if the auditor thinks that access is necessary for the proper exercise of the audit or inspection, then access will be proportionate. Access will in many cases be necessary if it is the only way to exercise the Auditor General's statutory responsibilities. However, there may be situations where the negative impact is great, and the benefit to the audit or inspection is relatively low. In such cases, auditors will consider whether the scope of the work may legitimately be reduced.



Procedure in cases of obstruction

32 If an auditor is obstructed by any person, they will in the first instance explain the relevant access rights and any relevant criminal provisions, and they will seek co-operation and compliance from that person. If, however, the obstruction persists, Wales Audit Office Law and Ethics staff will write to the obstructing persons, or, if relevant, their management. Wales Audit Office Law and Ethics staff will outline the law and explain that if access is not provided within a specified period (usually one week, but it may be shorter where the need is pressing) then the Auditor General will instruct solicitors to commence legal proceedings to enforce his access rights. If access is not provided by the deadline, then the Auditor General will commence legal proceedings. In addition to the required provision of information, explanation, assistance or facility etc, the Auditor General will also seek to recover the expenses incurred in any proceedings.

Contact for enquiries

If you have question regarding the Auditor General's access rights, please call 029 2032 0500 and ask to speak to a member of the Law and Ethics Team or email info@wao.gov.uk and mark the email for the attention of the **Law and Ethics Team**.

This document is also available in Welsh.

We welcome correspondence and telephone calls in Welsh and English. You can also write to us in either Welsh or English and we will respond in the language you have used. Corresponding in Welsh will not lead to a delay.

