



**TRIBIWNLYS Y GYMRAEG**  
**Rhif yr Achos: TyG/WLT/19/1**

CURON WYN DAVIES

(Ceisydd)

v.

COMISIYNYDD Y GYMRAEG

(Atebydd)

**PENDERFYNIAD Y TRIBIWNLYS**

Natur y Cais

Cais o dan adran 103 o Fesur y Gymraeg (Cymru) 2011 am ganiatâd i wneud cais i adolygu penderfyniad y Comisiynydd (19 Mawrth 2019) i beidio â chynnal ymchwiliad i gŵyn bod corff wedi methu â chydymffurfio â Safon Gymraeg berthnasol. Gwrthodwyd caniatâd gan Lywydd y Tribiwnlys ar 12 Ebrill 2019 ond gwnaethpwyd cais gan y Ceisydd, o dan reol 16(7) o Reolau Tribiwnlys y Gymraeg 2015, i'r cais gael ei ailystyried gan banel o aelodau'r Tribiwnlys. Penderfynodd y Ceisydd hefyd wneud cais o dan reol 32(4) o'r Rheolau am orchymyn bod y Comisiynydd yn datgelu cynllun gweithredu a baratowyd gan y corff dan sylw, y cyfeiriwyd ato



**WELSH LANGUAGE TRIBUNAL**  
**Case No: TyG/WLT/19/1**

CURON WYN DAVIES

(Applicant)

v.

WELSH LANGUAGE COMMISSIONER

(Respondent)

**TRIBUNAL DECISION**

Nature of application

Application under section 103 of the Welsh Language (Wales) Measure 2011 for permission to apply for a review of the decision of the Commissioner (19 March 2019) not to carry out an investigation into a complaint of a failure by a body to comply with a relevant Welsh language Standard. Permission was refused by the President of the Tribunal on 12 April 2019 but the applicant applied, under rule 16(7) of the Welsh Language Tribunal Rules 2015, for the application to be reconsidered by a Tribunal panel. The applicant also applied under rule 32(4) of the Rules for an order that the Commissioner disclose an action plan prepared by the body in question, which was referred to by the Commissioner when

gan y Comisiynydd wrth roi rhesymau dros beidio â chynnal ymchwiliad i gŵyn y Ceisydd.

#### Aelodau'r Panel

Keith Bush CF (Llywydd y Tribiwnlys)

Isata Kanneh

Sara Peacock

#### Y Gwrandawriad

Cynhaliwyd gwrandawriad yn Nhŷ Southgate, Caerdydd ar 12 Mehefin 2019.

#### Penderfyniad y Tribiwnlys

Mae Panel y Tribiwnlys:

- i) yn gwrthod gwneud gorchymyn i ddatgelu'r cynllun gweithredu cyn rhoi caniatâd i wneud y cais am adolygiad (ond gweler iii) isod);
- ii) yn rhoi caniatâd i'r Ceisydd i wneud cais am adolygiad;
- iii) yn cyfarwyddo bod y Comisiynydd, wrth gyflwyno datganiad achos, yn datgelu copi o'r cynllun gweithredu (gweler gorchymyn cyfarwyddiadau ar wahân).

giving reasons for not carrying out an investigation into the Applicant's complaint.

#### The Panel Members

Keith Bush QC (President of the Tribunal)

Isata Kanneh

Sara Peacock

#### Hearing

A hearing took place at Southgate House, Cardiff on 12 June 2019.

#### Decision of the Tribunal

The Tribunal panel:

- i) declines to make an order for disclosure of the action plan in advance of granting permission to make the application for a review (but see iii) below);
- ii) grants the Applicant permission to apply for a review;
- iii) directs that the Commissioner, when submitting a case statement, disclose a copy of the action plan (see separate order for directions).

## RHESYMAU

### Rhagarweiniad

1. Yn Ionawr 2019 fe wnaeth y Ceisydd nifer o gwynion i'r Comisiynydd yn honni nifer o fethiannau gan ei gyngor lleol i gydymffurfio â'i ddyletswyddau o dan Safonau'r Gymraeg. Roedd y safonau dan sylw oedd ym mhlith y rhai a nodwyd yn yr Hysbysiad Cydymffurfio a gyflwynwyd i'r cyngor gan y Comisiynydd ar 30 Medi 2015. Yr unig gŵyn sy'n berthnasol i'r cais presennol oedd cŵyn bod adran Gwasanaethau Parcio'r cyngor, wrth ohebu â'r Ceisydd, wedi defnyddio fersiwn Saesneg o'i gyfeiriad. Roedd hyn er ei fod wedi rhoi gwybod yn flaenorol i'r cyngor ei fod am i unrhyw ohebiaeth a dderbyniodd gan y cyngor fod yn Gymraeg. Mae'r Ceisydd o'r farn bod y cyngor, wrth ymddwyn fel hyn, wedi methu â chydymffurfio â'i ddyletswydd o dan safon 2 yn yr Hysbysiad Cydymffurfio perthnasol, dyletswydd a ddaeth i rym ar 30 Mawrth 2016.
2. Er bod y Comisiynydd wedi cytuno i gynnal ymchwiliad i nifer o gwynion y Ceisydd, penderfynodd beidio â gwneud hynny yng nghyswllt y gŵyn a ddisgrifir uchod. Felly nid oes unrhyw ganfyddiad ffurfiol wedi ei wneud gan y Comisiynydd bod y cyngor wedi ymddwyn yn groes i'r safon dan sylw. Nid yw'r cyngor yn un o'r partion yn y cais

## REASONS

### Introduction

1. In January 2019 the Applicant made a number of complaints to the Commissioner alleging a number of failures by his local council to comply with its duties under Welsh language standards. The standards in question were amongst those specified in the Compliance Notice served on the council by the Commissioner on 30 September 2015. The only complaint which is relevant to the current application was a complaint that the council's Parking Services department had, when corresponding with the Applicant, used an English version of his address. This was despite the fact that he had previously made it known to the council that he wished any correspondence which he received from the council to be in Welsh. The Applicant believes that by acting in this way the council failed to comply with its duty under standard 2 in the relevant Compliance Notice, a duty which came into force on 30 March 2016.
2. Although the Commissioner agreed to conduct investigations into several of the Applicant's complaints, she decided not to do so in relation to the complaint outlined above. There has therefore been no formal finding by the Commissioner that the council was in breach of the standard in

hwn, sy'n ymwneud yn llwyr â phenderfyniad y Comisiynydd i beidio â chynnal ymchwiliad. Hyd yma nid yw'r cyngor wedi cael unrhyw gyfle i herio'r gŵyn ac ni fydd unrhyw beth a benderfynwyd gan y Tribiwnlys, yn awr, yn effeithio ar hawl y cyngor i wneud hynny pe bai'r gŵyn hon, neu gŵyn debyg, yn cael ei ymchwilio iddi gan y Comisiynydd maes o law.

3. I bwrpas y cais hwn mae'n berthnasol nodi fodd bynnag bod y Comisiynydd, wrth roi ei rhesymau dros benderfynu peidio ag ymchwilio i gŵyn y Ceisydd, wedi derbyn, fel sail ar gyfer y rhesymau hynny, bod yr arfer y cynnodd y Ceisydd yn ei gylch yn anghyson â dyletswydd y cyngor o dan y safon berthnasol. Roedd ei rhesymau dros wrthod ymchwilio i'r gŵyn yn ymwneud â'r ffaith ei fod yn debyg i gŵyn flaenorol, a wnaed gan aelod arall o'r cyhoedd, yr oedd y Comisiynydd eisoes wedi ymchwilio iddi ac y penderfynodd y Comisiynydd ei derbyn fel cŵyn ddilys. Roedd rhesymau'r Comisiynydd dros beidio ag ymchwilio i gŵyn y Ceisydd yn ymwneud â chamau gorfodi a gymerodd yn erbyn y cyngor o ganlyniad i'r gŵyn flaenorol.
4. Roedd llythyr y Comisiynydd i'r Ceisydd dyddiedig 19 Mawrth 2019 yn cyfeirio at y ffaith ei bod, o dan adran 77(3)(a) o Fesur

question. The council is not a party to this application, which relates solely to the decision of the Commissioner not to conduct an investigation. The council has not, as yet, had any opportunity to contest the complaint and nothing decided by the Tribunal at this stage affects the right of the council to do so if this complaint, or a similar one, is eventually investigated by the Commissioner.

3. For the purpose of this application it is relevant to note, however, that the Commissioner, when giving her reasons for deciding not to investigate the Applicant's complaint, accepted, as a basis for those reasons, that the practice of which the Applicant had complained was inconsistent with the council's duty under the relevant standard. Her reasons for refusing to investigate the complaint related to the fact that it was similar to an earlier complaint by another member of the public, which had already been investigated by the Commissioner and which the Commissioner had upheld. The Commissioner's reasons for not investigating the Applicant's complaint related to the enforcement action which she had taken against the council as a result of the earlier complaint.
4. The Commissioner's letter to the Applicant dated 19 March 2019 referred to the fact that she had, under section 77(3)(a) of the

y Gymraeg (Cymru) 2011, wedi ei gwneud yn ofynnol bod y cyngor, yng nghyswllt y gŵyn flaenorol honno, yn paratoi "cynllun gweithredu" a fyddai'n gynllun "at y diben o atal methiant (y cyngor) i gydymffurfio â'r gofyniad perthnasol rhag parhau neu gael ei ailadrodd". Aeth y Comisiynydd ymlaen i ddweud bod y cyngor wedi paratoi'r cynllun angenrheidiol ac mai un o'r camau arfaethedig ynddo oedd:

"Sicrhau bod tendrau newydd ar gyfer meddalwedd Technoleg Gwybodaeth a ddefnyddir i greu llythyrau neu filiau'n ystyried y gofyniad i gynnwys dewis i'r systemau arddangos fersiwn Cymraeg a Saesneg o gyfeiriadau aelwydydd"

5. Eglurodd y Comisiynydd ei fod yn ofynnol, o dan y cynllun gweithredu, i gymryd y cam uchod erbyn 5 Medi 2019. Aeth ymlaen i ddweud, yng ngoleuni'r ffeithiau hynny:

"Ystyrir na fyddai cynnal ymchwiliad (h.y. i gŵyn y Ceisydd) yn ddefnydd effeithiol o adnoddau ac na fyddai cynnal ymchwiliad yn debygol o fy arwain at osod camau gorfodi gwahanol (i'r rhai) a osodwyd eisoes pe byddai methiant yn cael ei ganfod"

6. Yn ei Hysbysiad Cais (dyddiedig 9 Ebrill 2019) mae'r Ceisydd yn ceisio herio penderfyniad y Comisiynydd ar ddwy sail:
  - i) Nad oedd y cynllun gweithredu sydd eisoes yn bodoli (sef un yr oedd yn

Welsh Language (Wales) Measure 2011, required the council, in relation to that earlier complaint, to prepare an "action plan" which is a plan "for the purpose of preventing the continuation or repetition of (the council's) failure to comply with the relevant requirement." The Commissioner went on to state that the council had prepared the required plan and that one of the proposed steps included in it was:

"Ensure that new tenders for IT software used to create letters or bills take account of the requirement to include an option for the system to show Welsh and English versions of residential addresses (trans.)"

5. The Commissioner explained that the date by which the action plan required the above step to be taken was 5 September 2019. She went on to state that in the light of those facts:

"(I)t is considered that conducting an investigation (i.e. into the Applicant's complaint) would not be an effective use of resources and that conducting an inquiry would not, if a further failure were to be established, be likely to lead me to impose enforcement action different from (that) already imposed (trans.)"

6. In his Notice of Application (dated 9 April 2019) the Applicant seeks to challenge the Commissioner's decision on two grounds:

rhaid i'r Comisiynydd ei gymeradwyo o dan adran 80 o'r Mesur) yn rhoi sail gyfreithlon dros wrthod ymchwilio i gŵyn newydd y Ceisydd. Mae'r Ceisydd yn tynnu sylw at y ffaith bod y dyfyniad o'r cynllun gweithredu'n awgrymu, mae'n ymddangos, bod y cyngor wedi cael trafferth defnyddio fersiynau o gyfeiriad yn y ddwy iaith. Heb o leiaf weld y cynllun gweithredu llawn, mae'n amhosib deall yn union sut y mae'r camau y cyfeiriwyd atynt yn ymwneud â chydymffurfio â'r safon, ond mae'r Ceisydd yn tynnu sylw at y ffaith bod ei gŵyn ond yn ymwneud â methiant i ddefnyddio fersiwn Gymraeg o'i gyfeiriad. Os yw'r trefniadau presennol ond yn caniatáu i lythyrau gael eu cyfeirio mewn un iaith, yna pam na ddylai'r iaith honno fod yn Gymraeg? O dan adran 3(3)(c) o'r Mesur, mae'n ofynnol i'r Comisiynydd dalu sylw i'r egwyddor na ddylid trin y Gymraeg yn llai ffafriol na'r Saesneg. Ond mae'n ymddangos bod y Comisiynydd wedi cytuno i sefyllfa sy'n goddef parhau i ddefnyddio fersiynau Saesneg yn unig o gyfeiriadau. Mae'r Ceisydd yn dadlau bod hyn yn groes i

i) That the existing action plan (which was required by section 80 of the Measure to have been approved by the Commissioner) did not provide a lawful basis for refusing to investigate the Applicant's fresh complaint. The Applicant points out that the quotation from the action plan seems to imply a difficulty encountered by the council in using versions of an address in both languages. Without at least seeing the full action plan it is impossible to understand exactly how the action referred to relates to compliance with the standard, but the Applicant points out that his complaint relates only to a failure to use a Welsh language version of his address. If the current arrangements only permit letters to be addressed in one language, then why should that language not be Welsh? The Commissioner is required by section 3(3)(c) of the Measure to have regard to the principle that the Welsh language should be treated no less favourably than the English language. Yet it appears that the Commissioner has agreed to a state of affairs that tolerates the continued use of English-only versions of addresses. The

ddyletswyddau statudol y Comisiynydd a thrwy seilio ei phenderfyniad i beidio ag ymchwilio i'w gŵyn ar y cynllun gweithredu, bod y Comisiynydd wedi gweithredu y tu hwnt i'w phwerau. Gan mai pwrpas y cynllun gweithredu, fel y disgrifiwyd yn adran 77(3)(a) o'r Mesur, yw "atal parhad neu ailadrodd" methiant i gydymffurfio â gofynion y safon, mae'r Ceisydd yn cwestiynu a all y Comisiynydd ddibynnu'n gyfreithlon ar gynllun sy'n caniatáu i fethiant barhau am fisoedd neu flynyddoedd, er mwyn cyfiawnhau penderfyniad i beidio â chynnal ymchwiliad i gŵyn newydd fod y methiant i gydymffurfio â'r gofyniad yn parhau.

- ii) Hyd yn oed pe caniateir trin y ddarpariaeth berthnasol yn y cynllun gweithredu fel un berthnasol wrth benderfynu a ddylid ymchwilio i gŵyn newydd neu beidio, dadl y Ceisydd yw ei bod yn afresymegol ei thrin fel rheswm pendant dros beidio â gwneud. Mae'r Comisiynydd wedi cymryd yn ganiataol, ar gam, na fyddai pa ganlyniad bynnag a ddeuai o unrhyw ymchwiliad pellach yn rhoi iddi unrhyw sail ar gyfer cymryd camau gorfodi ychwanegol i'r rhai a

Applicant argues that this is contrary to Commissioner's statutory duties and that in basing her decision not to investigate his complaint on the action plan the Commissioner has acted beyond her powers. Since the purpose of an action plan, as set out in section 77(3)(a) of the Measure, is "preventing the continuation or repetition" of a failure to comply with a requirement of a standard, the Applicant questions whether a plan which permits a failure to continue for months or years can lawfully be relied upon by the Commissioner to justify a decision not to conduct an investigation into a fresh complaint that the failure to comply with the requirement is continuing.

- ii) Even if it is permissible to treat the relevant provision of the action plan as relevant in deciding whether to investigate a fresh complaint, the Applicant argues that it is irrational to treat it as a conclusive reason for not doing so. The Commissioner has wrongly assumed that whatever the outcome of a further investigation she would have no basis for taking any enforcement action which went beyond the obligations imposed on the council by the action plan. Again, the lack of

orfodwyd ar y cyngor o dan y cynllun gweithredu. Eto, heb weld copi o'r cynllun gweithredu llawn, mae'n amhosib asesu hyd a lled yr opsiynau a allai ddod i'r golwg o ganlyniad i ymchwiliad, ond pe bai'n cael ei ddatgelu, er enghraifft, nad oedd y cyngor ar darged i gydymffurfio â'r cynllun gweithredu, gallai achosi bod y Comisiynydd yn cymryd camau cryfach yn dilyn canfyddiad newydd o fethiant i gydymffurfio â'r safon.

7. Roedd y Llywydd, yn y lle cyntaf (ar 12 Ebrill 2019) wedi gwrthod caniatâd i wneud y cais. Yna penderfynodd y Ceisydd ymarfer ei hawl i ofyn am ail ystyriaeth gan banel o aelodau'r Tribiwnlys.
8. Fodd mae'r Ceisydd hefyd, ar 1 Mai 2019, wedi gwneud cais i'r Tribiwnlys am orchymyn o dan reol 32(4) o'r Rheolau y dylai'r Comisiynydd, cyn i'r Tribiwnlys ailystyried y mater, ddatgelu copi o'r cynllun gweithredu llawn. O ystyried pwysigrwydd y cynllun gweithredu i benderfyniad y Comisiynydd, roedd y Tribiwnlys, wrth ystyried y Cais yn y lle cyntaf, wedi cymryd yn ganiataol, a hynny'n anghywir, bod gan y Ceisydd gopi eisoes. Cyn ystyried y cais i ddatgelu'r cynllun gweithredu, gofynnodd y Tribiwnlys i'r Ceisydd pa gamau a gymerodd i gael gafael ar gopi o'r cynllun gweithredu heb

a copy of the full action plan makes it impossible to assess the full extent of the options that might come to light as a result of an investigation, but if it were revealed, for example, that the council were not on track to comply with the action plan, this might cause the Commissioner to take stronger action in relation to a fresh finding of failure to comply with the standard.

7. Permission to make the application was initially (on 12 April 2019) refused by the President. The Applicant then exercised his right to ask for a reconsideration by a Tribunal panel.
8. However, the Applicant also, on 1 May 2019, applied to the Tribunal for an order under rule 32(4) of the Rules that the Commissioner should, before the Tribunal reconsidered the matter, disclose a copy of the full action plan. Given the importance of the action plan to the Commissioner's decision, the Tribunal, when giving initial consideration to the Application had wrongly assumed that the Applicant already had a copy. Before considering the application for disclosure of the action plan, the Tribunal asked the Applicant what steps he had taken to obtain a copy of the action plan without an order. It then



orchymyn. Yna cafwyd gwybod bod y Ceisydd wedi gofyn i'r Comisiynydd ddatgelu copi mewn ymateb i gais o dan Ddeddf Rhyddid Gwybodaeth 2000 ond bod y Comisiynydd wedi gwrthod y cais. Wrth wneud hynny, roedd y Comisiynydd wedi dibynnu ar y cyfyngiad ar ddatgelu gwybodaeth yn adran 22 o'r Mesur, ac ar benderfyniad y Tribiwnlys Haen Gyntaf (y Siambr Rheoleiddio Cyffredinol) dyddiedig 15 Awst 2017 (cyf: EA/2017/0046). Dylid nodi bod y penderfyniad hwnnw'n ymwneud â hawliau'r cyhoedd o dan Ddeddf 2000 ac nid â datgelu tystiolaeth berthnasol yn ystod trafodion y Tribiwnlys hwn y mae'r Comisiynydd yn un o'r partïon ynddynt.

#### Y cais i ddatgelu'r cynllun gweithredu

9. Mae cysylltiad agos rhwng y ffactorau sy'n berthnasol i'r cais i ddatgelu a'r rhai sy'n berthnasol i'r prif gais am ganiatâd i herio penderfyniad y Comisiynydd. Felly penderfynodd y Tribiwnlys gyfarwyddo y dylid ystyried y cais i ddatgelu ar yr un pryd â'r cais am ganiatâd. Wrth wneud hynny roedd y Tribiwnlys yn nodi'n glir pe bai'n ymddangos i'r panel, ar ôl clywed dadleuon y Ceisydd, nad oedd modd delio'n deg â'r cais am ganiatâd heb ddatgelu'r cynllun gweithredu, yna y byddai'r Tribiwnlys yn gohirio ystyried y

emerged that the Applicant had requested the Commissioner to disclose a copy in response to a request under the Freedom of Information Act 2000 but that the Commissioner had rejected the request. In doing so, the Commissioner had relied on the restriction on disclosure of information in section 22 of the Measure and on the decision of the First-tier Tribunal (General Regulatory Chamber) dated 15 August 2017 (ref: EA/2017/0046). That decision relates, it should be noted, to the rights of members of the public under the 2000 Act and does not relate to the disclosure of relevant evidence in the course of the proceedings of this Tribunal to which the Commissioner is a party.

#### The application for disclosure of the action plan

9. The factors relevant to the application for disclosure and those relevant to the substantive application for permission to challenge the Commissioner's decision are closely related to one another. The Tribunal therefore directed that the application for disclosure should be considered at the same time as the application for permission. In doing so the Tribunal made it clear that if it appeared to the panel, after hearing the Applicant's arguments, that the application for permission could not be dealt with fairly without disclosure of the action plan then the Tribunal would defer consideration of

cais am ganiatâd tan ar ôl i'r cynllun gweithredu gael ei ddatgelu.

10. O dan adran 103(3) o'r Mesur, mae'n ofynnol i'r Tribiwnlys ddelio gyda chais o dan adran 103 "fel pe bai'n gais i'r Uchel Lys am adolygiad barnwrol". Mae'n dilyn mai'r egwyddorion y mae'n rhaid i'r Tribiwnlys eu dilyn wrth ystyried cais i ddatgelu dogfennau cyn i ganiatâd gael ei roi i wneud cais am adolygiad yw'r rhai a nodir gan Mr Ustus Silber yn achos *Sky Blue Sports & Leisure Limited (and others) v Coventry City Council* [2013] EWHC 3366. Yn benodol, pwysleisiodd Mr Ustus Silber mai'r prawf yw a oes angen datgelu "er mwyn datrys y mater yn deg a chyfiawn" ac mai "y mater" mewn achos o'r fath yw'r cais am ganiatâd ac nid y prif gais (gweler paragraff 23 o'r dyfarniad). Aeth ymlaen ym mharagraffau 25 a 26 i egluro, bod gan y llys hawl, wrth benderfynu rhoi caniatâd i wneud cais am adolygiad barnwrol neu beidio, i ystyried diffyg datgelu llawn, y pryd hwnnw, fel rhywbeth a allai gefnogi'r ddadl bod y mater yn haeddu ymchwiliad llawn ar sail yr holl dystiolaeth berthnasol.

11. Am y rhesymau a roddir isod, mae'r Tribiwnlys o'r farn bod ganddo ddigon o ddeunydd ar hyn o bryd fel sail i wneud penderfyniad teg ynghylch rhoi caniatâd

the application for permission until after the action plan had been disclosed.

10. Section 103(3) of the Measure requires the Tribunal to deal with an application under section 103 "as if it were an application for judicial review made to the High Court". It follows that the principles which the Tribunal must apply when considering an application for disclosure of documents before permission to apply for a review has been given are those set out by Mr Justice Silber in *Sky Blue Sports & Leisure Limited (and others) v Coventry City Council* [2013] EWHC 3366. In particular, Mr Justice Silber stressed that the test is whether disclosure is "necessary in order to resolve the matter fairly and justly" and that "the matter" in such a case is the application for permission and not the substantive application (see paragraph 23 of the judgement). He went on, at paragraphs 25 and 26, to explain that when deciding whether to give permission to apply for judicial review the court was entitled to take account of the absence of full disclosure at that stage in support of the argument that the matter merited full investigation based on all the relevant evidence.

11. For the reasons set out below, the Tribunal believes that it currently has sufficient material on which to make a fair decision on whether or not to give permission to

neu beidio i wneud cais i adolygu penderfyniad y Comisiynydd. Felly nid yw'r Tribiwnlys yn barod i gymryd y cam eithriadol o orchymyn bod y Comisiynydd yn datgelu'r cynllun gweithredu cyn ystyried a ddylid rhoi caniatâd neu beidio.

apply for a review of the Commissioner's decision. The Tribunal is not, therefore, prepared to take the exceptional step of ordering the Commissioner to disclose the action plan in advance of considering whether or not to give permission.

### Caniatâd i wneud cais i adolygu penderfyniad y Comisiynydd

### Permission to apply for a review of the Commissioner's decision

12. Roedd penderfyniad y Comisiynydd i wrthod ymchwilio i gŵyn y Ceisydd yn llwyr seiliedig ar fodolaeth ac effaith y cynllun gweithredu dan sylw. Wrth wrthod, yn y lle cyntaf, rhoi caniatâd i'r Ceisydd wneud cais i adolygu penderfyniad y Comisiynydd, pwysleisiodd y Tribiwnlys fod gan y Comisiynydd ddisgresiwn eang o ran penderfynu a ddylid cynnal ymchwiliad i gŵyn neu beidio a hefyd y ffaith nad oes gan y Tribiwnlys bŵer i gwestiynu'n uniongyrchol ganlyniad ymchwiliad blaenorol gan gynnwys, er enghraifft, penderfyniad y Comisiynydd i fynnu ac i gymeradwyo'r cynllun gweithredu.

12. The Commissioner's decision to refuse to investigate the Applicant's complaint was entirely based on the existence and effect of the action plan in question. In initially refusing permission to the Applicant to apply for a review of the Commissioner's decision, the Tribunal stressed the wide discretion which the Commissioner has in deciding whether or not to conduct an investigation into a complaint and the fact that the Tribunal has no power to directly question the outcome of an earlier investigation, including, for example, the Commissioner's decision to require and to approve the action plan.

13. Wrth ailystyried y mater, ar gais y Ceisydd, mae'r ffaith nad oedd panel y Tribiwnlys wedi'i rwyngu gan benderfyniad cychwynnol y Tribiwnlys i beidio â rhoi caniatâd, Yn awr, wrth gwrs, mae gan y panel y fantais o fod wedi gwrandao ar y Ceisydd yn datblygu ei ddadleuon yn fwy manwl nag oedd yn bosib yn ei gais

13. In re-considering the matter, at the request of the Applicant, the Tribunal panel is not bound by the Tribunal's initial decision not to give permission. The panel has, of course, now had the benefit of hearing the Applicant develop his arguments in more detail than was possible in his written application. In addition, the Tribunal is now

ysgrifenedig. Mae'r Tribiwnlys hefyd bellach yn ymwybodol o'r ffaith fod gwybodaeth y Ceisydd o delerau'r cynllun gweithredu, er bod y Comisiynydd wedi seilio ei phenderfyniad ar delerau'r cynllun hwnnw, wedi'i chyfyngu i ddyfyniad y Comisiynydd o un o bwytiau gweithredu'r cynllun hwnnw.

14. Yr hyn sydd ymhlyg yn rheswm y Comisiynydd dros wrthod ymchwilio i gŵyn y Ceisydd yw (yn ôl dadl y Ceisydd) bod corff cyhoeddus yr oedd yn gyfreithiol ofynnol iddo gydymffurfio â safon 2 erbyn 30 Mawrth 2016 wedi, mewn gwirionedd, dderbyn gohiriad y ddyletswydd honno tan 5 Medi 2019, mewn geiriau eraill am gyfnod o bron i dair blynedd. Y ddyletswydd dan sylw oedd dyletswydd statudol a grewyd o dan Reoliadau a wnaed gan Weinidogion Cymru ac a gymhwyswyd i'r cyngor drwy hysbysiad cydymffurfio statudol gan y Comisiynydd. Mae'r Mesur yn cynnwys trefniadau manwl i alluogi corff cyhoeddus i herio pa mor rhesymol a chymesur yw gosod safon arno, gan gynnwys y dyddiad erbyn pryd yr oedd yn ofynnol i'r corff gydymffurfio â'r safon. Mae'r Ceisydd yn dadlau nad oedd yn bosib i'r Mesur fod wedi cael ei fwriadu i alluogi'r Comisiynydd i wrthdroi'r trefniadau hyn a rhyddhau corff cyhoeddus o'i ddyletswydd statudol drwy gymeradwyo cynllun gweithredu lle mae'r corff dan sylw,

aware of the fact that although the Commissioner based her decision on the terms of the action plan, the Applicant's knowledge of the terms of that plan was limited to the Commissioner's quotation of one of the action points from that plan.

14. The implication of the Commissioner's reason for refusing to investigate the Applicant's complaint is (the Applicant argues) that a public body which was required by law to comply with standard 2 by the 30 March 2016 has, in effect, had that duty deferred to 5 September 2019, in other words by a period of almost three years. The duty in question was a statutory duty created under Regulations made by the Welsh Ministers and applied to the council by a statutory compliance notice served by the Commissioner. The Measure contains detailed machinery to enable a public body to challenge the reasonableness and proportionality of the imposition of a standard, including the date by which it is to be required to comply with it. The Applicant argues that the Measure cannot have been intended to enable the Commissioner to override this machinery, and to relieve a public body of a statutory duty, by approving an action plan under which the body in question is in effect given a lengthy extension of the period within which it must comply with the duty. He points out that action plans are

drwy'r cynllun hwnnw, mewn gwirionedd, yn derbyn estyniad helaeth o'r dyddiad pryd y mae'n rhaid iddo gydymffurfio â'r ddyletswydd. Mae'n tynnu sylw at y ffaith mai bwriad cynlluniau gweithredu yw sicrhau cydymffurfio â safonau – nid eu hamrywio. Mae'n pwysleisio hefyd bod hawliau'r cyhoedd, am na chaiff cynlluniau gweithredu eu cyhoeddi ar hyn o bryd gan y Comisiynydd, yn gallu, cael eu dileu, os yw'r Comisiynydd yn iawn, (o leiaf dros dro) gan broses na wŷr y cyhoedd ddim amdani ac sydd, mewn gwirionedd, yn gwneud i ffwrdd â hawliau a roddir i'r cyhoedd gan safonau a hysbysiadau cydymffurfio. Er ei bod yn glir na all y Tribiwnlys, yn yr achos hwn, ymyrryd yn uniongyrchol â'r cynllun gweithredu a gymeradwywyd gan y Comisiynydd yng nghyswllt y gŵyn flaenorol, fe allai yn ein barn ni ofyn iddo'i hun a ellid disgrifio'r cynllun hwnnw, a oedd yn ganolog i reswm y Comisiynydd dros wrthod ymchwilio i gŵyn y Ceisydd, fel un "perverse, irrational or one which was not open" i'r Comisiynydd ei gymeradwyo (gan fabwysiadu iaith yr Arglwydd Ustus Flaux yn achos *Secretary of State for the Home Department v MS [2018] EWCA Civ 594*).

16. Efallai pan fydd darpariaethau llawn y cynllun gweithredu'n cael eu hystyried y bydd dadleuon y Ceisydd, fel y nodir hwynt ym mharagraff 13 uchod, yn troi allan i fod

intended to ensure compliance with standards - not to vary them. He further stresses that, since action plans are not currently published by the Commissioner, the rights of the public can, if the Commissioner is right, be removed (at least temporarily) by a process of which the public has no knowledge and which effectively takes away rights which standards and compliance notices give them.

15. Whilst it is clear that the Tribunal cannot, in this case, interfere directly with the action plan approved by the Commissioner in relation to the earlier complaint it can, we believe, ask itself whether that plan, which was central to the Commissioner's reason for refusing to investigate the Applicant's complaint, can be described as "perverse, irrational or one which was not open to" the Commissioner to approve (adopting the language of Lord Justice Flaux in *Secretary of State for the Home Department v MS [2018] EWCA Civ 594*).

16. It may be that when the full provisions of the action plan are considered, the arguments of the Applicant, set out in paragraph 13 above, will turn out to be misplaced. But in the absence of access to the action plan they appear to have at least a reasonable prospect of success. Given the fundamental issues, of wide general importance, raised by the role of the action

yn seiliedig ar gamsynied. Ond heb weld y cynllun gweithredu, mae'n ymddangos bod ganddynt o leiaf gobaith rhesymol o lwyddo. O gofio'r cwestiynau sylfaenol, sydd o bwys cyffredinol eang, a godir gan rôl y cynllun gweithredu yn y penderfyniad i beidio ag ymchwilio i gŵyn a wnaed wedyn, mae'r Tribiwnlys hefyd yn credu bod yr angen i edrych ar y rôl honno'n fanwl, yn "rheswm cryf arall" dros glywed y cais presennol.

17. Ail ddadl y Ceisydd yw bod y Comisiynydd wedi gwrthod, ar seiliau annigonol, y posibilrwydd y gallai ymchwiliad newydd arwain at osod gwahanol sancsiwn i'r hyn a osodwyd drwy'r cynllun gweithredu presennol. Mae'n eithaf posibl y bydd llwyddiant y ddadl hon yn dibynnu ar ddarpariaethau'r cynllun gweithredu ar ôl eu hystyried i gyd. Oherwydd nad yw'r Ceisydd na'r Tribiwnlys, hyd yma, wedi gallu cael gweld y ddogfen honno, nid oes dim i danseilio dadl y Ceisydd y dylai fod opsiynau eraill ar gael i'r Comisiynydd os yw ymchwiliad yn canfod methiant i gydymffurfio â'r safon berthnasol. Ar sail y dystiolaeth bresennol, canfyddiad y Panel felly yw bod gan y ddadl hon hefyd obaith rhesymol o lwyddo.

plan in relation to the decision not to investigate a subsequent complaint, the Tribunal also believes that the need to examine that role in detail is a an "other compelling reason" why the present application should be heard.

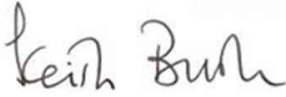
17. The Applicant's second argument is that the Commissioner rejected, on insufficient grounds, the possibility that a fresh investigation might lead to the imposition of a different sanction from the existing action plan. Whether that argument succeeds, may well depend on the provisions of the action plan when considered as a whole. Since the Applicant and the Tribunal have, so far, been unable to obtain access to that document, there is nothing to undermine the Applicant's argument that there must be other options open to the Commissioner if an investigation establishes a failure to comply with the relevant standard. On the present evidence the panel therefore finds that this argument also has a reasonable prospect of success.

## Casgliadau


18. Hyd yma, dim ond dadleuon yr Hawlydd a ystyriwyd gan y panel. Daeth i'r casgliad eu bod yn bodloni'r prawf statudol ar gyfer rhoi caniatâd i wneud cais i adolygu penderfyniad y Comisiynydd. Bydd eu llwyddiant neu'u methiant yn dibynnu ar unrhyw ddadleuon a gyflwynir gan y Comisiynydd. Bydd y Tribiwnlys, ar wahân, yn rhoi cyfarwyddiadau mewn perthynas â hysbysu'r Comisiynydd o'r cais fel y gall y Comisiynydd gyflwyno'r dadleuon hynny.
19. Rhaid i gynnwys llawn y cynllun gweithredu y cyfeiriwyd ato gan y Comisiynydd wrth wrthod ymchwilio i'r gŵyn gael ei ddatgelu, oni bai fod rhesymau eithriadol dros beidio. Fel y dywedodd yr Arglwydd Bingham yn *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 (paragraff 4): "Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence." Er mwyn osgoi unrhyw ansicrwydd ynghylch dyletswydd y Comisiynydd i ddatgelu'r ddogfen hon, wrth gyflawni swyddogaeth y Comisiynydd o ymateb i'r cais am adolygiad, bydd cyfarwyddiadau'r Tribiwnlys yn cynnwys gorchymyn penodol i wneud hynny.

## Conclusions

18. At this stage, the panel has only considered the Claimant's arguments. It has concluded that they satisfy the statutory test for giving permission to apply for a review of the Commissioner's decision. Whether they succeed or not will depend on any arguments put forward by the Commissioner. The Tribunal will, separately, give directions for giving notice of the application to the Commissioner so that the Commissioner can present those arguments.
19. The full content of the action plan referred to by the Commissioner when refusing to investigate the complaint must, unless there are exceptional reasons for not doing so, be disclosed. As Lord Bingham said in *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 (at paragraph 4): "Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence." In order to avoid any uncertainty over the duty of the Commissioner to disclose this document, in discharging the Commissioner's function of responding to the application for a review, the Tribunal's directions will include a specific order to do so.



**Keith Bush CF**  
Llywydd y Tribiwnlys  
28 Mehefin 2019



**Keith Bush QC**  
President of the Tribunal  
28 June 2019