

ATISN 9500 – Consideration For and Against Disclosure of Information

Section 36 - Effective Conduct of Public Affairs

The Freedom of Information Act 2000 (FOIA) has introduced a two-stage process for considering and using the s36 exemption. Stage 1 is to ascertain whether the basic conditions for triggering the application of the exemption apply. This is the role of the 'qualified person' and in relation to the Welsh Government, the qualified person usually means the First Minister. If the qualified person decides that the information would, or would be likely to, have the specified adverse effect(s), then the exemption is said to be engaged and Stage 2 can commence.

Stage 1 – Engagement of Exemption

The First Minister, as the 'qualified person', has agreed that s36(2)(b)(i), s36(2)(b)(ii) and Section 36(2)(c) are engaged for the following reasons:

Section 36 (2)(b)(i) – inhibiting the free and frank provision of advice for the purposes of deliberation; and Section 36 (2)(b)(ii) – inhibiting the free and frank exchange of views for the purposes of deliberation.

The information withheld under these exemptions relate to the provision of advice by Mick McGuire to the Minister for Economy Science and Transport, and the exchange of views by Mick McGuire and the Minister for Economy, Science and Transport, regarding options for supporting Ideoba Ltd. There is an expectation that there is a 'safe space' in which Welsh Government can hold these discussions; it is important that Officials are able to fully engage with Ministers and provide advice and exchange views away from the public gaze and that there should be no disincentive in doing so. If Officials or Ministers believed their advice or deliberations would be made public, it is likely they would, in the future, be more inhibited in what they say and be less willing to engage in free and frank exchange of views, leading to less rigorous and in-depth exploration of options.

Section 36(2)(c) – otherwise prejudice the effective conduct of public affairs

When a company approaches the Welsh Government seeking support, Officials follow a set process whereby it is necessary to request and record detailed information about the business at every stage. Part of that process is corresponding with Ministers at certain key stages, for example to seek approval to award funding or approval to provide other type of support or take action. Where a project is considered viable, the process continues with a formal application for funding which either gets approved or rejected. There are a range of grant schemes to consider, some of which are restricted to

specific applicants, such as local authorities, businesses or voluntary organisations. Some support is bespoke to a particular company's needs. In this case, the withheld information relates to the process of determining whether or not repayable business support for research and development purposes and a bridging loan could be offered to Ideoba, together with other ad hoc business support considerations.

Unless Officials are able to follow the process of considering options and advice surrounding the possible offer of support to any company, and subsequently corresponding with Ministers about that possible support, the effectiveness of the possible support that could be offered and the process of reaching such a decision would be undermined. This in turn, would be likely to prejudice the effective conduct of public affairs. Release of the information would also result in un-adopted positions in connection with the options under consideration being exposed to public scrutiny. . It is important to avoid public resources being unnecessarily expended in explaining the reason for interim positions, and/or why particular options were not subsequently chosen.

It was decided the above prejudicial effects would be relevant to the "would be likely to" limbs of section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c). After due consideration, the Qualified Person was in agreement that the exemption was engaged.

Stage 2

Section 36 is a public interest tested exemption. This means that in order to withhold information under its provisions, it has to be shown that the public interest in withholding the information outweighs that in releasing it.

The Welsh Government acknowledges the inherent public interest in the openness and transparency that release of the information would engender. It would also demonstrate that Government officials and Ministers are fully exploring all possible avenues so that business support decisions are based on sound evidence.

Guidance from the Information Commissioner's Office states that "information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority". The section 36(2)(c) exemption can be applied if releasing the information would *otherwise* prejudice, or would be likely to *otherwise* prejudice, the effective conduct of public affairs, and is about the process that may be inhibited, rather than what is in the information.

Section 36(2)(b)(i) - *free and frank provision of advice* and **Section 36(2)(b)(ii)** - *inhibiting the free and frank exchange of views for the purposes of deliberation*

The withheld information relates to the exchange of views and provision of advice by Mick McGuire to the Minister for Economy Science and Transport, regarding options for supporting Ideoba Ltd. We are heavily reliant on Government Officials being able to provide advice and exchange views in an open and frank way, exploring various options as part of the normal working process. This provides the Welsh Government with the space and freedom to hold such discussions and provide advice in the knowledge that if different outcomes or conclusions are finally agreed, these assessments will not have more far reaching implications than necessary.

It is in the interest of good governance to produce the best advice available for Ministers. To fully explore all options, Officials must be able to speak and debate freely. Officials would be less likely to fully engage in the provision of advice or in exchanging views if they thought their free and frank deliberations and advice would be revealed, and this outcome would be likely to lead to a less strenuous and in depth exploration of options and potentially less robust and effective recommendations. This would not be in the public interest.

Section 36(2)(c) - *otherwise prejudice the effective conduct of public affairs*

The withheld information was generated through the Welsh Government processes described above when considering options for providing a company with support. Detailed information about the business that is seeking advice and support has been requested and supplied. Information captured by the request relates to the process of determining whether or not repayable business support for research and development purposes and a bridging loan could be offered to Ideoba, together with other ad hoc business support considerations.

Officials believe that release of this information would be likely to prejudice the process described above undertaken by Officials in determining whether or not support is a viable option, because it would be likely that businesses would be less willing to provide the necessary amount of detail required when following the set process for assessing future business support requests, resulting in the failure of the necessary processes. It would also result in un-adopted positions in connection with the options under consideration being exposed to public scrutiny.

Unless Officials are able to provide options and advice surrounding the possible offer of support to any company, the effectiveness of the possible support that could be offered and the process of reaching such a decision would be undermined. This in turn, would be likely to prejudice the effective conduct of public affairs.

Also, it is important to avoid public resources being unnecessarily expended

in explaining to the public reasons for interim positions, and/or why particular options were not subsequently chosen.

Accordingly, the information requested has been withheld under Section 36(2)(b)(i), Section 36(2)(b)(ii) and Section 36(2)(c) of the Freedom of Information Act for the reasons set out above.