

15th February 2016

Dear ,

ATISN 10048

I wrote to you on 18th January 2016 regarding your request for information ATISN 10048. I undertook to provide a response by 15th February 2016.

I can confirm that the Welsh Government holds information of the type described in your request. However, after due consideration I have decided that the information is exempt from disclosure under sections 40, 43 (2) and 36 of the Freedom of Information Act.

The reasons for applying these exemptions are set out in full at Annex 1 to this letter.

If you are dissatisfied with the Welsh Government's handling of your request, you can ask for an internal review within 40 working days of the date of this response. Requests for an internal review should be addressed to the Welsh Government's Freedom of Information Officer at:

Information Rights Unit,
Welsh Government,
Cathays Park,
Cardiff,
CF10 3NQ

or Email: FreedomOfInformationOfficer@wales.gsi.gov.uk

Please remember to quote the ATISN reference number above.

You also have the right to complain to the Information Commissioner. The Information Commissioner can be contacted at:

Information Commissioner's Office,

Llandudno Junction office /Swyddfa Sarn Mynach
Cyffrdd Llandudno
Llandudno Junction/Cyffordd Llandudno
LL31 9RZ

Wycliffe House,
Water Lane,
Wilmslow,
Cheshire,
SK9 5AF.

However, please note that the Commissioner will not normally investigate a complaint until it has been through our own internal review process.

Yours sincerely

Llandudno Junction office /Swyddfa Sarn Mynach
Cyffrdd Llandudno
Llandudno Junction/Cyffordd Llandudno
LL31 9RZ

Annex 1:

I have decided to withhold the following information:

Information being withheld	Section number and exemption name
The report by consultancy Campbell Tickell into Tai Cantref Housing Association, carried out under Welsh Government powers to launch a statutory Inquiry.	S40 Personal Information S43 (2) Commercial Interests
The recommendations of this report provided to Tai Cantref	We do not hold information of this description
Any Correspondence between Tai Cantref and Welsh Government relating to this Inquiry	S36 Prejudicial to the conduct of public affairs

This Annex sets out our application of sections 40 and 43 (2) of the Freedom of Information Act.

Section 40: Personal Information

The Welsh Government believes that the Inquiry Report contains personal data about various members of staff which if disclosed may have harmful consequences to those concerned.

Section 40 of the Freedom of Information Act sets out an exemption from the right to know if the information requested is personal information protected by the Data Protection Act 1998 (DPA). Personal data is defined in Section 1(1) of the DPA as: “personal data” means data which relates to a living individual who can be identified from those data; or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

We have concluded that, in this instance, the information requested contains third party personal data relating to various members of staff. Under Section 40(2), personal data is exempt from release if disclosure would breach one of the data protection principles. We consider the principle being most relevant in this instance as being the first. This states:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

We consider that name of members of staff within the Inquiry Report clearly falls within the description of personal data as defined by the DPA and that its disclosure would breach the first data protection principle. The first data protection principle has two components:

1. Personal data shall be processed fairly and lawfully and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met

Guidance from the Information Commissioner's Office (Personal information (section 40 and regulation 13) v 1.3) states (at p11):

- *The starting point is to consider whether it would be fair to the data subject to disclose their personal data. The key considerations in assessing this are set out in the section on Fairness below.*
- *If disclosure would not be fair, then the information is exempt from disclosure.*

This approach was endorsed by the Court of Appeal in the case of *Deborah Clark v the Information Commissioner and East Hertfordshire District Council* where it was held:

“The first data protection principle entails a consideration of whether it would be fair to disclose the personal data in all the circumstances. The Commissioner determined that it would not be fair to disclose the requested information and thus the first data protection principle would be breached. There was no need in the present case therefore to consider whether any other Schedule 2 condition or conditions could be met because even if such conditions could be established, it would still not be possible to disclose the personal data without breaching the DPA” (paragraph 63).

In this instance, we believe that staff involved in the Inquiry would have no expectation that this information would be made public. Thus, we believe release of this information would be unfair and so breach the first data protection principle. For that reason, the information is being withheld under section 40(2) of the Freedom of Information Act. This is an absolute exemption and not subject to the public interest tests.

Section 43 (2): Commercial interests

This exemption is engaged in relation to correspondence between Welsh Government and Tai Cantref regarding the Inquiry. Unlike section 40, section 43(2) is a public interest tested exemption. This means that, in order to withhold information under it, it has to be shown that the public interest in releasing the information is outweighed by the public interest in withholding it.

The Welsh Government acknowledges the inherent public interest in the openness and transparency that release of this information would engender. Release of the information could allow individuals to understand the rationale behind why decisions have been made and, in some cases, assist them in challenging these decisions

However, the Inquiry Report contains some evidence of mismanagement, details of which may destabilise the Association as they respond to the Inquiry's findings. Such a destabilisation would likely prejudice the commercial interests of the Association.

On balance, I believe the public interest in withholding the information is greater than disclosing the information. To that end, this information has been withheld under s43 (2)

Section 36 - Prejudice to the effective conduct of public affairs

Section 36 is a set of public interest tested exemptions. This means that, in order to withhold information under them, I must show that the public interest in withholding is greater than the public interest in releasing it.

In principle, the public interest would be served in disclosing information which demonstrates transparency in the way in which government operates. Release of the information could allow individuals to understand the rationale behind why decisions have been made and, in some cases, assist them in challenging these decisions.

The public interest in withholding the information is set out below. Section 36, states (inter alia):

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act:

(b) would, or would be likely to, inhibit— .

(i) the free and frank provision of advice, or.

(ii) the free and frank exchange of views for the purposes of deliberation, or

(a) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Officials consider that the correspondence between the Regulation Team and Housing Associations falls within the scope of section 36 of FoIA. In reaching this view, we have taken into account whether disclosure of the information would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs. A number of First-Tier Tribunal (Tribunal) decisions have set out the implications of the two limbs of the 'prejudice' tests and have interpreted what they mean.

The Tribunal has stated that the first limb "would have" the prejudicial effect described in a provision means that it is "more probable than not" that there will be prejudice to the specific interest. The second limb of "would be likely to" have the prejudicial effect means that there is a significant and real risk of prejudice to the specific interest. Thus in considering whether this exemption applies, it is important to determine which limb of this test is being relied upon.

The willingness of senior managers at Housing Associations to confidently engage fully with the regulation process and to be confident in being able to disclose confidential and commercial-in-confidence information is fundamental to effective regulation. There should be no disincentive for embracing a co-regulatory approach, and correspondence between the two parties should be without reserve. Correspondence should reflect the openness and trust that are the key planks of the co-regulatory approach and assessment process.

Officials must be able to contribute fully to it without reserve in order to fulfil the regulation function on behalf of the Welsh Ministers. To this end, on-going regulatory assessments, correspondence and dealings between the Regulation Team and Associations need to be unrestrained, frank and candid.

These elements are particularly important when problems and difficulties occur in an Association. In this case, those involved in addressing the Inquiry findings and safeguarding Tai Cantref's future must be unrestrained in their dialogue and correspondence.

In particular, the following prejudice has been identified in relation to each of the exemptions under consideration.

Section 36(2)(b)(i) FoIA – free and frank provision of advice

Section 36(2)(b)(ii) FOIA – free and frank exchange of views

If the correspondence between the Regulation Team and Housing Associations were to be released into the public domain, officials are concerned public disclosure would be likely to remove the secure environment within which the kinds of discussions that are required to give valid, meaningful advice can take place. Future regulation would be less robust and the ability of regulators to provide advice would be inhibited. Co-regulation depends on the free and frank provision of advice and exchange of views between Housing Associations and the Regulation Team in order for it to be effective. This includes the free and frank exchange of views about failings in specific areas for which Associations have responsibility, without fear they would be subject to public criticism. Disclosure of the correspondence relating to the Inquiry would likely inhibit the free and frank exchange of views about areas of concern and how they can be addressed, with Housing Association Boards.

The prospect of disclosure would be likely to lead to officials in the Regulation Team being more reticent in the way in which they express themselves in providing advice in future correspondence between themselves and Housing Association Boards in order to limit harmful consequences. Moreover, if regulators were aware that correspondence in the aftermath of an Inquiry was likely to be published, they may adopt a less frank approach and not clearly and firmly articulate significant concerns to Associations. This would lead to potential problems being underplayed and Housing Associations failing to understand the seriousness of the situation they may find themselves in. Consequently, it would undermine the approach to regulation which is geared towards preventing problems in the first place, of problems occur, early intervention to prevent them from becoming worse and more difficult to resolve.

The prospect of disclosure would be likely to result in an Association being less candid with the Regulation Team about failings in their areas because of the fear that they and/or their colleagues could be subject to public criticism. This, in turn, is likely to undermine the effectiveness of regulation if the Regulation Team does not receive a full and frank account of issues of concern and their assessments do not contain a full and open account of the problems in the area under review.

Inhibiting the provision of advice or the exchange of views would be likely to impair the quality of decision making by the Housing Association.

Officials believe that these harmful effects are relevant to the “would be likely” limb of section 36(2)(b)(i) and 36(2)(b)(ii).

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

The social housing sector's private funders set great store by the Welsh Government's close, open and forthright relationships with Housing Associations. It is usually a requirement in the lending terms and conditions that Associations must share all significant correspondence and assessments issued by the Regulator. If the advice of regulators to Housing Associations was inhibited by fear of public disclosure and correspondence couched accordingly, the sector's funders may draw less comfort from regulation in Wales. This risks lenders re-pricing the existing and future loans to the sector as a whole. This would lead to less money being available for the building of new homes and providing services to existing and future tenants

Officials believe that these harmful effects are relevant to the "would be likely" limb of section 36(2)(c).