



Ein cyf/our ref ATISN 10227

7 April 2016

Dear ,

Request for Information – ATISN 10227

I wrote to you on 4 April regarding your requests for information. Apologies for the delay in responding on the final part of your request.

You have asked for copies of all emails received or sent, by Mick McGuire, Alex Bricknell, and Steve Codd, that makes reference to the company, Ideoba, between 1 January 2013 and 22 February 2016.

Whilst I can confirm that the Welsh Government holds information of this description, I have concluded that some of the email correspondence is exempt under Section 21 of the Freedom of Information Act (information reasonably accessible to applicant by other means). Some of this email correspondence has already been disclosed under a previous request, which can be accessed through the following link:
<http://gov.wales/about/foi/responses/2016/Feb16/atisn9500/?lang=en>.

Some of the information is also exempt under Section 40 (personal data), of the Freedom of Information Act 2000.

I have concluded that the remaining information held by Welsh Government is exempt from disclosure under Section 36 of the Freedom of Information Act 2000, specifically:

Section 36(2)(b)(i) - inhibiting the free and frank provision of advice;
Section 36(2)(b)(ii) - inhibiting the free and frank exchange of views for the purposes of deliberation;
Section 36(2)(c) – otherwise prejudice the effective conduct of public affairs

Full reasoning for applying these exemptions is given at Annex A.

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 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, 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

ATISN 10227 – 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 is the Welsh Ministers or the Counsel General to the Welsh Assembly Government. 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 Counsel General, 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 captures the provision of advice and exchanges of views that explore various options as part of the normal working process. 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 each other and provide advice and exchange views away from the public gaze and that there should be no disincentive in doing so. If officials believed their advice or their 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.

It is normal practice for officials to provide advice and exchange views in an open and frank way, and exploring various options as part of the process of deliberation. It is believed that disclosure of this information would mean that future discussions would be likely to be inhibited in that they would be less candid, would be likely to lead to less rigorous and in-depth exploration of options and this in turn would harm our deliberations resulting in less robust and effective outcomes, thus compromising the effective working of the Welsh Government with its key stakeholders.

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. 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, 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.

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.

It is also important to note that, regardless of the particular interests of the requestor, requests under the Freedom of Information Act are treated as 'applicant blind' and any release is made to the world at large. With that in mind, 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. However, there are a number of public arguments against release of this information and they are set out below.

Section 36(2)(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**

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.

The withheld information relates to the exchange of views and provision of advice by officials to officials or by officials to the Minister for Economy Science and Transport, and the exchange of views between officials and the subsequent sharing of that dialogue with the Minister for Economy, Science and Transport, regarding options for supporting Ideoba Ltd.

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. To that end, the information has been withheld under section 36(2)(b)(i) and (ii). The Welsh Government believes that the 'would be likely to' provision of the exemption is applicable.

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.

Some of the withheld information is correspondence from a third party that was

received by the Welsh Government after it had become apparent that the funding required by Ideoba would not be forthcoming. Some of the e-mail correspondence is based on an individual's own views. It is important to avoid public resources being unnecessarily expended in responding to and defending the Welsh Government's position in relation to such information, which would not otherwise be published,, together with the surrounding e-mail correspondence, which represents the personal views of one individual.

Some of the withheld information relate to the provision of advice by officials to press office, correspondence unit, and private offices regarding responding to ministerial correspondence, assembly questions, press queries and Freedom of Information requests.

The release of this information would be likely to prejudice the process of handling government business. Unless officials and press office are able to provide and consider options and advice surrounding the possible response and appropriate handling of correspondence, press queries, assembly questions and requests for information, the effectiveness of the possible support that could be offered and the process of handling government business would be undermined. This in turn, would be likely to prejudice the effective conduct of public affairs.

Other emails withheld relate to requests from Wales Audit Office. Officials believe that release of this information would be likely to prejudice the process of undertaking internal audit reviews. Unless officials and the Wales Audit Office are able to exchange emails and share information relating to a review, the effectiveness of undertaking internal reviews would be undermined.

Accordingly, the information requested has also been withheld under Section 36(2)(c) of the Freedom of Information Act for the reasons set out above. The Welsh Government believes that the 'would be likely to' provision of the exemption is applicable.

Section 40(2) – Personal Data

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.

It has been concluded that, in this instance, the information requested contains third party personal data. Under Section 40(2) of the FOI Act, 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.

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).

Some of the personal data amounts to names of individuals who do not have public facing roles. We consider that those individuals would have no reasonable expectation that their information would be disclosed to the public at large. Other personal data relates to possible personal investments in Ideoba and we believe there is a similar lack of 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