

Grwp Iechyd a Gwasanaethau Cymdeithasol
Health and Social Services Group



Llywodraeth Cymru
Welsh Government

Our Ref: ATISN 10625
Date: 26th August 2016

Dear ,

ATISN 10625 - Ysgol-y-Deri report

Thank you for your request under the Freedom of Information Act 2000, which I received on 31 July. You asked for confirmation of whether the Welsh Government holds a copy of the report into Ysgol-y-Deri referred to in the press article linked to your request, and if so, for us to provide you with a copy.

I have decided that the information requested is exempt from disclosure under section(s) 40 and 41 of the Freedom of Information Act 2000 and is therefore withheld. The reasons for applying these exemptions are set out in full at Annex A and B 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,

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,

Annex A

Section 41: Information provided in confidence

Section 41 sets out an exemption from the right to know where the information requested was provided to the public authority in confidence and disclosure of the information would give rise to an actionable breach of confidence.

S 41 Information provided in confidence:

(1) Information is exempt information if—

- (a) it was obtained by the public authority from any other person (including another public authority), and*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

Section 41 is an absolute exemption and is not, therefore, subject to the public interest test. For the purposes of s41(1)(a), I can confirm that the information has been provided to Welsh Government by a third party.

‘Confidential’ is not defined in the Act; it’s a common law concept and the test of confidentiality involves determining whether information was obtained in confidence, whether the information has the necessary ‘quality of confidence’ and whether its disclosure would constitute an actionable breach of confidence. For the purposes of s41 a breach will always be actionable if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- there was an unauthorised use of the information to the detriment of the confider (the element of detriment is not always necessary).

This three stage test is taken from the case of *Coco v Clarke*. For the information in question, the Welsh Government believes it has the necessary ‘quality of confidence’; the information is not otherwise accessible and it is not trivial.

Further, the information was communicated in circumstances importing an obligation of confidence.

The report was shared from one public authority to another public authority in strict confidence and under the condition that the report is not shared further. It was shared to the receiving public authority to assist with a review of school nursing and an agreement was made that it would not be shared further due to the nature of the report.

The report clearly contains the necessary quality of confidence, it was imparted in circumstances importing an obligation of confidence, and unauthorised use of the information would be to the detriment of the confider. As stated above, the confider has

clearly attached explicit conditions to the report the Welsh Government is satisfied that disclosure of this report would constitute a breach of the confidentiality that has been applied by the report author which would be actionable by the author of the report. Further, the Welsh Government believes a legal person could bring a court action for that breach of confidence if the report was disclosed and court action would be likely to succeed in this case.

Annex B**S.40 (2) – Personal information about others**

Section 40 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.

Throughout the report into Ysgol-y-Deri there are multiple references to individuals by name and by job title, making their identities known. Much of this report makes comments on individual’s behaviours. It would be possible to redact the person identifiable information, however given the volume of this material and how this information is interwoven into the factual statements contained in the report, the redacted version of the report would not be meaningful.

Under Section 40(2) of the Freedom of Information Act (FOI Act), personal data is exempt from release if disclosure would breach one of the data protection principles. We consider the first principle to be of most relevance in this instance.

The first data protection principle 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 the information in this case clearly falls within the description of personal data as defined by the DPA and that 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).

I have concluded that there is a reasonable expectation that the identity of the individuals mentioned within the report would not be made public. It is my view; therefore, that disclosure of the report would breach the first data protection principle, and thus is exempt from release under section 40 of the FOI Act.