



19 December 2016

Dear ,

### **Request for Information – ATISN 10834**

I wrote to you on 11 October regarding your request for information. In your request you asked for:

1. All legal advice given to the Welsh Government regarding the Variable Speed Limit system on the M4 motorway in Newport, regarding its use to enforce speed limits since the system was installed;
2. Any decisions taken within Welsh Government as a result of that advice.

I confirm that we hold information relating to your request. However, I have concluded that information relating to question 1 is exempt from disclosure under section 42(1) of the Freedom of Information Act 2000 (FOIA) – the exemption for Legal Professional Privilege. Full reasoning for applying this exemption is provided at Annex A.

Information relating to question 2 of your request is exempt from disclosure under section 21 of FOIA – Information accessible to the applicant by other means. This information can be seen at <http://gov.wales/about/cabinet/decisions/2016-new/jun-sep/transprt/?lang=en>

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](mailto: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,



**BUDDSODDWYR** | **INVESTORS**  
**MEWN POBL** | **IN PEOPLE**

E&I FOI Team  
Welsh Government  
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[EconomyandInfrastructureFOI@wales.gsi.gov.uk](mailto:EconomyandInfrastructureFOI@wales.gsi.gov.uk)  
[www.gov.wales](http://www.gov.wales)

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

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 42 – Legal Professional Privilege.**

This exemption states (inter alia):

*(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.*

Legal professional privilege (LPP) covers communications between lawyers and their clients for the purpose of obtaining legal advice, or documents created by or for lawyers for the “dominant” (main) purpose of litigation. The information in question clearly falls within the scope of this exemption as it consists of legal advice provided by a qualified solicitor to policy officials within the Welsh Government.

The section 42(1) exemption is qualified, which means that it is subject to a public interest test. This requires the Welsh Government to decide whether the public interest arguments in favour of withholding the information are sufficient to outweigh the public interest arguments in favour of disclosure. Our consideration of the public interest test is set out below.

#### **Public interest arguments in favour of disclosure**

There is a public interest in individuals being able to exercise their rights under FOIA to enhance their understanding of the reasons for decisions or actions taken by a public body and in some cases challenge decisions affecting the lives of members of the public.

There is an inherent public interest in ensuring that public authorities are transparent in the decisions they make in order to promote accountability and improve the quality of their decision making.

The disclosure of the legal advice might enable the public to ascertain whether there was any incompatibility between the advice provided and the policy decisions that were taken and whether any advice which had been provided was followed.

#### **Public interest arguments in favour of withholding**

There is a strong public interest served in public authorities being able to access advice which benefits from LPP. This was a point which was noted in *Bellamy v the Information Commission and DTI* [EA/2005/0023] in which the Tribunal said:

*"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...".*

The Welsh Government is of the firm view that it is highly important to maintain LPP and that, in the absence of at least equally strong countervailing considerations, any attempt to undermine that principle would result in substantial harm.

Legal advisers need to be able to present the full picture to their clients. In this case, the advice was provided by a qualified solicitor from the Welsh Government's Legal Services Department. This advice includes arguments in support of final conclusions and any relevant counter-arguments.

It is important that Government can obtain whatever legal advice it considers necessary in order to ensure that any decision that is ultimately taken is one that has been the subject of the most careful consideration. In a governmental context it is crucially important to the democratic process that Ministers and officials should have a free space in which to seek advice from lawyers, without fear of public scrutiny of that advice.

It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view. If recipients or providers of legal advice believe that it is likely that the legal advice would be published, especially so soon after being sought and in a complex political environment, then it is unlikely that comprehensive advice would be commissioned or provided. This would be likely to have a negative impact on the quality of decision-making since it would not be fully informed. It would also undermine the ability of legal advisers and their clients to rely confidently on the protection afforded by the principle of LPP.

Moreover, disclosure of legal advice has a significant potential to prejudice the governments' ability to defend its legal interests - both directly by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour.

In weighing up the arguments for and against disclosure, the Welsh Government considers that the public interest arguments in favour of withholding the information clearly outweigh those in favour of disclosure.