



Llywodraeth Cymru
Welsh Government

26th January 2018

Dear _____,

ATISN 11783 Review of conservatoire and the arts provision in Wales

Thank you for your request which I received on 28th November 2017 about the Murphy Review.

A copy of the information I have decided to release is enclosed.

I have decided that some of the information is exempt from disclosure under Section 35- formulation of government policy; 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; 40(1) personal information 40(1) - personal information and 43(2) - commercial interests of the Freedom of Information Act and is therefore withheld. The reasons for applying this exemption 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,
Wycliffe House,
Water Lane,
Wilmslow,
Cheshire,



Llywodraeth Cymru
Welsh Government

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



Llywodraeth Cymru
Welsh Government

Annex 1

I have decided to withhold the following information:

Information being withheld	Section number and exemption name
Welsh Government officials name and email addresses	40(1) Personal information
Emails between officials and Lord Murphy	35 Formulation of government policy
Meeting minutes and evidence	36(2)(b)(ii) – inhibiting the free and frank exchange of views for the purposes of deliberation
Meeting minutes and evidence	36(2) (c) – otherwise prejudice the effective conduct of public affairs
Financial information regarding the Royal Welsh College of Music and Drama	43(2) Commercial interests

This Annex sets out the reasons for the engagement of sections 40, 35, 36 and 43 of the Freedom of Information Act (FOIA) and our subsequent consideration of the relevant public interest tests.

Section 35 - formulation of government policy.

This exemption states (inter alia):

35 Formulation of government policy, etc.

(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to

(a) the formulation or development of government policy,



Llywodraeth Cymru
Welsh Government

Section 35 is a public interest tested exemption. That means that in order to withhold information under it, it has to be shown that the public interest in withholding the information outweighs that in releasing it.

The Welsh Government acknowledges the general public interest in openness and transparency that release of this information would engender. However, whilst it is important that the public understand that reviews are carried out independently from the Welsh Government and that a wide range of views are considered before policy decisions are made, divulging potential policy options prior to investigating whether options are viable and affordable would not be practical.

The Murphy Review was an independent review of the performing arts sector in Wales. Whilst officials supported Lord Murphy in his work, the recommendations made were the view of Lord Murphy on an independent basis. The recommendations are not necessarily going to be implemented and the public could be misled into seeing a potential recommendation as a policy decision.

Lord Murphy has recently submitted his report to the Cabinet Secretary for Education and she is currently considering the report, whilst officials are working on the viability and merits of his proposals. No firm decision has yet been reached on whether his recommendations can be implemented, and if we wish to accept them in full, in part or at all. Officials are currently in the process of considering the future direction of travel and the Cabinet Secretary will then be asked to take a view on future policy.

The Welsh Government believes that divulging the recommendations of Lord Murphy's report at this stage could cause harm to the higher education sector. Releasing the information regarding discussion on emerging themes from the report, prior to the recommendations being considered by Government would be unhelpful at this stage. The recommendations currently remain as Lord Murphy's views and are not government policy.

For these reasons we believe the public interest favours withholding the information and, to that end, emails between officials and Lord Murphy have been withheld under section 35(1) of the FOIA.

Section 36 – the effective conduct of public affairs.

The scope of the Section 36 exemption is potentially wide ranging and, in order to safeguard against possible abuse of its use by a public authority, the Freedom of Information Act (FOIA) introduces a two-stage process when its use is being considered.



Llywodraeth Cymru
Welsh Government

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 section 36 of the FOIA states that in relation to the Welsh Government, the qualified person means the Welsh Ministers or the Counsel General. If, after considering the information, the qualified person forms the reasonable opinion that the specified adverse effects will not (or will not be likely to) arise from disclosure, then the information cannot be withheld under Section 36.

If the qualified person decides that the information would, or would be likely to, have the specified adverse effect(s), then Stage 2 can commence.

In this case, on consideration, the Counsel General has agreed that the following limbs of section 36 of the FOIA are engaged.

Section 36 is also a public interest tested exemption.

Again, the Welsh Government acknowledges the general public interest in openness and transparency that release would engender. Releasing the information would allow the public to understand how the review was undertaken and what factors were taken into consideration before the recommendations were made.

Factors favouring withholding of the information

Section 36(2) (b) (ii) and 2(c) state:

(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—

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

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

Section 36(2) (b) (ii) FOIA – free and frank exchange of views for the purposes of deliberation.



Llywodraeth Cymru
Welsh Government

It was important that stakeholders who gave evidence or otherwise contributed to the review felt able to freely express their views. Lord Murphy encouraged stakeholders to speak freely about issues of concern in order to make recommendations as part of the review. Stakeholders divulged information during those meetings that they would perhaps not have written down as evidence, because they understood that their views would be kept confidential. It was important that the meetings were conducted in this way in order for Lord Murphy to understand the real issues which might impact on the potential future success of the performing arts sector in Wales and more specifically, the Royal Welsh College of Music and Drama (RWCMD).

It was important that the information contained in the documents caught within scope of this request was available to Lord Murphy so that he had a record of discussions to inform his report, but these documents contain private views expressed by individuals who were not aware that their views might be made public.

Making these documents public now would be likely to result in stakeholders being less willing to provide their own views regarding a third party organisation to the Welsh Government in the future. Such information provides senior officials or review leads with early warning of difficulties regarding public investments.

It is important that the Welsh Government has these types of discussions with stakeholders regarding universities business in order for us to contribute fully to such discussions. The discussions held by officials must be frank, candid and unrestrained to be effective.

The prospect of disclosure would be likely to lead to stakeholders being less frank and more reticent in the way in which they express themselves in meetings with Welsh Government officials in order to limit harmful consequences associated with the information being made public or getting into the hands of third parties and compromising discussions at a sensitive stage, or the commercial interest of the institution concerned.

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

The Welsh Government depends upon the continued engagement and cooperation of HEIs across Wales. Whilst publically funded, HEIs are charitable institutions in their own right, the Welsh Government provides additional public funding indirectly in the form of tuition fee grants and loans and maintenance support to Welsh students for them to attend courses. This unique relationship between Higher Education Institutions and Welsh Government can sometimes come under strain as funding becomes scarce.



Llywodraeth Cymru
Welsh Government

The ability to conduct meetings between officials and HEIs depends upon a cooperative, open and honest relationship between the organisations which would be undermined by public disclosure of the information concerning their financial interests or perhaps internal governance issues and further erode relationships between the parties.

Officials are also concerned that the public disclosure of such documents would be likely to prejudice the integrity of the decision-making process at the Welsh Government by removing the secure environment within which the kinds of discussions that are required to make valid, meaningful decisions can take place, meaning that future meetings would be less robust and the ability of officials to provide full and accurate advice to Ministers on government business would be inhibited.

On balance whilst there would be benefits to releasing the meeting minutes and evidence in terms of improved transparency and scrutiny, the significant detriments that could potentially result, not least in undermining the free and frank exchange of views in reviews of this kind resulting in future reviews undertaken under more guarded conditions. It is likely that such a release would be likely to prejudice the effective conduct of public affairs and this would not be in the public interest.

The Welsh Government believes that these harmful effects are relevant to the “would be likely” limb of section 36(2) (b) (ii) and 36(2) (c).

Section 43(2) - commercial interests

This states:

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

Again, section 43 is subject to the public interest test, and again, the Welsh Government acknowledges the general public interest in openness and transparency that release would engender. We also recognise inherent public interest in the expenditure of public money and, in addition, current and prospective students have an inherent interest in knowing whether an institute is capable of fulfilling the teaching requirements of students or not.



Llywodraeth Cymru
Welsh Government

However, the redacted information specifically relates to the RWCMD's sensitive commercial interests. We believe that disclosure would be likely to prejudice the College's ability to participate competitively in commercial activity and be effective in its negotiations, recruitment and enrolment.

We believe that disclosure of this information to the public at large, and at this current time, could impede current and future discussions, and the viability of current proposals for the RWCMD. This would be likely to be prejudicial to the commercial position and other resources of the College at present.

Any significant reduction in the ability of the College to raise its own funds could lead to demands for more public money to ensure the College meets its education provision in the future. With a shrinking public budget, such funds are less likely to be found, putting the future of the College at risk.

To that end, we do not believe that disclosure would be in the public interest. Accordingly, the content of some wording in the documents are being withheld under section 43(2) in order to protect the commercial interests of the College.

Section 40– personal information

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. 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.

The first data protection principle

This states:



Llywodraeth Cymru
Welsh Government

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 names and email addresses of those working on the review with Lord Murphy 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 the third party data subjects, Lord Murphy and officials who supported Lord Murphy during the review 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



Llywodraeth Cymru
Welsh Government

under section 40(2) of the Freedom of Information Act. This is an absolute exemption and not subject to the public interest tests.