



Llywodraeth Cymru
Welsh Government

E-mail request

Our ref: ATISN 14687

Date: 17 May 2021

Dear

ATISN 14687

Thank you for your request which I received on 18 December 2020. You asked for the following information:

In relation to the round-table sessions held in Tŷ Hywel in March 2019 mentioned in an exchange between Delyth Jewell MS and the Permanent Secretary during the Senedd's Public Accounts Committee meeting on 7 December 2020, please release all the documentation the Welsh Government holds in relation to these sessions (including any papers or reports prepared prior to and in preparation for these sessions).

The information requested accompanies this letter. I have concluded that some information (contained within a document provided by an official to the First Minister) is exempt under Section 36 (2)(b)(i); and Section 36(2)(c) of the Freedom of Information Act (2000). I have also concluded that the some information within the information released is also exempt under Section 40(2) of the Act. The reasons for applying the exemptions are set out 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: Freedom.ofinformation@gov.wales

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 1

Section 36 (2)(b)(i) would, or would be likely to, inhibit the free and frank provision of advice

Section 36 is a public interest tested exemption. This means that in order to withhold information under it, the public interest in withholding must outweigh that in releasing.

Public Interest arguments in favour of disclosing

The Welsh Government acknowledges the general public interest in openness and transparency that release of information engenders.

Public Interest arguments in favour of withholding

The timely provision of information to Ministers and the First Minister on topics and issues on a range of matters is a key role of officials. There is concern that public disclosure of the information would be likely to inhibit the free and frank provision of views to Ministers at early stages of thinking or at a future point in time where a policy has been developed and a decision is sought. It is normal practice for officials to provide advice and exchange views in an open and frank way, and exploring various options. It is believed that disclosure of information would mean that future discussions would be likely to be inhibited in that officials 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.

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

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

Advising Ministers is a fundamental role of the civil service. This can be in the context of Ministers being required to make a decision or for information purposes.

In providing briefing and information to Ministers, officials provide formal and informal advice in relation to a new decision relating to policy, operations, legislation or any other matter. In order for the formal or informal advisory process to function properly, officials must be able to conduct themselves in a frank and open way where ideas and views can be expressed within a ‘safe space’ environment.

The information withheld was provided to the First Minister at a stage of ‘early thinking and reflection’ following the roundtable discussions. If this information were to be released - particularly as direction on the matters set out have not yet been established or fully developed - it would be likely to prejudice the effective conduct of public affairs in that it would lead to confusion and ill-informed debate, public scrutiny, speculation or interpretation on the possible direction of matters identified within the paper. Release would also negatively impact the ‘safe space’ environment which a government requires in order to develop ideas or make decisions, consider live issues and reach decisions away from external interference and distraction. Further, erosion of this ‘safe space’ may lead to a loss of frankness and candour on behalf of officials if they believed their early policy considerations or opinions would be exposed to public scrutiny at an early stage which in turn could damage the quality of advice and lead to poorer decision making.

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

Balance of Public Interest test

I consider that the public interest arguments to withhold the requested information outweigh the public interest arguments to release the information. I believe that the information should be withheld on the basis that its release would be likely to prejudice the effective conduct of public affairs.

Section 40(2) – Personal Data

Section 40(2) of the Freedom of Information Act 2000 (FOIA), together with the conditions in section 40(3)(a)(i) or 40(3)(b), provides an absolute exemption if disclosure of the personal data would breach any of the data protection principles.

‘Personal data’ is defined in sections 3(2) and (3) of the Data Protection Act 1998 (‘the DPA 2018’) and means any information relating to an identified or identifiable living individual. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual. I have concluded that this relates to the names (and other associated personal information) of those involved in the round table discussions as well as those exchanging correspondence.

Under Section 40(2) of the FOIA, personal data is exempt from release if disclosure would breach one of the data protection principles set out in Article 5 of the GDPR. We consider the principle being most relevant in this instance as being the first. This states that personal data must be:

“processed lawfully, fairly and in a transparent manner in relation to the data subject”

The lawful basis that is most relevant in relation to a request for information under the FOIA is Article 6(1)(f). This states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”.

In considering the application of Article 6(1)(f) in the context of a request for information under FOIA it is necessary to consider the following three-part test:

1. The Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
2. The Necessity test: Whether disclosure of the information/confirmation or denial that it is held is necessary to meet the legitimate interest in question;
3. The Balancing test: Whether the above interests override the interests, fundamental rights and freedoms of the data subject.

Our consideration of these tests is set out below:

1. Legitimate Interest Test

The Welsh Government recognises there is a legitimate interest in being able to identify individuals involved in any discussions (to help understand the reason for their involvement). We do not believe, however, there is any legitimate reason why the personal data would need to be released in order to follow and understand those discussions.

2. Is disclosure necessary?

The Welsh Government is of the view that it is not necessary to disclose the personal information caught by your request - we do not believe it is necessary to disclose the personal data to understand the information.

3. The Balancing Test

As it has been concluded it is not necessary to disclose the personal information caught by the request, there is no requirement to balance the rights and interests of those individuals against the rights, under FOIA, of the requester.

To conclude, as release of the information would not be legitimate under Article 6(1)(f), and as no other condition of Article 6 is deemed to apply, release of the information would not be lawful within the meaning of the first data protection principle. It has therefore been withheld under section 40 of the Freedom of Information Act. Section 40 is an absolute exemption and not subject to the public interest test.