

8 June 2023

Dear

ATISN 17259

Thank you for your request to the Welsh Government for information received on 9 March 2023 which has been dealt with under the Freedom of Information Act (2000) (FOIA) and in accordance with the UK General Data Protection Regulation (GDPR).

We apologise for the delay in responding.

You had requested the following:

During December 2022 the Welsh Government undertook a review of Betsi Cadwaladr Health Board. The Terms of Reference state that this was due to the receipt of a large number of whistleblowing disclosures submitted by employees of the Board, regarding the leadership of the Board. The Terms of Reference state that the report was due to be completed in January. As of writing, the report does not appear to have been published.

- 1. When will the report be published*
- 2. Did any of the disclosures submitted describe unsatisfactory behaviour related to Independent Members (including the Chair) of the Board.*
 - 2a. If yes, how many IMs (including the Chair) were accused of unsatisfactory behaviour.*
- 3. Did any of the disclosures submitted describe unsatisfactory behaviour related to Executives (voting Executives on the Board).*
 - 3a. If yes, how many Executives (voting Executives on the Board) were accused of unsatisfactory behaviour.*

Our Response

We have concluded that the report is exempt from disclosure under section **36(2)** of the Freedom of Information Act and is therefore withheld. The Welsh Government has no plans to publish the report. The reason for applying this exemption is set out in full at **Annex 1** to this letter.

Next steps

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

The Freedom of Information Act (FOIA) provides a right for anyone to ask a public authority to make requested information available to the wider public. As the release of requested information is to the world, not just the requester, public authorities need to consider the effects of making the information freely available to everybody. Any personal interest the requester has for accessing the information cannot override those wider considerations. We have decided to withhold the following information:

Information being withheld	Section number and exemption name
<i>A report produced for the Welsh Government following an investigation into whistle blowing disclosures at Betsi Cadwaladr UHB.</i>	<ul style="list-style-type: none">• section 36(2)(b)(i) inhibit the free and frank provision of advice; and• section 36(2)(b)(ii) inhibit the free and frank exchange of views for the purposes of deliberation.- otherwise prejudice the effective conduct of public affairs.• Section 36(2) (c) – would otherwise prejudice the effective conduct of public affairs.

This Annex sets out the reasons for the engagement of section 36 of the FOIA and our subsequent consideration of the Public Interest Test.

Engagement of section 36(2) of the Freedom of Information Act 2000

Section 36 (2) of the FOIA reads:

- (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—
- (a) would, or would be likely to, prejudice—
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the Cabinet of the Welsh Assembly Government.
 - (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, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

The FOIA has introduced a two-stage process for considering and using the section 36 exemptions. 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 currently the Counsel General. 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 2 considers the statutory public interest test before deciding whether to withhold or release the information.

Stage 1 – Engagement of Exemptions

The Welsh Government believes that these exemptions are engaged in relation to the release of the report, and that the information in the report should be exempt from disclosure.

Why we believe section 36 (2)(b)(i) is engaged

The report contains recommendations and advice provided by an experienced HR professional, at the request of officials from the Welsh Government and the Chair of the Health Board. That HR professional was appointed as an Independent Investigator to form a view and advise on whether, on the balance of probabilities, the conduct complained of had taken place. If we disclose the report, it is likely that if a similar situation arises in the future, and an experienced HR professional is appointed (eg. in response to whistle blower concerns) to form a view and advise on the situation, the free and frank views and advice of that professional would be likely to be inhibited, with the loss of frankness leading to reduced clarity and quality of any advice.

Why we believe section 36 (2)(b)(ii) is engaged

During the investigation that led to the current report being submitted to the Welsh Government, the Independent Investigator assured all the people he interviewed that he would do his uttermost to protect their identity, and to respect the confidentiality inherent in the protected disclosure process, as enshrined in the Public Interest Disclosure Act 1998. We therefore consider that disclosure of the report would, or would be likely to, inhibit the free and frank exchange of views that might otherwise be offered by interviewees and/or other contributors in any subsequent independent investigation, and that the loss of candour would be likely to damage the ability of a HR professional to deliberate on whether, on the balance of probabilities, any conduct which is being investigated took place.

Why we believe section 36 (2)(c) is engaged

We believe it is an essential element of the effective management of the NHS in Wales that there is a 'safe space' for employees to raise any concerns that they identify, not only relating to the management of health services, but also any concerns they may have about matters of conduct at Board level.

If we make public the information in this report, it would be likely to significantly undermine any 'safe space' and in the future NHS employees in Wales might not have confidence in raising any concerns for fear that they could be exposed. We wish to ensure that those who raise any concerns or disclosures, feel confident and safe to do so.

The Qualified Person's decision

The Counsel General, as the 'qualified person', has **agreed** that all of the above three parts of section 36 are engaged.

Stage 2 – Public Interest Test

In order to satisfy the public interest test in relation to the exemptions, it is necessary to conclude that the public interest arguments in favour of withholding the information are sufficient to outweigh the public interest arguments in favour of release.

Public interest arguments in favour of disclosure:

We believe that the public interest arguments in favour of disclosure would be the same for all three exemptions. As such we have set out these once.

The public interest in the context of the FOIA means the public good, it is not:

- what is of interest to the public; or
- the private interests of the requester (unless those private interests reflect what is the general public good, eg holding public authorities to account).

As well as the general public interest in transparency, which is always an argument for disclosure, we recognise that there is a great deal of public and media interest in disclosing information surrounding the resignation of the Chair and all of the Independent Members on 27 February. Furthermore, three of the Independent Members that resigned have since appeared in various public fora – two at the Public Accounts and Public Administration Committee (PAPAC) and one on TV (Politics Live) selectively quoting aspects of the report. Consequently, we acknowledge that it would be in the public interest to release the report to enable the public to have a more balanced and complete view of the actual findings.

Public interest arguments in favour of withholding

The section 36 exemptions are engaged because of the wider impact of releasing a report concerning disclosures that people made to us in confidence. It would work against the public interest if people were deterred from raising issues of quality and/or safety for fear of the information they provided being linked back to them.

There is a public interest inherent in prejudice-based exemptions, such as section 36(2)(b) and (c), to avoid the harm specified in those exemptions.

In this instance, we believe that it is the ‘would be likely’ limbs of each of the exemptions that applies. This means that we need to consider whether, in each case:

- there is a plausible causal link between the disclosure of the information in question and the argued prejudice; and
- there is a real possibility that the circumstances giving rise to prejudice would occur, ie the causal link must not be purely hypothetical; and
- the opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote.

Section 36 (2)(b)(i) – Inhibit free and frank provision of advice

We consider that there is a very significant and weighty chance that a future independent investigator would hold back from providing free and frank advice in a case of alleged bullying if he or she thought that their report would be disclosed in response to a freedom of information request. In other words, they might “pull their punches”. If this were to happen, the Welsh Government (Ministers and/or officials) would not be given a clear and accurate picture of the full extent of what had been discovered during such an investigation. The opportunity for prejudice in such a case is by no means remote, and the consequences would not be in the public interest, as the Welsh Government would not be able to take appropriate action to remedy the situation.

Section 36 (2)(b)(ii) – Inhibit free and frank exchange of views

Many of the people who were interviewed by the Independent Investigator only agreed to talk openly with him after receiving firm assurances that their identity would not be revealed, and/or that any comments they made would not be attributed to them. Even though the report has been drafted with this commitment in mind, we believe that there is a real and significant risk that in any future investigation, the possibility of a report such as this being published would deter people from speaking freely and offering their views to an investigating officer. Even if this particular report has been able to preserve the anonymity of individual contributors – and we cannot be certain of this – it would not guarantee that a report relating to a future investigation would be equally effective in this regard. There is therefore a significant possibility that a future investigation in similar circumstances would not uncover all of the relevant facts. This suggests that the opportunity for this prejudice to arise is not so limited that the chance of prejudice is in fact remote.

Section 36(2)(c) – Would be likely otherwise to prejudice the effective conduct of public affairs.

This exemption is engaged because of the importance of providing a ‘safe space’ for employees to raise concerns eg. relating to the management of health services or matters of conduct at Board level.

The public interest in maintaining the exemption here is perhaps not so clear as in relation to sections 36(2)(b)(i) & (ii). Nevertheless, we believe there is a public interest in protecting that ‘safe space’ so that the people who are at the heart of our NHS in Wales can be confident enough to speak out when they have concerns. The Public Interest Disclosure Act 1998 provides a certain amount of protection to so-called whistle-blowers, but we think it is likely to make potential whistle blowers think twice before raising concerns if those concerns may be published in a report, potentially revealing their identity. This would be likely to severely restrict our ability to manage the NHS safely and effectively (for staff and patients), and this would not be in the public interest.

Moreover, in this particular case the Welsh Government has not yet finished the process of considering the report and issuing the decision to those who made the disclosures, and those who were investigated as a result of those disclosures. We do not believe it would be in keeping with the principles of natural justice to release the report while that process is still ongoing; not least because further public comment could be seen to undermine the fairness

of the process. The potential consequences of undermining the fairness of the process would also not be in the public interest.

Balance of public interest test

On balance, officials consider that the public interest in maintaining the exemptions at this time, outweighs the longer term public interest in disclosure. Even if the Welsh Government had completed the process of considering the report and issuing the decision, the balance would still have been in favour of maintaining the exemptions. The probability of the prejudices arising may not be strong (eg. 'would be likely' rather than 'would'), but the potential consequences associated with each of the prejudices are much more compelling. In any event, we consider that the public interest in maintaining the section 36(2)(c) exemption is especially overwhelming while the process of considering and acting on the report is still ongoing within the Welsh Government, and there is a very real risk that further public comment at this time would undermine the fairness of that process, contrary to the public interest.

Because of this, the information has been withheld under section 36(2) of the Freedom of Information Act 2000.