

15 June 2023

Dear

**Subject: ATISN 17413 - Information Request - De-escalation of Betsi Cadwaladr University Health Board.**

Thank you for your information request received on 19 April 2023 relating to the de-escalation of Betsi Cadwaladr University Health Board. A response to your information request is provided below:

- 1. Could you provide us with the evidence provided by HIW to the tripartite group when the decision to de-escalate was made?*

The evidence provided by Healthcare Inspectorate Wales (HIW) to the tripartite group includes reports relating to HIW assurance activity. The relevant reports are all in the public domain on the HIW website, as such these are not included within this response.

We have decided that the following is exempt from disclosure. Our reasons for applying these exemptions are set out at Annex 1 to this response.

Information being withheld	Section number and exemption name
The evidence provided by Healthcare Inspectorate Wales (HIW) to the tripartite group when the decision to de-escalate was made.	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.

HIW operates within the Welsh Government's framework for handling Freedom of Information requests. 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: [Freedomofinformation@gov.wales](mailto:Freedomofinformation@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
The evidence provided by Healthcare Inspectorate Wales (HIW) to the tripartite group when the decision to de-escalate was made.	<ul style="list-style-type: none"><li>• section 36(2)(b)(i) inhibit the free and frank provision of advice; and</li><li>• 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.</li><li>• Section 36(2) (c) - would otherwise prejudice the effective conduct of public affairs.</li></ul>

This Annex sets out the reasons for the engagement of exemptions provided by 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 Exemption**

The Welsh Government believes that these exemptions are engaged in relation to the records of every tripartite group meeting and any related correspondence, along with information in these documents should be exempt from disclosure.

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

The tripartite group meeting process relies on those participating in the meetings to be able to fully engage and provide advice freely. Advice provided to assist with decision making can come from a variety of sources, for example, junior staff, external sources, etc. For all those involved in the process, there is a need for uninhibited frank and candid dialogue in providing this advice, and it is imperative that views on the status of various elements of health boards' circumstances can be exchanged freely and frankly, to facilitate the decision-making process to move health boards to the next level of escalation or to lower it.

Releasing the evidence provided by Healthcare Inspectorate Wales would be viewed as a removal of the 'safe space', and would be likely to inhibit that free and frank provision of advice in the future and contribute to a less effective escalation/de-escalation process.

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

Throughout the Tripartite Escalation Group meeting process, it is important to secure the willingness of participants to fully engage views even if that does not amount to advice (i.e. there should be no disincentive to contributing views and sharing intelligence). Unless those involved in the process are able to engage in uninhibited frank and candid dialogue in order to share and deliberate views surrounding possible issues in a 'safe space', the effectiveness of the process would be undermined. In this case, it is imperative that views on the current status of various elements of health boards' circumstances can be exchanged freely and frankly, in order to facilitate the decision-making process to move the health board to the next level of escalation or to lower it. This also needs to take account of the whole escalation process journey of the body in question and not just most recent events. Any inhibitions regarding this free and frank exchange of views would be likely to inhibit deliberation amongst the participants and ultimately contribute to a less effective process in that participants would feel the need to suppress their opinions and options may not be shared freely.

Releasing the evidence provided by Healthcare Inspectorate Wales to the tripartite meeting, would or would be likely to inhibit that free and frank exchange of views. In addition to publicly available reports, the evidence provided includes intelligence captured from complaints and concerns raised, intelligence captured from engagement with the health board or other relevant partners, and notes summarising the intelligence that Healthcare Inspectorate Wales holds regarding the health board.

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

The tripartite meeting is part of an established process within the NHS Wales Escalation and Intervention Arrangements. The collective arrangements are predicated on effective and regular information sharing between the Welsh Government and external review bodies and is used to determine if there are serious concerns which require a change to the escalation levels of Health Boards. For these meetings to function properly, participants must be able to conduct themselves in an open way, sharing information that they have that is not in the public domain. If this information was to be released, participants would be less likely to share this type of information in the future which would prejudice both the proper functioning of the process and the realisation of its aims.

Within the tripartite meeting a combination of hard data, such as reports, reviews and action plans is reviewed alongside soft intelligence, which may be details of a conversation that has taken place with a Health Board or feedback from Healthcare Inspectorate Wales relationship managers. We believe that these exchanges would be likely to be impeded if there existed a fear or concern that the information would be placed into the public domain, thus prejudicing the effectiveness of the process.

### **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 certain degree of public and media interest in disclosing information that is held surrounding the Tripartite Escalation Group meetings, particularly following reports in the media regarding Betsi Cadwaladr University Health Board. Consequently, we acknowledge that it would be in the public interest to release this information to enable the public to have a more balanced and complete view of how the Tripartite meetings operate and the rationale for moving a health board into or out of special measures.

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

The section 36 exemptions are engaged because of the wider impact of releasing the evidence provided by Healthcare Inspectorate Wales which have been provided in confidence. It would work against the public interest if people representing Welsh Government, Healthcare Inspectorate Wales or Audit Wales are deterred from raising and sharing sensitive information with the view to determine if there are serious concerns and issues of quality and/or safety which require a change to the escalation of Health Boards 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 it is important for those involved in the Tripartite Escalation Group meetings to provide free and frank advice to assist with decisions being made which can come from a variety of internal/external sources and colleagues. If those thought that their advice would be disclosed in response to a freedom of information request, this would likely inhibit the exchange of free and frank discussion and remove the 'safe space'. Consequently, this would be likely to inhibit decision-making, contribute to a less effective process for escalation or de-escalation of health boards. This would not be in the public interest, as the Welsh Government would not be able to take appropriate action to remedy the situation.

Many themes and issues raised within older Tripartite Escalation Group meetings notes and related information, remain consistent and if participants knew that information and issues they had discussed in the past were going to be released, at some point in the future, then it is likely that it will further prevent full and open discussion.

#### *Section 36 (2)(b)(ii) - Inhibit free and frank exchange of views*

It is imperative that views on the current status of various elements of health boards' circumstances can be exchanged freely and frankly, in order to facilitate the decision-making process to move the health board to the next level of escalation or to lower it. For this to be undertaken, the willingness of those taking part in the discussions need to be fully engaged to provide frank and candid dialogue to share views in a 'safe space'.

The free and frank exchange of views applies to the whole escalation process journey of the body in question and not just most recent events. Any reservations relating to this free and frank exchange of views would be likely to inhibit deliberations and ultimately contribute to a less effective process in that participants would feel the need to suppress their opinions and options may not be shared freely.

As previously stated, many themes and issues raised within older Tripartite Escalation meetings notes and related information, remain consistent and if participants knew that information and issues, they had discussed in the past were going to be released, at some point in the future, then it is likely that it will further prevent full and open discussion.

*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 participants of the Tripartite Escalation Group meetings for them to be able to conduct themselves in an open way, sharing information that they have that is not in the public domain. If this information was to be released, participants would be less likely to share this type of information in the future, which would prejudice both the proper functioning of the Escalation/De-escalation process and the realisation of the aims.

We believe there is a public interest in protecting that 'safe space' so that participants can be confident enough to speak out and share information and views. The Welsh Government has a wider relationship with Audit Wales and Healthcare Inspectorate Wales that involves proper and regular exchanges of sensitive information. Within the tripartite meeting a combination of hard data such as reports, reviews and action plans are considered alongside soft intelligence which may be details of conversations that have taken place with a health board or feedback from Healthcare Inspectorate Wales relationship managers. These exchanges would be likely to be impeded if there existed a fear or concern that the information would be placed into the public domain, thus prejudicing the effectiveness of the process.

### **Balance of public interest test**

On balance, officials consider that the public interest in maintaining the exemptions outweighs the public interest in releasing the information. We believe the public good is much better served by ensuring that the Tripartite process works effectively, than by disclosing the records of the Tripartite meetings. We considered that disclosing the records would allow the public to decide for itself whether the Tripartite process has worked effectively in the past, but this would be likely to come at the cost of damaging the effectiveness of the Tripartite process going forward for the reasons given above. We believe the future effectiveness of the Tripartite process is more aligned with the public interest than disclosing how the process has worked in the past. Accordingly, we believe that the information related to the Tripartite Escalation Group meetings and supporting documents should be withheld on the basis that its release would be likely to inhibit the free and frank provision of advice and exchange of views, and that it would prejudice the effective conduct of public affairs. Because of this, the information has been withheld under section 36(2) of the Freedom of Information Act 2000.