

5 January 2024

Dear

**ATISN/19372, Information relating to the Senedd Cymru (Electoral Candidate Lists) Bill.**

**Information requested**

Thank you for your request which we received on Tuesday 5 December 2023.

You asked for any material or documentation the Welsh Government holds (including internal and external communication) referring or relating to the decision to postpone or cancel the introduction of the Senedd Cymru (Electoral Candidate Lists) Bill, which was due to be introduced on 4 December 2023. You asked that this should include all material, including where any other names are used for the Bill, as well as any consultations with third parties outside of Welsh Government relating to this decision.

**Our response**

We have decided that some of the information can be released in response to your request, this is provided at **Annex A**.

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 some information and have set out in **Annex B** the relevant exemptions under the FOIA we believe are applicable and why we believe the information should not be disclosed. This includes our consideration of the public interest test.

**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](mailto: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 B

### Application of exemptions/exceptions

The 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 information in line with the below exemptions under the FOIA.

Considerations and advice on policy that has not yet been decided by the Minister	Section 35 – Formulation of Government Policy
Names of officials and correspondents	Section 40 – Personal Information
Legal advice	Section 42 – Legal Professional Privilege

This Annex sets out the reasons for the engagement of these sections of the FOIA and our subsequent consideration of the Public Interest test.

#### **Section 35(1) - Formulation and development of Government policy**

The Welsh Government believes that some of the information we hold regarding your request relates to the formulation and development of Government policy.

This exemption states, inter alia:

#### ***Formulation of government policy***

Section 35(1)(a) covers information relating to the formulation or development of government policy:

*(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,*

The exemption acknowledges that government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. The information captured by this request relates to the formulation of government policy.

This exemption is a time limited one and applies for as long as the policy is in development. For these purposes, this will be until a decision is made on the policy in formulation by the Minister.

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

#### **1. Public interest arguments in favour of release**

The Welsh Government recognises the inherent public interest in openness and transparency that release of this information would engender. Further, there is interest in the public understanding the ongoing development of our policies and the advice being considered by Ministers. The matter relates to a decision to postpone introduction of a Bill,

and therefore we also recognise the public interest in making this information available for the sake of greater transparency and openness.

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

The proposed policy and legislation remains under discussion and advice on handling relies on the safe space for free and frank exchange of views amongst those involved in the formulation of policy. Should this information be released, there would be a chilling effect on further such exchange of views that would not be in the public interest. Moreover, the release of information at this stage would damage public understanding of the policy, as information released might not represent the policy or legislation as it will be once formulated. This would therefore place information in the public domain that would be inaccurate. This would then damage the policy making process.

We consider it important for ministers and officials from all devolved administrations to be able to have a safe space to undertake discussions and believe their candour in doing so would likely be affected by a fear of whether the content of such discussion would be made public.

In terms of the public interest in this area, the Welsh Government has endeavoured to ensure we are as transparent as possible through the media, publication of documents, Ministerial meetings with stakeholders and public statements in the Senedd along with ministerial press conferences.

In conclusion we believe it is within the wider public interest to withhold the information related to this request in order to provide the government with a safe space to consider and form policy as the Minister has yet to make the final policy decision. To that end, the information has been withheld under s35(1)(a).

### **Section 40(2) – Personal Data**

Section 40(2) 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 2018 (‘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.

We have concluded that, in this instance, the information requested contains third party personal data.

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:-

- **The Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- **The Necessity test:** Whether disclosure of the information/confirmation or denial that it is held is necessary to meet the legitimate interest in question;
- **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 interests**

The personal data is the names of officials and correspondents in the information captured by this request. There is a legitimate interest in understanding the context of communications, and from which and to which organisations the correspondence was addressed.

### **2. Is disclosure necessary?**

Disclosure of the personal data is not necessary for the legitimate interest, where we can provide the context of the request instead. By replacing the names with the context (e.g. WG Official 1 etc.) we are able to maintain the context for which a legitimate interest exists without disclosing personal data, which affects the fundamental rights of the data subjects under data protection legislation.

### **3. The balance between legitimate interests and the data subject’s interests or fundamental rights and freedoms**

Because the redaction meets the legitimate interest and so disclosure of the personal data is not necessary, there is no need to further consider the balance of interests, and the information is withheld.

### **Section 42(1) (Legal Professional Privilege)**

This exemption states:

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 (Advice Privilege), or documents created by or for lawyers for the “dominant” (main) purpose of litigation (Litigation Privilege). The information in question relates to whether advice was sought and provided from our legal advisors. We believe that the Advice Privilege of LPP attaches to this information.

The section 42 exemption is qualified, which means that it is subject to a public interest test.

## Public Interest Test

### Public interest arguments in favour of disclosure

The Welsh Government recognises that there is a strong public interest in the openness and accountability of government, particularly with respect to this issue, where there is a legitimate public interest in understanding why a decision was made to postpone the introduction of the Senedd Cymru (Electoral Candidate Lists) Bill.

### Public interest arguments in favour of withholding

That there is a public interest served in public authorities being able to access advice which benefited from professional legal privilege was noted in *Bellamy v the Information Commission and DTI* [EA/2005/0023] in which the tribunal, on the subject of LPP 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 legal professional privilege and that, in the absence of at least equally strong countervailing considerations, any attempt to undermine the principle of legal professional privilege would result in substantial harm.

Legal advisers need to be able to present the full picture to their clients, in this case all UK Government and devolved administrations, which includes arguments in support of final conclusions and any relevant counter-arguments. This is the purpose behind the long-established principle of legal professional privilege.

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 result in substantial harm to 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 legal professional privilege.

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.

To that end, we believe the information in question should be properly withheld under Section 42(1) of the Freedom of Information Act.

### Balance of the Public Interest

Although there is a public interest in understanding the decision made, it is not necessary that the legal advice be made known to answer that question. Although legal advice may have informed any deliberations, the context of the decision lies outside of the advice itself. Therefore, the Welsh Government believes that **information provided by lawyers in confidence** should be exempt from disclosure.