



Ref: ATISN 19648

28 June 2024

Dear ,

ATISN 19648 – Swansea Bay Maternity Services

Thank you for your request to the Welsh Government for information under the Freedom of Information Act (2000) received on 4 June 2024 and which you clarified on 5 June regarding Swansea Bay Maternity Services. You have requested the following:

- *Any emails to or from the health board relating to maternity (including review), meeting notes, records relating to Swansea Bay maternity between 1 March 24 and 4 June 2024*

Our Response

I confirm that the Welsh Government holds the information that you are requesting. I have attached documents that fall within the scope of your request. We are also releasing several documents that are dated after 4 June 2024, because they are closely related to other documents within the time period that you have indicated.

We have determined that some information is exempt from disclosure under the following sections of the Freedom of Information Act (2000):

- Section 41 - Information provided in confidence – See Annex A of this letter.
- Section 40(2) - Personal Information – See Annex B of 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 A

Section 41: Information provided in confidence

Section 41 sets out an exemption from the right to know where the information requested was provided to the public authority in confidence and disclosure of the information would give rise to an actionable breach of confidence.

S 41 Information provided in confidence:

(1) *Information is exempt information if—*

- (a) it was obtained by the public authority from any other person (including another public authority), and*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

Section 41 is an absolute exemption and is not, therefore, subject to the public interest test. For the purposes of s41(1)(a), I can confirm that the information has been provided to Welsh Government by a third party.

'Confidential' is not defined in the Act; it's a common law concept and the test of confidentiality involves determining whether information was obtained in confidence, whether the information has the necessary 'quality of confidence' and whether its disclosure would constitute an actionable breach of confidence. For the purposes of s41 a breach will always be actionable if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- there was an unauthorised use of the information to the detriment of the confider (the element of detriment is not always necessary).

This three stage test is taken from the case of *Coco v Clarke*. For the information in question, the Welsh Government believes it has the necessary 'quality of confidence'; the information is not otherwise accessible and is not trivial.

Furthermore, the information was communicated in circumstances importing an obligation of confidence. The information was shared in confidence with the Welsh Government in line with the NHS Wales Oversight and Escalation Framework and pertains to direct activities undertaken by staff in fulfilling obligations placed upon the organisation within its escalation arrangements. It is considered that disclosure of this information would constitute a breach of confidence with the potential to detrimentally impact the organisation and/or the patients that it serves. It is our view that such a breach of confidence would be actionable.

In light of the above, the information has been withheld under section 41 of the Freedom of Information Act.

Annex B

S.40 (2) – Personal information about others

Section 40 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.

The documents provided contain the names of living individuals connected with each case. Under Section 40(2) of the Freedom of Information Act (FOI Act), personal data is exempt from release if disclosure would breach one of the data protection principles. We consider the first principle to be of most relevance in this instance.

The first data protection principle states:

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 information in this case clearly falls within the description of personal data as defined by the DPA and that 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).

I have concluded that there is a reasonable expectation that the identity of the living individuals connected with each case would not be made public. It is my view, therefore, that disclosure of the redacted information would breach the first data protection principle, and thus is exempt from release under section 40 of the FOI Act.