



Llywodraeth Cymru
Welsh Government

Our reference: ATISN/20058

2 February 2024

Dear ,

ATISN//20058, Information relating to the Senedd Cymru (Electoral Candidate Lists) Bill.

Information requested

Thank you for your request which we received on Friday 5 January 2024.

You asked for all material and documentation referring or relating to the leak of the Gender Quotas Bill / Senedd Cymru (Electoral Candidate Lists) Bill, reported from 29 October 2023. You asked that this should include policy papers, ministerial briefings and internal and external communications, including where other names are used for the Bill and any consultations with third parties outside of Welsh Government.

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

Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

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 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.

Documents relating to the leak investigation	Section 31(1) – Law Enforcement
Considerations and advice on policy that has not yet been decided by the Minister	Section 35(1) – Formulation of Government Policy
Names of officials and correspondents	Section 40(2) – Personal Information

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 31(1) – Law Enforcement

Section 31(1) of the Freedom of Information Act 2000 (FoIA) states:

31 (1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

We believe disclosure of the requested information is exempt from disclosure under section 31(1)(g), the relevant purposes under subsection (2) that apply in this case are as follows:

Section 31(2):

- (a) the purpose of ascertaining whether any person has failed to comply with the law,*
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper.*

Some of the information captured by this request includes information that was gathered and /or created for the purposes of establishing whether or not any person was responsible for any action that would either be unlawful (for example, in breach of the Official Secrets Act 1989); or improper conduct (for example in breach of the Civil Service Code).

We believe the release of this information would be likely to prejudice any future leak investigations as to do so would reveal the methodology by which such investigations are carried out. Such information would be useful for any individual who considers the unauthorised disclosure of information in the future as it would provide them with information that could allow them to cover their tracks more successfully, thus avoiding detection. Disclosure of information relating to the investigation, would also be likely to deter witnesses from full and frank co-operation with future investigations.

The section 31 exemptions are qualified (public interest tested) exemptions. This means that in order to withhold information under section 31, the public interest in withholding the information must be greater than the public interest in releasing it. We have therefore given consideration to the effects of disclosure of the information to the world at large as the information is made available to anybody and everybody, not just the requestor. As such, when considering your request, we have considered the wider effects of disclosure rather than any personal interest you may have in being provided with the information.

Public Interest in favour of disclosing

The Welsh Government recognises the general public interest in openness and transparency and how releasing the requested information would help the public gain a better understanding of the decisions made by Government.

There is also public and media interest in the circumstances surrounding this leak. Disclosure of this information would allow some public understanding of how the information was leaked, and the process followed in investigating the matter.

Public interest in favour of withholding

It is in the wider public interest that the Welsh Government should be able to investigate fully any allegations of misconduct, or unlawful disclosure, without prejudicing those investigations by revealing its investigation methodology. To reveal that methodology would be likely to assist anyone who may be minded to make an unauthorised disclosure in future to avoid detection.

It is also in the wider public interest that any people who have information relevant to such investigations are confident that they can fully engage in the process without fear of retribution or trial, or vilification, by social media as a result of their evidence being made public.

To release the requested information would therefore be likely to have a “chilling effect” on the willingness of those with relevant information to co-operate with future investigations. Anyone asked to provide information would be less likely to participate if there was a likelihood that the information they provided would be placed in the public domain.

In conclusion, we believe that the balance of the public interest therefore falls in favour of withholding the requested information.

S35(1)(a) formulation of government policy

Section 35(1)(a) covers any information relating to the formulation or development of government policy. The information requested relates to the Gender Quotas Bill / Senedd Cymru (Electoral Candidate Lists) Bill. Information we hold relates to the formulation of this policy area, and release of information that remains subject to ongoing discussions and development work would be likely to prejudice these discussions and adversely affect the policy development.

As this is very much a live issue, we are of the view that the s35(1)(a) exemption is engaged by the information captured by this request.

The use of section 35(1)(a) is subject to a public interest test.

Public interest arguments in favour of release

We understand that formulation of development of government policy with regards to the Gender Quotas Bill / Senedd Cymru (Electoral Candidate Lists) Bill is of interest to the general public. It is important that public service activities carried out are appropriately transparent to provide assurance to citizens. We are also aware of additional interest in the matter following the weak to which you referred.

Public interest arguments in favour of withholding

We take the view that the section 35(1)(a) is intended to ensure that the possibility of public exposure does not deter from full, candid and proper deliberation of policy formulation and development, including the exploration of all options.

The withheld information relates to Welsh Government policy views on various provisions within the Gender Quotas Bill / Senedd Cymru (Electoral Candidate Lists) Bill. It is important to note that the Gender Quotas Bill / Senedd Cymru (Electoral Candidate Lists) Bill is still in development and subject to change. Therefore, it is possible that the information held is already out of date.

As part of the formulation of this, we are heavily reliant on Government officials being able to provide advice and exchange views in an open and frank way, exploring various options as part of the normal working process. Officials need to be able to think through and discuss all the implications of different options, be able to undertake rigorous and candid assessments in the knowledge that if different outcomes or conclusions are finally agreed, these assessments will not have more far reaching implications than appropriate. This should include the ability to receive information on a confidential basis or the candour of the engagement will certainly be weakened. Releasing the information that Welsh Government holds at this time may lead to significantly less considered and a less effective policy in this important area.

Conclusion

We believe that 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 live policy issues away from external intrusion. The Welsh Government endeavour to ensure it is as transparent as possible, in particular through the media, publication of documents, Ministerial Written Statements and public statements in the Senedd. We take the view that, on balance, this public interest has been satisfied and the information requested has been withheld under section 35(1)(a) of the Act for the reasons set out above.

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 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 name of correspondents in the correspondence captured by this request. There is a legitimate interest in understanding the context of communications, and form 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.