



27 February 2017

Dear ,

Request for Information – Complaint - ATISN 10694

I wrote to you on 13 January in response to your e-mail of complaint which we received on 13 December 2016.

I have conducted an internal review in accordance with the procedure outlined in the [Welsh Government's Practical Guide for Making Requests for Information](#) which is available by post on request, or via the internet.

I note in your original request you asked for information regarding the **contract between Student Loans Company and HCL regarding the Core Banking Platform Software and Services Agreement dated 28th February 2014:**

1. Any communication (including emails, meeting minutes and any other documents) between SLC, the Department for Business, Energy & Industrial Strategy, the Scottish Ministers, the Welsh Government and/or the Department for the Economy in Northern Ireland regarding the potential for public money to be wasted upon the termination the Agreement between 1 January 2015 and 23 August 2016.

Following my review, I can confirm that the Welsh Government did not have any dealings with the management of the contract between HCL and SLC. I can also confirm that the Welsh Government does not hold any information regarding the potential for public money to be wasted upon the termination of the agreement between the dates requested. I apologise that this was not confirmed in our original response.



2. Any and all communications (including emails and meeting minutes) and/or any other documents regarding the decision to terminate the Agreement between 1st January 2015 and 23rd August 2016.

Having investigated the complaint, I have concluded that the original response you received was correct and that the information should be exempt from disclosure under section 43(2) of the Freedom of Information Act (Commercial interests) for the reasons set out therein. Although the Agreement under review has been terminated, I understand that HCL and SLC continue to participate in critical 'without prejudice' negotiation meetings regarding the contract. The limited information the Welsh Government hold is considered to be commercially sensitive and legally privileged. I believe that whilst negotiations are ongoing then the release of this information would undermine those discussions and potentially influence the commercial outcome and in doing so, potentially damage the relationship between shareholders. I therefore do not uphold your complaint.

My review has also concluded that the information captured by this request should also be properly withheld under other exemptions not cited in the original response, namely:

Section 28 – Relations within the United Kingdom

Section 42 – Legal professional privilege.

Section 21 – Information accessible to the applicant by other means

Section 28 (1):

Section 28(1) sets out an exemption from the right to know if the disclosure of the information in question would, or would be likely to prejudice relations between two or more United Kingdom administrations. The purpose of the exemption is to ensure that the Act does not cause harm to relations between the different UK administrations.

As with Section 43, Section 28 is a qualified exemption. This means that it can only be relied upon where the public interest in maintaining the exemption outweighs the public interests in disclosing the information.

In terms of the public interest in releasing the information, the Welsh Government acknowledges the general public interest in openness and transparency that release would engender. It is also acknowledged that organisations in receipt of public money should expect a degree of public scrutiny into how that money is to be, or has been, used, along with a public interest in ensuring that those charged with spending public funding do so fairly and obtain the best value from that expenditure.

However the release of commercially sensitive information could damage the relationship between shareholders and prejudice diplomatic relations in the future.

Section 42

Section 42 provides an exemption under FOIA for information which is subject to legal professional privilege (LPP). There are two types of privilege within the concept of LPP:

- litigation privilege; and,
- advice privilege.

I can confirm the information captured by this request involves litigation privilege.

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

For these reasons, parts of the information have been withheld under Section 42 of the Freedom of Information Act.

Section 21

This states:

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

From my review, I am content that two of the documents captured by your request have been either sent to or sent from HCL. These documents are titled 'Report for SLC mediation 10 April 2015' and SLC Mediation paper 020415'. To that end, I believe they are exempt under section 21 as they should be reasonably accessible. Section 21 is an absolute exemption and not subject to the public interest test.

I trust the above provides a clearer explanation of our position on this matter.

If you remain dissatisfied with this response you also have the right to complain to the Information Commissioner at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Tel: 01625 545 745
Fax: 01625 524 510
Email: casework@ico.gsi.gov.uk

Also, if you think that there has been maladministration in dealing with your request, you have the option to make a complaint to the Public Services Ombudsman for Wales who can be contacted at:

Public Services Ombudsman for Wales
1 Ffordd yr Hen Gae
Pencoed
Bridgend
CF35 5LJ

Telephone: 0845 6010987 (local rate)
Email: ask@ombudsman-wales.org.uk

Yours sincerely,



Group Director
Skills, Higher Education and Lifelong Learning