



10 August 2018

Dear ,

Complaint in respect of Request for Information – reference ATISN 11972

Thank you for your request to review ATISN 11972, which was received on 13 July 2018.

I have reviewed the handling of your original request and am content that the Welsh Government's original decision not to release the information you asked for should be upheld. I have attached the exemptions at Annex 1 again for reference.

The decision to withhold the leak report is consistent with those made by other governments across the United Kingdom and detailed legal advice was sought as part of our considerations.

In conclusion, it is my considered view that the correct exemptions have been applied in this case.

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

Office of the First Minister
Swyddfa'r Prif Weinidog

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,

Peter Greening
Head of Cabinet Division

I have concluded the information requested is exempt under the following sections of the Freedom of Information Act 2000 ("FoIA"):

- 31(2)(a) Prejudice to law enforcement - failure to comply with the law
- 31(2)(b) Prejudice to the investigation of improper conduct
- 32 (2)(b) Court records
- 36(2)(b)(ii) Prejudice to the free and frank exchange of views for purposes of deliberation
- 36(2)(c) Prejudice to the effective conduct of public affairs
- 40(2) Personal information
- 41 Information provided in confidence.

I have outlined below the reasons for withholding the information under each of the exemptions (where they are subject to the public interest test).

Section 31 – Law enforcement

The relevant parts of the section state:

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 purpose specified in subsection (2)

31 (2) The purposes referred to in subsection 1(g) to (i) are –

(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.

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), in relation to claims that information was leaked in advance of a Cabinet reshuffle.

I believe the release of the report 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 leaking 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 the Report, in full, would also be likely to deter witnesses from full and frank co-operations 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. I 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 I 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 considerable public and media interest in the circumstances that preceded the death of Carl Sargeant, including his dismissal from the Cabinet. There have been public allegations that news of Mr Sargeant's dismissal was "leaked" to some individuals prior to the First Minister discussing the matter with Mr Sargeant.

While the outcome of the investigation has been reported, which was that:

There is no evidence of a prior unauthorised sharing of information by the Welsh Government of information relating to the recent Ministerial reshuffle.

disclosure of the full report (and/or the evidence which informed the report) would allow the public to understand more fully how that conclusion was reached.

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.

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

Section 32 – Court records etc,

Section 32 is an absolute exemption, which is therefore not subject to the public interest test. It applies to information held by a public authority only for the purposes of court proceedings and/or investigations or inquiries.

The relevant part of section 32 states:

32 (2) Information held by a public authority is exempt information if it is held only by virtue of being contained in—

(a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or

(b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

32 (4) In this section—

*...
(c) “inquiry” means any inquiry or hearing held under any provision contained in, or made under, an enactment...*

The leak investigation is an “inquiry” as defined by section 32(4), because it was held under sections 48 and 71 of the Government of Wales Act 2006.

The report into the leak investigation, and other information created for the purposes of the investigation by the person conducting it, is caught within the scope of section 32(2)(b) and is therefore absolutely exempt from disclosure.

Section 36 – the effective conduct of public affairs

The scope of the section 36 exemption is potentially wide ranging and, in order to safeguard against possible abuse of its use by a public authority, FoIA introduces a two-stage process when its use is being considered.

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 section 36 FoIA states that in relation to the Welsh Government the qualified person means the Welsh Ministers or the Counsel General. If, after considering the information, the qualified person forms the reasonable opinion that the adverse effects specified in section 36 will not (or will not be likely to) arise from disclosure then the information cannot be withheld under section 36.

If the qualified person decides that the information would, or would be likely to, have the specified adverse effects(s), then Stage 2 can commence.

In this case, following consideration, the qualified person has agreed that the following limbs of section 36 are engaged, because disclosure of the information requested:

- would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation – section 36(2)(b)(ii); or
- would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs – section 36(2)(c).

Section 36(2)(b)(ii) FoIA – free and frank exchange of views for the purposes of deliberation

If views cannot be exchanged freely and frankly during the leak investigation process, then the process of producing a factually accurate and effective report would be undermined.

A leak investigation depends on the free and frank exchange of views and deliberations between the Chief Security Officer, Welsh Government staff and/or others who are interviewed or requested to provide evidence. This would include the free and frank exchange of views without fear that those providing them would be subject to public comment or criticism. Disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberations by the Chief Security Officer.

For instance, the prospect of disclosure would be likely to result in those requested or required to provide evidence being less candid with the Chief Security Officer because of the fear that they and/or their colleagues could be subject to public criticism, or that their views, given in confidence, could be known to a wider (public) audience. This, in turn, is likely to undermine the effectiveness of the leak investigation process, if the leak report

or any associated information gathered or considered as part of the process were disclosed.

It is important that an effective process is conducted so that robust assurances can be made and any required actions taken in an effective manner.

I believe that these harmful effects are relevant to the “would be likely” limb of section 36(2)(b)(ii).

Section 36(2)(c) – would otherwise prejudice the effective conduct of public affairs

The disclosure of the way in which leak investigations are conducted would/would be likely to prejudice the conduct of investigations i.e. to disclose the methodology would be likely to prejudice the effective conduct of public affairs.

Officials are concerned that public disclosure of the requested information would be likely to prejudice the integrity of the leak investigation process by removing the secure environment in which staff or members of the public are able to express concerns openly, meaning that future investigations would be less robust. This would also, in turn, be likely to prejudice the reliability of the leak investigation process itself in future.

Publication of the leak report could impact on any future ones because individuals may be reluctant to provide evidence with the knowledge that such information may be made available in the public domain. Consequently, resource and time may be taken up in agreeing an investigation which is then deferred, delayed or obstructed in some way.

Leak investigations (and associated information that is generated through discussions) are, by their design and conduct, an internal process not intended for wider use and publication. There is concern that where such information is made known, the leak investigation process will be less efficient. There is also concern that individuals may take a more defensive position from the outset and this unreceptive frame of mind would be likely to lead to the loss of opportunities to discuss potential process improvements to be adopted. Both of these situations are prejudicial to the effective conduct of public affairs.

Officials believe that these harmful effects are relevant to the “would be likely” limb of section 36(2)(c).

Section 40 (2) – personal information

Section 40(2) FoIA sets out an exemption from the right to know if the information requested is personal information of someone other than the requester and is protected by the Data Protection Act 2018 (“DPA”) or the General Data Protection Regulation (“GDPR”).

Personal data is defined in Section 3(2) of the DPA as:

“Personal data” means any information relating to an identified or identifiable living individual

We have concluded that, in this instance, the information provided by individuals as part of the work undertaken by the Welsh Government’s Chief Security Officer amounts to the personal data of others than the person submitting the request.

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 General Data Protection Regulation (GDPR) and section 34(1) DPA. We consider the principle being most relevant in this instance as being the first.

The first GPDR principle.

This states:

.....that personal data shall be:

a) processed lawfully, fairly and in a transparent manner in relation to the data subject;

We consider that the information highlighted falls within the description of personal data as defined by the DPA and that its disclosure would breach the first data protection principle.

Guidance from the Information Commissioner’s Office (Personal information (section 40 and regulation 13) v 1.4) states:

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. (paragraph 63).

Individuals who provided information to the leak investigation would not have had any expectation at the time that information from which they could be identified would be placed in the public domain. Because of this, it is my view that the release of such information would be unfair and so breach the first data protection principle.

For that reason, the information is being withheld under section 40(2) of the Freedom of Information Act. This is an absolute exemption and not subject to the public interest tests.

Section 41 – Information provided in confidence

Section 41 provides as follows:

- 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.*

This is an absolute exemption, which is not subject to the public interest test.