

Swyddfa'r Prif Weinidog a Swyddfa'r Cabinet

Office of the First Minister and Cabinet Office



Llywodraeth Cymru
Welsh Government

30 January 2019

Dear _____,

Complaint in respect of Request for Information – reference ATISN 12784

Thank you for your request, received on 2 January 2019, to review ATISN 12784, originally received on 20 November 2018.

You stated:

I am writing to request an internal review of Welsh Government's handling of my FOI request 'Text messages sent by the First Minister to a named individual'.

This is to enable you to go back and check again with the previous First Minister about text messages exchanges between himself and a named individual.

I have considered your complaint 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 have considered the position regarding the exemption previously cited, section 40(2), and those considerations are set out again at Annex 1.

Sections 40(5A) and (5B) of the Freedom of Information Act 2000 (“FOIA”), provides that a public authority is under no duty to confirm nor to deny whether it holds information which, if it were held, would be exempt under section 40(2) FOIA. Therefore, I am content that the original position as stated is correct and

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that we neither confirm nor deny whether the Welsh Government holds information of that description. If relevant information were held, it would be exempt under Section 40(2) of the Freedom of Information Act 2000.

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,

Peter Greening
Head of Cabinet Division

Section 40 (2) – personal information

Section 40(2) of the Freedom of Information Act 2000 (“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.

If information within scope of this request were held, it would be exempt 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;

I consider that if the information requested were held, it would fall 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:

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“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).

It is my view that, if information within the scope of this request were held, its release would be unfair and so breach the first data protection principle – there would be no expectation on data subjects that private text messages, which were not exchanged in the course of government business, would be placed into the public domain. For that reason, the information would be withheld under section 40(2) FOIA. This is an absolute exemption and not subject to the public interest tests.

Section 40(5A) and (5B) of the FOIA provides that a public authority is under no duty to confirm nor deny whether it holds information which, if it were held, would be exempt under section 40(2) FOIA.