



Llywodraeth Cymru
Welsh Government

Email request

Our ref: ATISN 13672

Date: 3 March 2020

Dear ,

Request for Information – ATISN 13672

Thank you for your correspondence dated 2 January 2020.

I have included in Annex 1 to this letter, my response in relation to your requests for information.

I consider that all other points raised within your correspondence (not responded to in Annex 1) are either not requests for information under the Freedom of Information Act or relate to matters that have been previously addressed by the Welsh Government. I consider that these requests fall under the exemption in section 14 in that they are vexatious and therefore the Welsh Government is not under an obligation to comply with them.

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 e-mail: 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 1

You have previously been advised that the Freedom of Information Act provides a right to ask for recorded information held at the time a request is made and does not require an authority such as the Welsh Government to provide views or opinions where those views are not already recorded. It was explained to you that this is confirmed by the Information Commissioner's guidance 'The Guide to Freedom of Information', page 7:

"The Act does not cover information that is in someone's head. If a member of the public asks for information, you only have to provide information you already have in recorded form. You do not have to create new information or find the answer to a question from staff who may happen to know it."

Question 1:

David Richard's inquiry. I wish to know how the inquiry was conducted

Response: Whilst I can confirm information of this description is held by Welsh Government, it is considered exempt under Section 36 of the Freedom of Information Act (2000). Please see the response to question 5 for further information on the application of this exemption.

Question 2:

I would request that the First Minister also provides evidence of the text within the Ministerial Code that is to be amended in December 2019 to strengthen the rules (i.e. the text before and after the rule strengthening).

Response:

The information you have requested is exempt under Section 21 of the Freedom of Information Act (2000) – information readily accessible to the applicant by other means.

All versions of The Ministerial Code are published on the Welsh Government website at the following link <https://gov.wales/ministerial-code> Additional information was included in the latest update (nothing was removed).

Question 3:

I would ask the First Minister what new guidance is being included to avoid what is clearly, (and admitted by the First Minister), a Breach of the Ministerial Code? The First Minister states ""The provisions of the Ministerial Code were not fully observed "" which implies that in order to breach the Ministerial Code the Minister has to ""fully"" breach all the provisions of the Ministerial Code of which there are many.

Response a: The Welsh Government does not hold recorded information of this description.

Does a Minister have to breach all the provisions of the Ministerial Code in order for the First Minister to take any action?

Response b: The Welsh Government does not hold recorded information of this description.

Which breaches of the Ministerial Code require further action?

Response c: The Welsh Government does not hold recorded information of this description.

Question 4:

It would be interesting to know exactly when in November 2019 the Ministerial Code was amended and exactly when the Independent Adviser, David Richards, was asked to conduct his investigation.

Response a: The Ministerial Code was updated on 26 November 2019.

Response b: David Richards was asked to conduct his investigation on 9 October 2019.

Question 5:

Could you please therefore provide me with a copy or information on how I can access the document detailing the Welsh Government inquiry by David Richards into the Transport Minister providing funding of £80,000 for the No 5 luxury Double Decker Sapphire Arriva service in the Minister's constituency, resulting in bus services (Arriva No 2, No 5, No 5C and Trawscymru T3) along the route from Wrexham to Llangollen via Ruabon Station every 8 minutes.

Could you please also provide me with the documentation relating to your requests to David Richards for further information and the replies you received to your requests for further information from David Richards?

Whilst I can confirm information of this description is held by Welsh Government, it is considered exempt under Section 36 of the Freedom of Information Act for the reasons set out below.

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, the Freedom of Information Act (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 of the 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 specified adverse effects 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 effect(s), then Stage 2 can commence.

In this case, on consideration, the Counsel General has agreed that the following limbs of section 36 of the FOIA are engaged:

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

Section 36 is a qualified exemption, subject to the public interest test.

Ministers accept office subject to the terms of the Ministerial Code which govern their conduct. This includes a commitment to the effect that where an Independent Advisor is appointed to consider a complaint the findings of that Advisor will be published. Whilst the Code is silent as to what information might be disclosed following an informal investigation undertaken by officials to advise the First Minister on whether a complaint should be referred to an Advisor there is a public interest in the report, or the findings of the report, so far as they concern the conduct of the Minister being disclosed on an equivalent basis. More generally, and derived from the wording of the Ministerial Code, there is a public interest in transparency and openness so far as the actions and decisions of Ministers are concerned, and knowing whether their conduct has been consistent with the standards set by the Ministerial Code.

There is a public interest in ensuring that Ministers are held to the standards set by the Ministerial Code, that any investigation procedures reinforce this objective, and that information arising from any complaint is made public to the extent necessary to demonstrate whether the Code has or has not been complied with. There is a public interest in withholding information to the extent that disclosure might impair the effectiveness of an investigation (and thus achievement of the principal objective) or otherwise prejudice the effective operation of Government.

Whilst there is a public interest in favour of openness and transparency about the actions and decisions taken by Ministers and the outcome of an investigation there is still a need to maintain a secure environment for the purpose of the investigation/review process.

Section 36 (2)(b)(i) - would, or would be likely to, inhibit the free and frank provision of advice and Section 36(2)(b)(ii) FOIA – would inhibit the free and frank exchange of views for the purposes of deliberation.

If views cannot be exchanged freely and frankly during the investigation/review process, then the need to produce a factually accurate and effective report, or otherwise provide advice, would be undermined.

Prompt and effective advice to the First Minister depends on the free and frank exchange of views and deliberations with those who are required to be interviewed or requested to provide evidence or commissioned to advise. This would include the free and frank exchange of views without fear they would be subject to public criticism or wider public knowledge of the evidence or advice given. Disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberations by the independent adviser or official responsible for producing advice to the First Minister.

For instance, the prospect of disclosure would be likely to result in those requested or required to provide evidence or to give advice, being less candid because of the fear that they and/or their colleagues, could be subject to public criticism or their views, given in confidence, could be known to a wider (public) audience, or their views may not be welcomed by the Minister who is the subject of the complaint. This, in turn, is likely to undermine the effectiveness of the investigation/review process, if any resulting 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 findings can be formulated, and advice given to the First Minister, to enable the First Minister to determine what, if any, action may be appropriate.

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

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

The full disclosure of information to the public would be likely to lead to less robust assurance and may have a negative and prejudicial impact on future or ongoing complaints. Control and governance arrangements around Ministerial Code investigations/reviews could be directly compromised from disclosure of information gathered in the investigation and not forming part of the formal findings.

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

Publication of the underlying evidence and advice could impact on any future investigations/ reviews where individuals may be reluctant to provide evidence or to give candid advice with the knowledge that such information may be made available in the public domain including the wider Welsh Government.

Ministerial Code investigations/reviews (and associated information that is generated through discussions) are an internal process intended to result in published findings and/or to support decisions of the First Minister. There is concern that where the full information generated by the investigation/review is made known, the 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).