

Ein Cyf/ Our ref ATISN 14585

21 January 2021

Dear

ATISN 14585 – Lifting of measures for Betsi Cadwaladr University Health Board

Thank you for your request to the Welsh Government for information under the Freedom of Information Act (2000) received on 25 November. You asked for –

1. *A copy of the evidence report/s that was provided to make the judgement that BCUHB could be lifted out of Special Measures.*
2. *A copy of the briefing notes provided to the Minister by officials.*
3. *A copy of the notes from the meeting that took place before the announcement at the Senedd when the decision was made.*
4. *A copy of the notes of the meeting you held with the Chairman of BCUHB prior to the announcement.*
5. *A copy of the assurance report that the BCUHB provided prior to the final assessment.*
6. *A copy of the assessment notes from the meeting of Officials who made the recommendation to lift SM.*

On question 1, Welsh Government holds this information and is attached at **Document 1 and Document 2**. Additionally, further information will be published by Betsi Cadwaladr University Health in due course and therefore has been withheld under Section 22 of the Freedom of Information Act 2000. I have provided a link below to where the publication will be published.

<https://bcuhb.nhs.wales/news/updates-and-developments/special-measures/#:~:text=BCUHB%20Special%20Measures%3A%20May-Sept%2018%20Report%20v2.0%20Following,driving%20and%20embedding%20improvements%20in%20the%20following%20areas%3A>

Please note that some information that is personal and that may not already be in the public domain has been redacted under Section 40 – Personal Information of the Freedom of Information Act.

An explanation of the use of these exemptions is provided at **Annex 1**.

On question 2, this information has been withheld from you under the following section of the FOI Act:

- Section 36(2)(b)(ii) inhibiting the free and frank exchange of views for the purposes of deliberation and;
- Section 36(2)(c) otherwise prejudice of the effective conduct of public affairs.

An explanation of the use of these exemptions is provided at **Annex 2**.

However, I have provided correspondence provided to Welsh Government in connection with Special Measures progress. These are attached to the email at **Doc 3,4 and 5**.

Please note that some information that is personal and that may not already be in the public domain has been redacted under Section 40 – Personal Information of the Freedom of Information Act.

An explanation of the use of these exemptions is provided at **Annex 1**.

On question 3, Welsh Government does hold information that falls under the scope of this request in the form of tripartite meetings held between Welsh Government, Audit Wales and Health Education and Improvement Wales relating to the escalation status of Betsi Cadwaladr University Health Board. However, this information is being withheld from you under the following section of the FOI Act:

- Section 36(2)(b)(ii) inhibiting the free and frank exchange of views for the purposes of deliberation and;
- Section 36(2)(c) otherwise prejudice of the effective conduct of public affairs.

An explanation of the use of these exemptions is provided at **Annex 2**.

On Question 4, no meeting was held between Welsh Government and the Chairman of Betsi Cadwaladr University Health Board prior to the announcement.

On question 5, see our response at question 1.

On question 6, see our response at question 3.

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 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 1

Freedom of Information Act 2000: Section 40(2)

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 1998 ('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 third party 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

Your request indicates you are interested in obtaining information used to inform the decision to de-escalate Betsi Cadwaladr University Health Board's escalation status. We have concluded that, in this instance, there is little to be gained from releasing the names of individuals included within the attached documentation. We believe we have provided sufficient information to satisfy the legitimate interest and we do not believe disclosure of the identities of those consultants would allow any greater understanding.

2. Is disclosure necessary?

Following the above analysis, we do not believe that disclosure of the personal data is necessary.

3. The balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

As we do not believe disclosure of this personal data is necessary, there is no requirement on us to undertake a test to balance the legitimate interests against the right of individuals, as the fundamental rights and freedoms provided by the DPA are not being challenged.

Annex 2

This annex sets out the reasons for the engagement of exemptions to disclosure provided under section 36 of the FOIA and our subsequent consideration of the Public Interest Test:

Section 36 – Effective Conduct of Public Affairs

The FOIA has introduced a two-stage process for considering and using the s36 exemption. 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 in relation to the Welsh Government, the qualified person usually means the Counsel General for Wales. If the qualified person decides that the information would, or would be likely to, have the specified adverse effect(s), then the exemption is said to be engaged and Stage 2 can commence. Stage 2 considers the statutory public interest test before deciding whether to withhold or release the information.

Stage 1 – Engagement of Exemption

The Counsel General for Wales as the ‘qualified person’, has agreed that the below limbs of the exemption are engaged for the following reasons:

- 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 to otherwise prejudice, the effective conduct of public affairs – section 36(2)(c).

The aim of the tripartite meeting is to utilise all available information and intelligence from the three organisations to make an assessment on the appropriate level of escalation and therefore level of support that is required for an organisation. In order for the process to be effective in its objectives, its effectiveness depends upon the willingness of all parties to engage fully and support the escalation and intervention framework process, the timeliness of the process – participants should be prepared to engage at any point as required -and the full contribution of all those involved in the process. To this end, participants in the tripartite meeting need to be unrestrained, frank and candid to be effective.

The disclosure of the notes associated with the tripartite meetings would be likely to have an inhibiting and/or prejudicial effect upon all the elements above. In particular, it is likely that individuals involved in the process will be less frank and candid in their contributions at any future meeting. This, in turn, would be likely to have a negative impact on the integrity and effectiveness of the process.

The concern is that, should this information become available beyond its intended circulation, participants will be less likely to highlight intelligence which they are in possession of. The removal of this “secure environment” for the provision of advice and exchange of views would mean that future escalation discussions would become less robust.

The above comments notwithstanding, then in terms of the specific limbs of the section 36 exemption, the following instances of harm can be identified:

Stage 2 - Public Interest Test

Public Interest arguments in favour of disclosure

The Welsh Government recognises the inherent public interest in openness and transparency that release of the information would engender. Furthermore, disclosure may result in increased understanding and confidence in how the Welsh Government holds NHS organisations to account.

Public interest arguments in favour of withholding the information

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

Throughout the tripartite meeting process, it is important that the willingness of participants to fully engage (i.e. there should be no disincentive to contributing views and sharing intelligence) is secured. In this case, it is imperative that views on the current status of various elements of Betsi Cadwaladr University Health Board's circumstances could be exchanged freely and frankly, in order to facilitate the decision making process to move the health board to the next level of escalation. Unless those involved in the process are able to engage in uninhibited frank and candid dialogue in order to share and deliberate views surrounding possible governance and performance issues, the effectiveness of the process would be undermined. If the information were released then it is likely that the participants would feel inhibited in engaging in a free and frank way which would ultimately inhibit the deliberations that lie at the heart of the tripartite meeting process and which would in turn hamper the ability of the group to reach a fully informed and robust decisions, resulting in decisions that are based on partial or incomplete information. We do not believe this would be in the public interest. We believe this would engage the 'would be likely' limb of section 36(2)(b)(ii).

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

The tripartite meeting is part of an established process within the NHS Wales Escalation and Intervention Arrangements. The collective arrangements are predicated on effective and regular information sharing between Welsh Government and external review bodies and are used to determine if there are serious concerns which require a change to the escalation levels of Health Boards. In order for these meetings to function properly, participants must be able to conduct themselves in an open way, sharing information that they have that is not in the public domain. If this information was to be released, participants would be less likely to share this type of information in the future which would prejudice both the proper functioning of the process and the realisation of its aims.

Further, the Welsh Government has a wider relationship with WAO that involves proper and regular exchanges of sensitive information. Within the tripartite meeting a combination of hard data, such as reports, reviews and action plans is reviewed alongside soft intelligence, which may be details of a conversation that has taken place with a Health Board or feedback from relationship managers. I believe that these exchanges would be likely to be

impeded if there existed a fear or concern that the information would be placed into the public domain, thus prejudicing the effectiveness of the process.

It is also important that the Welsh Government's relationship with external review bodies is protected to facilitate proper and regular exchanges of sensitive information in relation to the escalation levels of health boards. These exchanges would be likely to be impeded if there existed a fear or concern that the information shared would be placed into the public domain. Such a fear would affect the participants' willingness to be open and to fully share information, a situation that would be likely to prejudice the effectiveness of the process and result in less effective decisions. This is clearly contrary to the public interest. We believe that these prejudicial effects are relevant to the "would be likely" limb of section 36(2)(c).