

13 December 2023

Dear

ATISN 19295 – Report into BCUHB Report

Thank you for your email received on 15 November 2023, which is being dealt with under the Freedom of Information Act (2000).

1. You asked *if the process of considering and acting upon Geraint Evans' reports has concluded?*
2. You then asked *what was the outcome of that process?*

Our Response

We confirmed that the process has concluded in our letter of 17 November 2023.

The outcome of the process was a decision report compiled by the Director responsible for NHS governance. The decision report was presented to the Director General of the Health & Social Services Group and NHS CEO on 25 October 2023.

I have concluded that the decision report is exempt from disclosure by section 40 and section 41 of the Freedom of Information Act (FOIA), for the following reasons.

Section 41 – Confidential information

The information in the decision report was obtained by the Welsh Government from an external investigator, the late Geraint Evans. Mr Evans also obtained the information in confidence during interviews that he conducted with employees and board members at Betsi Cadwaladr UHB. I have good reason to believe that the disclosure of the information in the decision report would constitute a breach of confidence actionable by one or more other persons.

Section 41 sets out an exemption from release of information where the information requested was provided to the public authority in confidence and disclosure of the information would give rise to an actionable breach of confidence.

S 41 Information provided in confidence:

(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.*

Section 41 is an absolute exemption and is not, therefore, subject to the public interest test. For the purposes of s41(1)(a), as explained above, the information was provided to the Welsh Government by a third party, Geraint Evans.

'Confidential' is not defined in the Act. It is a common law concept, and the test of confidentiality involves determining whether information was obtained in confidence,

whether the information has the necessary 'quality of confidence' and whether its disclosure would constitute an actionable breach of confidence.

For the purposes of s41 a breach will always be actionable if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- there was an unauthorised use of the information to the detriment of the confider (the element of detriment is not always necessary).

This three-stage test is taken from the case of *Coco v Clarke*. For the information in question, the Welsh Government believes it has the necessary 'quality of confidence'; the information is not otherwise accessible, and it is not trivial.

Further, the information was communicated in circumstances importing an obligation of confidence. For example, all the individuals who were interviewed by Geraint Evans during his investigation were given assurances of confidentiality. Moreover, the terms and conditions of the investigation, shared with the individuals in advance, were marked 'Confidential'. And the report provided to the Welsh Government by Mr Evans was also marked 'Confidential'. There is no evidence to suggest that the decision report would be made available in the public domain. As far as I am aware, it has never been the intention of the Welsh Government to publish either the investigation report or the decision report. I therefore consider that the individuals identified in the investigation report and the decision report could reasonably expect that these reports would not be published in the future and would remain confidential.

I appreciate that there is a public interest in the outcome of the investigation¹, but in my view the public interest in this particular information does not override the duty of confidence that the Welsh Government owes to the individuals identified in the decision report.

In light of the above, I am withholding the information under section 41 of the FOIA.

Section 40(2) – Personal data

The decision report is also exempt information because it constitutes personal data as defined in section 40(2) of the FOIA.

Section 40 sets out an exemption from the right to know if the information requested is personal information protected by the Data Protection Act 1998 (DPA). Personal data is defined in Section 1(1) of the DPA as follows:

“personal data” means data which relates to a living individual who can be identified from those data; or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

The requested information identifies the names of living individuals. Under Section 40(2) of the Freedom of Information Act (FOI Act), personal data is exempt from release if disclosure would breach one of the data protection principles. We consider the first principle to be of most relevance in this instance.

¹ This is relevant because the law of confidence recognises that a breach of confidence may not be actionable when there is an overriding public interest in disclosure.

The first data protection principle states:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

We consider that the information in this case clearly falls within the description of personal data as defined by the DPA and that disclosure would breach the first data protection principle. The first data protection principle has two components:

1. Personal data shall be processed fairly and lawfully and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met

Guidance from the Information Commissioner's Office (Personal information (section 40 and regulation 13) v 1.3) states (at p11):

- The starting point is to consider whether it would be fair to the data subject to disclose their personal data. The key considerations in assessing this are set out in the section on Fairness below.
- 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. There was no need in the present case therefore to consider whether any other Schedule 2 condition or conditions could be met because even if such conditions could be established, it would still not be possible to disclose the personal data without breaching the DPA” (paragraph 63).

I have concluded that there is a reasonable expectation that the identity of the living individuals would not be made public. It is my view that disclosure of the decision report would breach the first data protection principle, and thus it is exempt from release under section 40 of the FOI Act.

Next steps

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,