



Ref: ATISN 23148

30 December 2024

Dear ,

### **ATISN 23148 – Welsh Intensive Care Information System Programme**

Thank you for your request to the Welsh Government for information under the Freedom of Information Act (2000) received on 28 November 2024 relating to WICIS Programme. You have requested the following:

- ***A full copy of the report into the review of the WICIS program that was commissioned by the Welsh Government and released by the Welsh Government to Digital Healthcare Wales in or around November 2024 in its final form.***

### **Our Response**

I can confirm that Welsh Government holds a copy of the report requested.

However, I have concluded that some information with the report is exempt from disclosure under the following sections of the Freedom of Information Act 2000 (“the Act”):

- section 40(2) – Personal data
- section 41 - Information provided in confidence.

An explanation of our application of these exemptions is set out at the Annex to this letter.

### **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](mailto: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

### **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 within the Report 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 for a copy of the WICIS Report includes some personal data. I have not identified any legitimate interest that you may have in knowing the identities of those individuals named within the Report.

#### **2. Is disclosure necessary?**

We do not believe disclosure of the identities of those involved would allow any greater understanding of the draft plan.

### **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.

#### **Section 41: Information provided in confidence**

Section 41 sets out an exemption from the right to know 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), I can confirm that the information has been provided to Welsh Government by a third party.

'Confidential' is not defined in the Act; it's 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 – eg. the report is marked "Commercial in confidence restricted distribution".

Although section 41 is not subject to the public interest test, the ICO guidance on this provision makes it clear that we need to carry out a test to determine whether we would have a public interest defence for the breach of confidence. This is because case law on the common law of confidence suggests that a breach of confidence won't succeed, and

therefore won't be actionable, in circumstances where a public authority can rely on a public interest defence.

Some weight should always be afforded to the general public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny, for example where disclosure would:

- further public understanding of, and participation in the debate of issues of the day;
- enable individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions; or
- facilitate accountability and transparency in the spending of public money.

These would all be strong arguments in a public interest defence.

Furthermore, in the circumstances of this case, I understand that selected parts of the report have already been shared with the requester by DHCW. That increases the public interest in favour of releasing substantially the whole document – especially if there might be a belief (right or wrong) that the parts that have been selectively shared may not represent a fair and reasonable view of the whole document.

Within the report, there are some passages where the duty of confidence may reasonably be regarded as protecting a person's private interests. The public interest in transparency and accountability alone, is not sufficient to override the public interest in maintaining that individual's privacy, and we have therefore redacted any parts of the report that might be regarded as a breach of confidence to which one or more individuals might be entitled.

## **Conclusion**

In light of the above, some information has been withheld under Section 40 and Section 43(2) of the Freedom