



Ein cyf/Our ref ATISN 15686

9 December 2021

Dear

Request for Information – ATISN 15686

I wrote to you on 18 and 19 November regarding your request for information.

Information Requested

1. A copy of a letter dated 30 July 2021 from the Chief Executive of Development Bank Wales, Giles Thorley to a Welsh Government official which includes the wording “I cannot see that there is any new information provided which materially changes matters or is clear evidence of serious wrongdoing”.
2. A copy of the request made by the Welsh Government to Giles Thorley asking for more information, to which he responded as above on 30 July 2021.

Our Response

I confirm the Welsh Government holds information caught by your request. I have decided, however, that some of the information is exempt from disclosure under sections 40(1) and 40(2) of the Freedom of Information Act, personal data and is therefore withheld. The remaining information is withheld under Section 43, commercial and Section 41, confidential information, of the FoIA. The reasons for applying these exemptions are set out at Annex A 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.
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

ATISN 14475 - Application of exemptions

The Freedom of information Act provides a right for anyone to ask a public authority to make requested information available to the wider public. As the release of requested information is to the world, not just the requester, public authorities need to consider the effects of making the information freely available to everybody. Any personal interest the requester has for accessing the information cannot override those wider considerations.

We have decided to withhold the following information:

- All personal data.
- All commercially sensitive information caught by question 1.
- All information provided in confidence caught by question 1.

This Annex sets out the reasons for engaging Sections 40, 41 and 43 of the FoIA.

Engagement of S40(1) – Personal Data of the requestor

The Welsh Government believes the personal data of the requestor within both questions of this request should be exempt from disclosure

Section 40(1) of the Freedom of Information Act 2000 (FoIA) provides an absolute exemption if the information requested is the requestor's own personal data. Section 40(1) states:

40 Personal information

(1)Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

In such circumstances, the information falls to be considered as a data subject access request under the UK General Data Protection Regulation. I will write to you separately regarding your subject access request.

Engagement of S40(2) – Personal Data of third parties

Section 40(2) of the FoIA, 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 2018 ('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, some of the information contained within the information caught by your request contains third party personal data. Specifically, this relates to correspondence containing names of officials and their direct e-mail addresses.

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 uk 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) of the UK GDPR. 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:

1. The Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
2. The Necessity test: Whether disclosure of the information/confirmation or denial that it is held is necessary to meet the legitimate interest in question;
3. 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 Interest Test

The Welsh Government recognises there is a legitimate interest in being able to identify the parties involved in any communication in order to follow the flow of that communication and to understand the views and positions expressed by each party. We do not believe, however, there is any legitimate reason why the personal data would need to be released in order to follow and understand those communications. The views expressed in the communications are those of the respective organisations rather than those of the individuals concerned. As such it is irrelevant as to who made those comments. The Welsh Government cannot identify any other legitimate interest in you or the public receiving the personal data captured by your request.

2. Is disclosure necessary?

The Welsh Government is of the view that it is not necessary to disclose the personal information caught by your request. It is straight forward, even when withholding the personal data, to follow the discussions and to identify the views expressed by each organisation. As such we do not believe it is necessary to disclose the personal data to allow the conversations to be followed. Nor do we believe it is necessary to

disclose the personal data in order to allow members of the public to contribute to this, or future discussions on this or any other matter. There are mechanisms by which the public can contact the relevant policy areas, such as generic mailboxes, public consultations, or writing to a Minister, etc.

3. The Balancing Test

As it has been concluded that there is no necessity to disclose the personal data of another individual, the fundamental rights and freedoms of the affected third party prevail in this instance and releasing the information cannot be justified under Article 6(1)(f).

Conclusion

To conclude, as release of the information would not be legitimate under Article 6(1)(f), and as no other condition of Article 6 is deemed to apply, release of the information would not be lawful within the meaning of the first data protection principle. It has therefore been withheld under section 40 of the FoIA. Section 40 is an absolute exemption and not subject to the public interest test.

Engagement of Section 41, information provided in confidence of the FoIA 2000

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. Section 41 states:

(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.*

In the first instance, it should be explained that Development Bank Wales (DBW) is wholly owned by Welsh Ministers. DBW was set up by Welsh Government for the sole purpose of making it easier for private businesses to access finance to start their businesses, strengthen and grow. It is in direct competition with other commercial banks which are not subject to disclosing confidential and commercially sensitive information under the FoIA. Any information shared with DBW in confidence by a third party business is similarly shared with Welsh Government in the same vein.

Some information caught by question 1 discusses financial forecasting, financial analysis and investment information provided in confidence by DBW/the business in question to the Welsh Government. The information is neither trivial nor is it publicly accessible. Neither DBW nor the business in question has provided consent for Welsh Government to make the information available to any party who asks for it.

The forecasts and other financial analysis referred to in the letter regarding the privately owned business were prepared for its investors, shareholders and funders, of which the then Finance Wales, now DBW is just one shareholder. Despite being 9

years old, the information remains very much confidential to both DBW and the business in question and is not meant for the public eye.

Whilst some of the information may have been prepared by previous owners of the company, it is interlinked with analysis undertaken by DBW and an external accountancy business and other information provided in confidence by the business in question.

As outlined above, should the information be released to the requestor, it would also be released to the world at large who may choose to use the information in a different way. For example, placing such information in the public domain would enable competitors to obtain confidential financial information of the privately owned businesses and its investors. It would similarly unveil investment and operational matters relating to DBW which is not otherwise available to its commercial competitors. The information was provided to WG on the explicit understanding that access to the information would be closely restricted.

Consequentially I believe that the information is owed a legal duty of confidence and that disclosure without consent would result in an actionable breach of that confidence. Section 41 is an absolute exemption and is not, therefore, subject to the public interest test.

Engagement of S43(2), prejudice to commercial interests of the FoIA 2000

This exemption states that:

- (2) *Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*

The Welsh Government believes that the financial information caught by question 1 should be exempt from disclosure as to release it would be likely to compromise the ability of DBW to negotiate future equity investment on a commercial basis and also disclose information not otherwise publicly available regarding a private business which is still very much in operation.

Public Interest Test

In order to satisfy the public interest test in relation to the exemption(s), it is necessary to conclude that the public interest arguments in favour of withholding the information are sufficient to *outweigh* the public interest arguments in favour of release.

Public Interest For Release

I recognise the general public interest in openness and transparency and releasing the information would help the public gain a better understanding of the decisions made by Government and DBW. It is also recognised that there is a public interest in how public money is to be, or has been, used to ensure that Government gets the best value from the public purse.

Public Interest Against Release

The Welsh Government is of the view that it would not be in the public interest to release DBW's operational and analytical considerations, in relation to its investments in a private business, to the world at large. As outlined above, DBW is in direct competition with other commercial banks which are not subject to disclosing commercially sensitive information under the FoIA.

To disclose this information would mean disclosing operational data upon which DBW relies in order to undertake its business activities in a competitive market. This information is commercially sensitive to DBW and disclosure would be likely to cause the company commercial disadvantage when negotiating future equity investment on a commercial basis. Similarly, releasing the information would place in the public domain commercially sensitive information about a private business which is still very much in operation. Releasing the information may provide competitors of the business with an unfair advantage.

I am aware that as a general rule, the sensitivity of information is likely to reduce over time, so that the age of information, or timing of the request may be relevant in determining whether to apply the exemption, or where the public interest may lie. In this case, however, as explained above, the information captured is very much current information.

In conclusion, I believe that the balance of the public interest therefore falls in favour of withholding the information.