



Our ref: ATISN 15662
Date: 17 December 2021

Dear _____,

ATISN 15662

Thank you for your request which I received on 6 November 2021. Please accept my apologies for the delay in responding to you. You asked for the following information:

- The name of the First Minister's 'advisor' referred to in correspondence dated 3rd November 2021; and
- a copy of the advisor's findings and the advice they forwarded to the First Minister for consideration, which subsequently informed his response.

I can confirm your complaint was considered under the supervision of David Richards, the Director of Governance and Ethics of the Welsh Government.

With regard to part 2 of your request, I have concluded the information you have requested is exempt under the following exemptions:

- Section 36 (2)(b)(i), Section 36 (2)(b)(ii) and Section 36(2)(c).

I have set out the reasons for non-disclosure at annex 1 of this letter.

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

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 provide advice. 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).