

11 April 2024

Dear

ATISN 20282

Thank you for your request which I received on 28 February 2024. You asked for the following information:

Disclosure of advice provided to First Minister, in relation to the issue of whether the Minister for Economy breached the Ministerial Code.

I have concluded the information requested is exempt under Section 36(2)(b)(i), 36(2)(b)(ii) and (c) of the Freedom of Information Act (2000). My reasons for non-disclosure are contained at Annex 1 to 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 e-mail: 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

Telephone: 0303 123 1113

Website: www.ico.org.uk

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

Engagement of section 36(2) of the Freedom of Information Act 2000 (FOIA)

Section 36 (of the FOIA reads (inter alia):

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

The FOIA has introduced a two-stage process for considering and using the section 36 exemptions. 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 is currently the Counsel General. 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 – The Qualified Person's decision

The Counsel General, as the 'qualified person', has agreed that all of the above parts of section 36 are engaged.

Stage 2 – Public Interest Test

In order to satisfy the public interest test in relation to the exemptions, 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 arguments in favour of disclosure:

The public interest in the context of the FOIA means the public good, it is not:

- what is of interest to the public.

As well as the general public interest in transparency, which is always an argument for disclosure, we recognise that there is public and media interest in disclosing the advice provided to First Minister as described in your request.

Public interest arguments in favour of withholding

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, or would be likely to, 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 that part of the process and the o 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 interviewed or requested to provide evidence. 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 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, 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.

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 sections 36(2)(b)(i) and (ii).

Section 36(2)(c) – Would be likely otherwise to 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 would be likely to have a negative and prejudicial impact on future or ongoing investigations/reviews. Control and governance arrangements around Ministerial Code investigations/reviews would be likely to be directly prejudiced from disclosure of information gathered in the investigation and not forming part of the formal findings.

Officials believe that public disclosure would be likely to prejudice the integrity of the investigation/review process and any 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 as it would 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.

Publication of the underlying evidence would be likely to impact on any future investigations/reviews where individuals may be reluctant to provide evidence 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 is likely to be prejudiced and become far less efficient. There is also concern that individuals from the outset would be in an unreceptive frame of mind if it was known their comments could be placed into the public domain and this would therefore be likely to lead to the loss of opportunities to discuss potential process improvements and for them 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).

Balance of public interest test

On balance, officials consider that the public interest in maintaining the exemptions at this time, outweighs the longer term public interest in disclosure.