

12 April 2024

Dear

**ATISN 20353 Information upon which the Minister of Social Justice is confident the Senedd Cymru (Electoral Candidate Lists) Bill is within the legislative competence of the Senedd.**

### **Information requested**

Thank you for your request which we received on 13 March 2024.

You asked for the information provided to the Minister for Social Justice and Chief Whip as Member in Charge of the Senedd Cymru (Electoral Candidate Lists) Bill, which enabled her to reach the view that the Bill would be within the legislative competence of the Senedd.

### **Our response**

We have found that some of the information requested is already in the public domain and links to this information are provided at **Annex A**.

The Freedom of Information Act (FOIA) 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 some information and have set out in **Annex B** the relevant exemptions under the FOIA we believe are applicable and why we believe the information should not be disclosed. This includes our consideration of the public interest test.

### **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 A**

### **Information already available in the public domain**

Our considerations found that some of the information you have requested is already in the public domain. The following documents were provided to the Minister for Social Justice and Chief Whip in her role as Member in Charge of the Senedd Cymru (Electoral Candidate Lists) Bill and some of the information within these documents would have enabled her to reach the view that the Bill would be within the legislative competence of the Senedd.

#### **The Senedd Cymru (Electoral Candidate Lists) Bill, as introduced:**

<https://senedd.wales/media/b2jib2uz/pri-ld16394-e.pdf>

#### **The Explanatory Memorandum accompanying the Bill:**

<https://senedd.wales/media/xp4dqjto/pri-ld16394-em-e.pdf>

#### **Impact Assessments undertaken in relation to the Bill:**

<https://www.gov.wales/senedd-cymru-electoral-candidate-lists-bill-impact-assessments>

## Annex B

### Application of exemptions/exceptions

The FOIA 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 information in line with the below exemption under the FOIA.

Legal Advice	Section 42 – Legal professional privilege
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This annex sets out the reasons for the engagement of this section of the FOIA and our consideration of the Public Interest test.

#### Section 42(1) (Legal professional privilege)

This exemption states:

1. Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

Legal professional privilege (LPP) covers both confidential communications between lawyers and their clients made for the main purpose of seeking or giving legal advice (“advice privilege”), and confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation (“litigation privilege”). The information in question is legal advice which was provided to the Minister for Social Justice and Chief Whip. We believe that advice privilege covers this information and that a claim to LPP could be maintained in legal proceedings in respect of it.

The section 42 exemption is qualified, which means that it is subject to a public interest test.

#### Public Interest in favour of disclosing

The Welsh Government recognises that there is a public interest in the openness and accountability of government, and that releasing the requested information would help the public gain a better understanding of the basis upon which the Minister reached her view.

#### Public interest in favour of withholding

That there is a public interest served in public authorities being able to access advice which benefits from legal professional privilege was noted in the judgment of *Bellamy v the Information Commissioner and DTI* [EA/2005/0023] in which the tribunal, on the subject of LPP said:

*"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."*

The Welsh Government agrees with this view that it is important to maintain legal professional privilege and considers that, in the absence of at least equally strong countervailing considerations, any disclosure of information covered by legal professional privilege would be likely to result in substantial harm.

Legal advisers need to be able to present the full picture to their clients which includes legal arguments in support of a position and any relevant counterarguments. This is what underpins the long-established principle of legal professional privilege.

It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view. If recipients or providers of legal advice believe that it is likely that the legal advice would be published, especially in respect of an ongoing matter, then this would have an adverse effect on whether such advice is commissioned or provided and how comprehensive it is. This would be likely to result in substantial harm to the quality of decision-making since it would not be fully informed.

Moreover, disclosure of its legal advice has a significant potential to prejudice the Government's ability to defend its legal interests - both directly by unfairly exposing legal arguments to others who may seek to challenge the Government's action or position, and indirectly by diminishing the reliance it can place on the advice having been properly considered and presented without fear or favour.

### **Balance of the Public Interest**

Although there is a public interest in understanding whether the Bill would be within the legislative competence of the Senedd, it is not necessary that the legal advice be made known to answer that question. That question of legislative competence can only be determined definitively by the Supreme Court. For the reasons set out above, there is a strong public interest in maintaining legal professional privilege in respect of legal advice on this matter provided in confidence to the Minister.

In conclusion, we believe the public interest in maintaining the exemption under section 42(1) of the Freedom of Information Act outweighs the public interest in disclosing the information.