

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 July 2013

Public Authority: Welsh Assembly Government
Address: Cathays Park
Cardiff
CF10 3NQ

Decision (including any steps ordered)

1. The complainant requested information about the First Minister's Delivery Unit. The Welsh Government disclosed some information, but withheld other information under section 36 of the FOIA. During the course of the Commissioner's investigation, the Welsh Government disclosed additional information relevant to the request and also sought to rely on sections 35 and 28 of the FOIA.
2. The Commissioner's decision is that:
 - In respect of the information withheld under Section 35 the exemption is engaged for all of the withheld information but the public interest in maintaining the exemption does not outweigh that in disclosure for some of the information.
 - In relation to the information withheld under section 36(2)(b), the exemption is engaged for all the withheld information and the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.
 - The Welsh Government breached section 10 of the FOIA as the information which was disclosed during the Commissioner's investigation was not disclosed within 20 working days of receipt of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose some parts of the information withheld under section 35 as detailed in the confidential annex to this notice

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 9 May 2012, the complainant wrote to the Welsh Government and requested information in the following terms:

"Further to the announcement of the establishment of a 'First Minister's Delivery Unit' in July 2011, I request the following information:
 - a) The title and subject area of each report the First Minister has received from the Delivery Unit
 - b) Copies of each 'periodic delivery report' received to date by the First Minister
 - c) The number of civil servants which have been seconded to the Delivery Unit, and the pay grade of each employee
 - d) Confirmation of the total operational running costs of the delivery Units since its creation
 - e) The criteria, targets and outcomes used by the Delivery Unit to assess the delivery of Welsh Government policies in each of the 'priority areas', and within each Welsh Government Department".
6. The Welsh Government responded on 13 June 2012, and provided some information relevant to the request, but withheld information relating to part (b) of the request under sections 36(2)(b)(i) and 36(2)(b)(ii) of the FOIA.
7. On 19 June 2012 the complainant requested an internal review of the Welsh Government's decision to withhold information relevant to part (b) of the request. She indicated that she was dissatisfied with the application of section 36 to part (b) of her request and asked the Welsh Government to review its response to this part of her request and consider providing copies of the documents in question in a "redacted form, retaining the performance-related data". She also asked for full disclosure of those sections of the briefing documents relating to non 'live' issues, as described in Annex 2 of the response of 13 June 2012.
8. On 10 July 2012 the complainant chased a response to her internal review request.

Scope of the case

9. The complainant initially contacted the Commissioner on 19 September 2012 to complain about the delay in the Welsh Government conducting an internal review of its handling of her request. She also asked the Commissioner to consider whether the information she requested should be disclosed.
10. On 26 September 2012 a member of the Commissioner's staff telephoned the Welsh Government to see whether the internal review had been concluded. The Welsh Government advised that the internal review would be concluded within two weeks.
11. As the internal review had still not been concluded, in view of the significant delay, on 10 November 2012 the Commissioner exercised his discretion and accepted the complaint without an internal review having been carried out.
12. During the course of the Commissioner's investigation, the Welsh Government disclosed redacted copies of documents held relating to part (b) of the request. The Welsh Government also confirmed that as well as sections 36(2)(b)(i) and (ii) stated that it considered sections 35, 36(2)(c) and 28 to apply to the withheld information.
13. The scope of the Commissioner's investigation into this complaint is therefore to consider whether the remaining withheld information relevant to part (b) of the request should be disclosed, or whether the Welsh Government has appropriately applied the exemptions considered applicable. The remaining withheld information comprises sections of a number of briefing reports produced by the First Minister's Delivery Unit ('the Reports').

Reasons for decision

Background

14. On 13 July 2011, the First Minister issued a written statement¹ announcing the establishment of a First Minister's Delivery Unit ('the Delivery Unit'). The statement indicated that the role of the unit is to:

¹ <http://wales.gov.uk/docs/cabinetstatements/2011/110713fmdeliveryuniten.doc>

- “Ensure that all parts of the Welsh Government are playing their part to deliver the Welsh Government’s policy objectives against measurable and transparent targets.
 - Produce delivery reports for each department about performance on the Welsh Government’s key priorities against measurable outcomes which would show whether or not they were on track to achieve them.
 - Provide challenge, based on evidence.
 - Remove barriers and support cross-departmental working on cross-cutting issues.
 - Ensure systems are in place to find out what impact policies are having at ground level and to provide early identification of emerging problems or obstacles to progress”.
15. The Welsh Government advised the Commissioner that the Delivery Unit is tasked with enabling the First Minister to drive performance improvements when delivering key government priorities. Each member of staff within the Delivery Unit is responsible for a particular area, for example, one officer has responsibility for providing briefings on the Local Government and Communities portfolio.
16. In order to effectively advise the First Minister, each member of the Delivery Unit must be familiar with all relevant policies, programmes, sensitivities and issues relating to the portfolio area they are responsible for. To obtain this knowledge Delivery Unit members of staff are given unfettered access to all information relevant to their area of responsibility. They are also invited to attend high level meetings, including senior management team meetings and project boards.
17. Members of the Delivery Unit are tasked with providing the First Minister with briefings on subject areas (the Reports) to inform his meetings with other Ministers and senior staff. The Reports contain a summary of key priority area/policies/programmes as well as a series of questions and prompts. They also contain the personal judgements of the author.
18. The Welsh Government advised that the Reports have a very limited circulation - each report is only available to the author of the report, the head of the Delivery Unit, the First Minister and his special advisor. The
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Reports are not shared with other Ministers, senior staff or other members of the Delivery Unit.

Section 35 – formulation of government policy

19. Section 35(1)(a) of the FOIA provides that information held by government departments is exempt if it relates to the formulation or development of government policy. Section 35(1) is a class-based exemption, meaning that it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.
20. During the Commissioner's investigation the Welsh Government introduced its reliance on section 35 to various sections of the Reports which relate to a number of current Welsh Government policies.
21. The FOIA does not define what is meant by the formulation or development of government policy. Although often used interchangeably, the Commissioner considers that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.
22. Also, in the Commissioner's view, the term 'relates to' should be interpreted broadly to include any information concerned with the formulation or development of the policy in question and does not specifically need to be information on the formulation or development of that policy.
23. The Reports cover a wide range of topics and subject areas. The Welsh Government provided the Commissioner with detailed representations to support the engagement of section 35 and how the information related to the formulation and development of government policy. The Commissioner is unable to detail this within this notice as it would reveal the content of the withheld information. However, having viewed the withheld information and considered the Welsh Government's

representations the Commissioner is satisfied that the information can be considered to relate to the formulation and development of a number of Welsh Government policies. As such, the Commissioner's decision is that section 35(1)(a) is engaged.

The public interest test

24. As section 35(1)(a) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

25. The Welsh Government acknowledges that disclosure would promote transparency in the process of policy formulation and it might provide the public with a more detailed knowledge of the full range of issues considered and a better understanding of how the Welsh Government is taking forward policies. This in turn could allow the public increased participation in key policy decisions and a more informed public debate.
26. The Welsh Government also accepts that it is in the public interest for government to demonstrate that it is rigorous in its policy development and that the First Minister takes a proactive role in monitoring the Programme for Government. Disclosure would also provide the public with insight into the challenges that are faced and addressed by the Welsh Government.

Public interest arguments in favour of maintaining the exemption

27. The Welsh Government has submitted the following arguments in favour of maintaining the exemption at section 35(1)(a):
- (i) The Reports contain the personal views of members of the Delivery Unit on how particular policies are being progressed. Each Report is only viewed by the officer in the Delivery Unit who wrote it, the head of the Delivery Unit, the First Minister and his special advisor. Disclosure would result in staff working within the Delivery Unit being less able to provide full and frank advice and opinions on policy proposals. This in turn would undermine the mechanism which the First Minister uses for monitoring the development of policy.
 - (ii) Disclosure would be likely to prejudice the Delivery Unit's relationship with other areas across the Welsh Government. If civil servants are privy to the criticisms and concerns that Delivery Unit staff raised about a particular area of responsibility, they would be less co-operative in the future. This would be likely to adversely impact on the ability of Delivery Unit staff to obtain the knowledge and intelligence needed to properly advise the First Minister on the

policies being formulated as part of the Programme for Government in Wales.

- (iii) The prospect of disclosure would be likely to deter Delivery Unit staff from providing the First Minister with a frank and candid view of how policies are being taken forward. This would inhibit the Delivery Unit from exploring the full range of policy options that ought to be considered, which would in turn harm the Welsh Government's ability to deliver the best policy outcomes within each policy area.
- (iv) Disclosure would put civil servants in the position of having to defend everything that has been raised by the Delivery Unit in their briefings, even in circumstances where issues raised have already been addressed. This will have the effect of diverting resources away from the policy making process in order to respond to such queries.
- (v) Disclosure would be likely to prejudice the Welsh Government's relationship with the UK Government at a time when negotiations on key policy areas are taking place. Disclosure may have a detrimental impact on interdepartmental co-operation between governments which in turn will be likely to have an impact on the policy options available to the Welsh Government in order to mitigate some of the impacts of UK Government policy. Disclosure may also provide misinformation to the public on the impact of the reforms (both in terms of welfare and further devolution) under development.
- (vii) Discussions between Ministers are a natural step in developing Government policy. The Reports were provided to the First Minister to inform his discussions with Cabinet colleagues. The views expressed within the Reports are not necessarily shared by either the First Minister or his Cabinet Colleagues but are presented to initiate uninhibited discussion about the development and progress of policies. The Welsh Government considers that disclosure would remove the safe space required to discuss and explore all options, however radical, for fear of creating public anxiety. It is essential that the policy making process is afforded the safe space required to enable draft policies to be challenged and improved prior to Ministerial agreement and publication. Disclosure has the potential to prevent such free and frank discussions between the First Minister and his Cabinet colleagues in the future and would inhibit the ability of the Delivery Unit and Ministers to identify and resolve issues in the policy making process.

- (viii) Disclosure would be likely to undermine relationships between the Welsh Government and other sectors, for example, the housing sector (on the proposed Housing Bill) and the further education sector (on the issue of All-Age Transformation) by disclosing information prior to formal consultation taking place. Disclosure would also be likely to undermine relationships between Ministers at the Cabinet table as the Reports outline difficulties experienced in taking forward cross-cutting policy issues. Disclosure of such concerns would likely make cooperation and collaboration between departments more difficult in the future.
- (ix) The trajectory indicators / statistical information relates to the Welsh Government's Programme for Government (which sets out what it is going to do to improve the lives of people in Wales and how it is going to measure its progress against improvements). The Reports reflect the personal judgment of the author and were not prepared in a manner that was intended to allow for side-by-side comparison with the information which was subsequently released in the Programme for Government report published in May 2012. The Welsh Government considers that disclosure of the Reports could lead to the information being misinterpreted or misunderstood. Information relating to trajectory indicators / statistical information was prepared by the Strategic Planning Division independently of the relevant policy owners and without any scrutiny by a third party. The information was intended to open a dialogue about performance between the First Minister and his Ministers/senior civil servants. The Welsh Government considers that disclosure would be likely to inhibit the production of such material in the future, thereby undermining the ability of the First Minister to monitor the Programme for Government and challenge his Ministers.

Balance of the public interest test

- 28. When assessing the public interest the Commissioner has given due consideration to protecting what is inherent in this exemption, which is essentially protecting the policymaking process. The key public interest arguments for this exemption usually relate to preserving a 'safe space' to debate live policy issues away from external interference and distraction, preventing a 'chilling effect' on free and frank debate in future, and preserving the principle of collective Cabinet responsibility.

29. The Commissioner considers that disclosure of the requested information would enable the public to gain a better understanding as to how the First Minister monitors policy development across all areas of the Welsh Government. He also accepts that disclosure would increase transparency in the way policy is formulated and monitored in the Welsh Government and provide an insight into some of the challenges faced and would thereby further public discussion and debate.
30. The Welsh Government has argued that disclosure would be likely to result in civil servants having to defend everything referred to within the Reports and this would divert resources away from the policy making process to respond to such queries (paragraph 27(iv) above). The Commissioner considers that this public interest argument relates more closely to section 36(2)(c) and he has therefore not afforded this argument any weight in considering the public interest test associated with section 35.
31. Further, the Welsh Government has argued that disclosure would be likely to prejudice its relationship with the UK Government at a time when negotiations on key policy areas are taking place (paragraph 27(v) above). The Commissioner considers that this public interest argument relates more closely to section 28 of the FOIA and he has therefore not afforded this argument any weight in considering the public interest test associated with section 35.
32. In terms of the Welsh Government's view that disclosure of the withheld information could lead to the information being misinterpreted or misunderstood, the Commissioner considers that this argument would only carry weight if the information would create a misleading or inaccurate impression and there were particular circumstances that would mean it would be difficult or require a disproportionate effort to correct the impression or provide an explanation. However, the Welsh Government has not provided any specific examples as to how disclosure of the withheld information could mislead the public or that it would not be possible to easily correct any misleading impression given through disclosure so the Commissioner has not attached significant weight to this argument.
33. The remaining arguments the Welsh Government has submitted in favour of maintaining the exemption broadly relate to 'chilling effect' and 'safe space' arguments associated with section 35 of the FOIA.
34. The Commissioner considers that there is a strong public interest in protecting the safe space for Ministers and officials to be able to develop live policy away from external scrutiny. The Commissioner also considers that there is a strong public interest in Ministers and officials being able to discuss issues openly and candidly. If the requested information were disclosed whilst government policy is still under

development Ministers and officials may be less open in their further discussions.

35. The Commissioner considers that significant weight should be given to the safe space arguments in cases where the policy making process is live at the time of the request, and the requested information relates directly to that policy making. In these circumstances there is a strong public interest in protecting the need for a private space to develop live policy, allowing Ministers and officials the time and space to *"hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy"*². In such scenarios the public interest is very unlikely to favour disclosure unless for example it would expose some level of wrongdoing. The Commissioner notes that this has not been suggested by the complainant, nor is there any suggestion of this in the withheld information.
36. In this case, the Commissioner notes that the withheld information reflects free and frank discussions and observations made by staff within the Delivery Unit to inform/promote discussions between the First Minister and his Cabinet colleagues, in relation to the formulation and development of a number of Welsh Government policies.
37. The Welsh Government has argued that disclosure would inhibit officers in other departments from co-operating with members of the Delivery Unit and inhibit members of the Delivery Units from providing the First Minister with a frank and candid view of how policies are being taken forward. This would have an adverse impact on the policy making process. These arguments are known as the chilling effect, and public authorities often argue that disclosure of internal discussions will inhibit free and frank discussions and the loss of frankness and candour will damage the quality of advice, leading to poorer decision making. The Commissioner is sceptical of broad arguments about a chilling effect on future unrelated discussions, but accepts that arguments about a chilling effect on on-going related discussions are likely to carry some weight. Accordingly, in terms of any chilling effect the Commissioner considers that the timing of a request, whether the issue is still live and the content and sensitivity of the information are key factors to take into account in attaching weight to such arguments.
38. The timing of the request adds significant weight to the public interest in favour of maintaining the exemption in this case as the information which has been withheld under section 35 relates to policy issues which

² DfES v the ICO & The Evening Standard [EA/2006/0006] para 75

were still live and on-going at the time of the request. The Commissioner is therefore satisfied that the argument that a safe space was needed to protect the policy making process is a relevant one and he affords it considerable weight. He has also given weight to the Welsh Government's arguments in terms of any chilling effect resulting from disclosure in view of the policies in question being live and under consideration at the time of the request.

39. However, the Commissioner considers that some of the information which has been withheld under section 35 reveals little about policy intentions or detail. Rather, it could be argued that it provides a degree of insight into the nature of the scrutiny and performance monitoring that is taking place. In respect of this information, the Commissioner considers that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. The information which the Commissioner considers should be disclosed is referred to in paragraph 3 of this notice and further detail is provided in the confidential annex to the notice. This annex will be provided only to the Welsh Government, in order that it does not prejudice any subsequent appeal which may be submitted to the First-Tier Tribunal (Information Rights).
40. The Commissioner accepts that there is a public interest in informing public debate surrounding the issues to which the withheld information relate, however he considers that in this case there is a very strong public interest in allowing Ministers and officials the safe space to develop and formulate the policies in question and to be able to continue to effectively discuss issues surrounding policy formulation and development in a frank and open manner. The Commissioner therefore considers that, with the exception of the information detailed in the confidential annex to this notice, the public interest in disclosing the information is outweighed by the public interest in favour of maintaining the exemption in this case.
41. In relation to the information to which the Welsh Government applied section 35 of the FOIA, the Welsh Government also sought to apply section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) in the alternative. Section 36(1)(a) provides that where information held by government departments or the Welsh Government is exempt under section 35 of the FOIA, section 36 cannot apply to that information. This is the case even if section 35 is engaged in relation to any particular information but the public interest test under section 35 is in favour of disclosure. In view of this, as the Commissioner has found that section 35 is engaged in relation to all of the information which has been withheld under section 35 (albeit he has ordered disclosure of certain parts of the withheld information as the public interest favours disclosure), he has not gone on to consider the Welsh Government's application of section 36.

42. Further, the Welsh Government also applied section 28 of the FOIA to some parts of the information withheld under section 35. In relation to these parts of the withheld information, the Commissioner has found that section 35 is engaged and the public interest in maintaining the exemption at section 35 favours non-disclosure. The Commissioner has therefore not gone on to consider the application of section 28 to this information.

Section 36 – prejudice to the effective conduct of public affairs

43. Sections 36(2)(b)(i) and (ii) provide that information is exempt if its disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. Section 36(2)(c) provides that information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. These exemptions can only be cited where the reasonable opinion of a specified qualified person is that these exemptions are engaged.
44. In order to engage any limb of section 36, the 'qualified person' must give an opinion that the prejudice would or would be likely to occur, but that in itself is not sufficient; the opinion must be reasonable.
45. To establish whether section 36 has been applied correctly the Commissioner considers it necessary to:
- ascertain who is the qualified person for the public authority;
 - establish that an opinion was given;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
46. In deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that is, not irrational or absurd, and in accordance with reason. If it is an opinion that a reasonable person could hold, then it is reasonable. This is not the same as saying that it is the *only* reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be *a* reasonable opinion.
47. The Commissioner is satisfied that, under section 36(5) of the FOIA, the First Minister is the qualified person for the Welsh Government.
48. The Welsh Government provided the Commissioner with a copy of the submission put to the qualified person and confirmation that he agreed the engagement of section 36. The qualified person was also provided

with copies of the withheld information with the submission. The Commissioner notes that the qualified person signed his agreement to the submission which indicated that the level of prejudice claimed was the lower threshold of “would be likely”.

49. The Welsh Government has applied all three subsections of section 36 to parts of the Reports in question. It has also applied section 28 to some parts of the information withheld under section 36. The Commissioner considers it acceptable to claim more than one limb of section 36(2) in relation to the same information, as long as arguments can be made in support of the claim for each individual subsection. The Commissioner has looked first at sections 36(2)(b)(i) and (ii). If the Commissioner finds that neither of these limbs is engaged in relation to any of the withheld information he will go on to examine section 36(2)(c). The Commissioner will only go on to consider section 28 which has been applied to parts of the withheld information if he finds that section 36 does not apply.

Section 36(2)(b)(i) – inhibit the free and frank provision of advice

50. The Welsh Government advised the Commissioner that the Reports in question were prepared by members of the Delivery Unit to inform the First Minister’s meetings with Cabinet colleagues. The reports are based on the Delivery Unit’s assessment of the progress and performance of departments towards delivering key priorities across the stated outcomes in the Programme for Government to ensure policies remain consistent with Ministerial priorities.
51. The submission to the qualified person explained that the Reports were of a generally speculative character. The information was never intended for the public arena, albeit it was necessary to relay it in order to fully apprise the First Minister of all relevant issues in advance of his meetings with the various Ministers. The Welsh Government considers the information to be of a potentially sensitive character, highly susceptible to misrepresentation or misunderstanding.
52. The submission to the qualified person set out the argument that disclosure would be likely to inhibit the future free and frank provision of advice by members of the Delivery Unit to the First Minister. In turn this would be likely to inhibit the free-flow of information and the comprehensiveness of the advice provided to the First Minister. As such, disclosure would be likely to be detrimental to the ultimate quality of decision-making and the completeness of the First Minister’s knowledge of ‘live’ issues.
53. In further representations to the Commissioner about its application of section 36(2)(b)(i), the Welsh Government explained that disclosure would be likely to lead to officials:

“being less frank when documenting assessments which might be provisional in nature and not had the benefit of wider input. The expectation of such assessments not being disclosed allows the Delivery Unit to undertake assessments or provide briefing in such circumstances to be bolder in expressing their views in the knowledge that, if further more detailed considerations result in different conclusions being drawn, the impact of initial views will not have more far reaching implications than necessary”.

The Commissioner has been unable to find any evidence that these specific issues were considered by the qualified person when he decided that section 36(2)(b)(i) was engaged. However, he considers that the additional arguments above expand on the information provided in the submission to the qualified person about the engagement of section 36(2)(b)(i). In view of this, the Commissioner has taken the additional arguments into account in relation to the application of section 36(2)(b)(i).

Section 36(2)(b)(ii) – inhibit the free and frank exchange of views for the purposes of deliberation

54. The submission to the qualified person explained that a high proportion of the advice provided by the Delivery Unit to the First Minister was for the purpose of aiding deliberation on particular issues. The submission explained that disclosure would be likely to inhibit staff from providing advice in such a free and frank manner in the future.
55. The Welsh Government advised the Commissioner that it considers that the context behind the preparation of the Reports is necessary in considering its application of section 36(2)(b)(ii) to the withheld information. The Reports were produced as part of a briefing process designed to enable the First Minister to hold his Ministers and senior officials to account for progress. The withheld information was of a generally speculative nature, and not intended for the public arena, but needed to be relayed in order to fully apprise the First Minister of all relevant issues in advance of his meetings with Ministers.
56. In representations to the Commissioner, the Welsh Government explained that it considers it essential that there is space, away from the public gaze, in which officials can freely and frankly exchange views when providing briefings that are sensitive in nature, in that by implication, it could reflect on the performance on individual officials. It also added that release of the Reports would be:

“likely to inhibit the drafting process when officials are providing advice to Ministers. It is central to the drafting and briefing process in such circumstances that officials are able to freely and frankly share information with Ministers for the purposes of discussion and

deliberation. It is our view that release of the information would be likely to inhibit staff from providing advice in such a free and frank manner in the future. This in turn, would be likely to inhibit the free-flow of information and therefore the comprehensiveness of advice provided. As such it is also likely to be detrimental to the ultimate quality of decision making and the completeness of Ministers' knowledge about 'live' issues".

Again, the Commissioner has been unable to find any evidence that these specific issues were considered by the qualified person when he decided that section 36(2)(b)(ii) was engaged. However, there is reference within the submission to the qualified person to the inhibition which would result in relation to the provision of free and frank advice in for the purpose of aiding deliberation on issues. However, he considers that the additional arguments above expand on the information provided in the submission to the qualified person about the engagement of section 36(2)(b)(ii). In view of this, the Commissioner has taken the additional arguments into account in relation to the application of section 36(2)(b)(ii).

Is the qualified person's opinion reasonable?

57. In reaching a view on whether the exemptions under section 36(2)(b) are engaged in this case the Commissioner has taken into account the fact that the documents in question were intended for a very limited audience within the Welsh Government and were not intended for wider dissemination. The Commissioner has taken into account the fact that the main purpose of the Delivery Unit is to enable the First Minister to drive performance improvements when delivering key government priorities. The Reports were produced to highlight issues associated with key priority areas to inform the First Minister's discussion with Cabinet colleagues. The documents contain content that could be fairly characterised as free and frank and that relate to the provision of advice and / or the exchange of views. The Commissioner also considers that the processes by which Delivery Unit both engages with other departments in order to obtain the relevant information they require, and the method by which the briefings are then prepared for the First Minister would be likely to be inhibited.
58. Taking into account the nature of the withheld information and the representations provided, the Commissioner is satisfied that it was a reasonable opinion that disclosing the withheld information would have been likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. The Commissioner therefore finds that the exemptions at section 36(2)(b)(i) and (ii) were correctly engaged in respect of the withheld information.

The public interest test

59. The next step is to consider the balance of the public interest. The role of the Commissioner here is to consider whether the concerns identified by the qualified person outweigh the public interest in disclosure. When assessing the balance of the public interest in relation to section 36, the Commissioner will give due weight to the reasonable opinion of the qualified person, but will also consider the severity, extent and frequency of the inhibition and prejudice that he has accepted would be likely to result through disclosure.

Public interest arguments in favour of disclosure

60. The Welsh Government acknowledges that there is a public interest in exposing draft positions so that the public is given a fully informed picture of the decision making process, thus promoting transparency and accountability in relation to its activities.
61. The Commissioner also considers that disclosure would provide transparency and accountability in relation to the role played by the Delivery Unit in briefing the First Minister on key priority areas. Whilst the Commissioner considers the position at the time a request is submitted to a public authority, he notes that since the request was submitted there has been some media attention relating to the role and cost effectiveness of the Delivery Unit³.

Public interest arguments in favour of maintaining the exemption

62. The Welsh Government argues that disclosure would be likely to undermine the role of the Delivery Unit as well as the First Minister's ability to hold his Ministers to account. The withheld information contains the personal judgement and comment of Delivery Unit staff and the documents have a very limited audience (the author, the head of the Delivery Unit, the First Minister and his special advisor). Disclosure would be likely to result in other Ministers and senior officials being less willing to co-operate with the Delivery Unit in the future. This would make it very difficult for the Delivery Unit to gather the necessary information that is required to effectively advise the First Minister, as the briefings would be less comprehensive. This in turn would have a negative impact on the ability of the First Minister to effectively question Ministers and monitor the Welsh Government's Programme for Government.

³ <http://www.dailypost.co.uk/news/north-wales-news/first-ministers-civil-service-briefings-2658789>

63. The Welsh Government considers it essential that there is private discussion space, away from the public gaze, for the First Minister to receive independent advice, assessments and views. The free and frank exchange of views when drafting documents and providing advice to Ministers is necessary if the most rigorous assessment of matters is to be made in order for decisions to be made which make the most effective use of public money.
64. Disclosure would be likely to inhibit Delivery Unit staff from being so candid in the way in which they provide advice and express their views in the future. The views expressed by Delivery Staff within the Reports essentially reflect the initial views of the member of the Delivery Unit who often raises questions about how key priorities are being taken forward. The withheld information therefore does not represent the final views of the Welsh Government and it is felt that disclosure could give a misleading impression to the public as a result. The Reports are designed to provide an opportunity for officials to seek further evidence, make suggestions and offer opinions as frankly as possible. This is particularly important when issues are still "live". It is considered that there is a real risk that disclosure would result in Delivery Unit staff being less frank in the way they express themselves and their views within the Reports in the future. This would have a detrimental effect on the First Minister's ability to question Ministers and other senior civil servants.
65. The Welsh Government considers there is a strong public interest argument in maintaining the efficacy of the drafting/briefing process. Disclosure would be likely to inhibit the free and frank provision of advice which is required during the drafting process in order to undertake the best possible analysis.

Balance of the public interest arguments

66. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
67. The Commissioner acknowledges that there is a strong public interest in openness and transparency in relation to government activities. In this case disclosure of the withheld information would inform the public about the role of the Delivery Unit, the way in which it provides briefings to the First Minister and the issues which are then discussed with other Ministers. However, the Commissioner accepts that this argument is

weakened to an extent by the fact that some of the withheld information essentially represents initial views of members of the Delivery Unit on priority areas and performance against priority areas and not necessarily the concluded view of the Welsh Government.

68. Having accepted the opinion of the qualified person as reasonable in this case, the Commissioner recognises that this inhibition and prejudice would be likely to result with some frequency. The main role of the Delivery Unit is to enable the First Minister to drive performance improvements when delivering key government priorities. The Reports are key to the role of the Delivery Unit as they inform regular meetings the First Minister has with Cabinet colleagues on key priority areas in relation to the Programme for Government.
69. As mentioned earlier in this notice, the Reports cover a wide range of topics and subjects relating to all areas of the work of the Welsh Government – there is a separate Report for discussion with each individual Minister at each “round” of bi-monthly meetings with the First Minister. The Commissioner notes that, at the time of the request, many of the issues to which the withheld information relates were still “live” at the time of the request. In relation to the severity of the inhibition, the Commissioner considers that the live nature of the issues intensifies the impact of disclosure on the processes described by the exemptions, namely the free and frank provision of advice and exchange of views for the purposes of deliberation. The previous interest shown by the press in this matter also increase the probability that disclosure would result in the safe space identified by the Welsh Government being invaded.
70. In weighing the public interest factors, the Commissioner has taken into account the likelihood of disclosure restraining, decreasing or suppressing the freedom with which opinions or options are expressed. The Commissioner gives weight to the Welsh Government’s argument that there is a strong public interest in officials and Ministers retaining the ability to communicate between themselves freely, frankly and in confidence.
71. In relation to any inhibition of the frankness of future advice and exchange of views by officials, the Commissioner believes that the guiding principle is the robustness of those officials, i.e. they should not be easily deterred from carrying out their functions properly. However, such arguments must be considered on a case by case basis, and in this case the Commissioner accepts that an inhibiting effect would be likely as the majority of issues under consideration were “live” at the time of the request and weight must be given to protecting the process in question so that relevant parties involved in the discussions can continue to contribute to them with frankness and candour.

72. Having considered the opposing public interest factors in this case, the Commissioner concludes that the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information. As the Commissioner finds that the information was correctly withheld under sections 36(2)(b)(i) and (ii), he has not considered the other exemptions claimed by the Welsh Government in respect of this information.

Procedural matters

73. The original request was made on 9 May 2012. The Welsh Government responded on 13 June 2012, and disclosed some information but withheld other information under section 36. During the Commissioner's investigation the Welsh Government released additional information relevant to the request. In relation to this additional disclosure, as the information was not disclosed within 20 working days of receipt of the request, the Welsh Government breached section 10 of the FOIA.

Other matters

74. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters of concern.
75. Whilst there is no explicit timescale laid down by the FOIA for completion of internal reviews, the Commissioner considers that they should be completed as promptly as possible. The Commissioner believes that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
76. In this case, the complainant requested an internal review on 19 June 2012. Despite reminders from the complainant and the Commissioner, by 10 November 2012, the Welsh Government had still not completed its internal review. As a result, the Commissioner exercised his discretion and accepted the complaint without an internal review having been carried out. The Commissioner does not consider that any exceptional circumstances existed to justify that delay, and he therefore wishes to express his view that the Welsh Government fell short of the standards of good practice by failing to complete its internal review within a reasonable timescale. He would like to remind the Welsh Government of the expected standards in this regard and recommends that it aims to complete any future reviews within the Commissioner's standard timescale of 20 working days.

Right of appeal

77. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

78. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

79. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
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Cheshire
SK9 5AF