

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 27 August 2013

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

#### **Decision (including any steps ordered)**

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1. The complainant requested information about the decision as to who was to act as adjudicator in Current Market Rent appeals in relation to general medical premises. The Welsh Government provided some information relevant to the request and withheld other information under sections 36, 42, and 40 of the FOIA. The Commissioner's decision is that the Welsh Government correctly withheld the remaining disputed information in accordance with sections 36(2)(b)(i), 36(2)(b)(ii) and 42. He does not require any steps to be taken.

#### **Request and response**

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2. On 9 July 2012, the complainant wrote to the Welsh Government regarding the procedure for determination of Current Market Rent (CMR) appeals and requested information in the following terms:

"I should be grateful if you would arrange to supply me with copies of all the advice/recommendations/information you received during the consultation process Welsh Government undertook before deciding upon the appointment of [named individual] to act as adjudicator on CMR Appeals.

I expect that Welsh Government received advise/recommendations from RICS Dispute Resolution Service, Welsh Health Estates and possibly NHS Litigation Authority concerning the appropriate procedures to be adopted for CMR Appeals, and copies of the letters/emails etc that were exchanged would be appreciated".

3. The Welsh Government wrote to the complainant on 11 July 2012 asking him to confirm the scope of his request. He responded on 12 July 2012 advising that he was :  
  
"not specifically requesting details concerning the appointment of [named individual], but the general consultation process engaged upon by Welsh Government concerning who was to act as adjudicator and how was the determination to be achieved, as I am aware that advice was provided by Welsh Health Estates to Welsh Government concerning this matter".
4. After some initial correspondence, the Welsh Government responded fully on 16 October 2012. It provided some information relevant to the request and stated that other information held was exempt under sections 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c), 42 and 40 of the FOIA.
5. On 5 November 2012 the complainant requested an internal review of the Welsh Government's handling of his request as he was dissatisfied that information had been withheld under the various exemptions cited.
6. The Welsh Government provided the outcome of its internal review on 17 December 2012. It disclosed two letters which had inadvertently not been disclosed with its original response. The Welsh Government upheld its position that the remaining information held relevant to the request was exempt under sections 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c), 42, and 40 of the FOIA.

### **Scope of the case**

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7. The complainant contacted the Commissioner 14 January 2013 to complain about the way his request for information had been handled. He asked the Commissioner to determine whether the Welsh Government should disclose the information requested on 9 July 2012
8. The Commissioner considers this complaint to relate to the Welsh Government's refusal to disclose information held relating to the request and whether any exemptions have been correctly applied. During the course of the Commissioner's investigation, the complainant confirmed that he was not interested in any personal data which the Welsh Government had withheld under section 40(2) of the FOIA. As a result, the Commissioner has not considered this information within this notice.
9. The withheld information in this case comprises emails, and attachments to emails, including drafts of various documents which are attached to email exchanges. The Welsh Government has applied various

exemptions and combinations of exemptions to different parts of the withheld information, as detailed below:

- Section 36(2)(b)(i) only
- Section 36(2)(b)(ii) only
- Sections 36(2)(b)(i) and 36(2)(b)(ii)
- Sections 36(2)(b)(i), 36(2)(b)(ii) and section 36(2)(c)
- Sections 36(2)(b)(i), 36(2)(b)(ii) and section 42
- Section 36(2)(b)(i) and section 42
- Section 36(2)(b)(ii) and section 42
- Section 42 only

## Reasons for decision

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### Background

10. The National Health Service (General Medical Services – Premises Costs) (Wales) Directions 2004 ('the Premises Directions') provide the contractual rules for the funding of primary care premises under the general medical services ('GMS') contract and came into effect on 12 April 2004. They describe the circumstances under which local health boards should consider supporting the making of payments to general medical practices to cover all or part of their premises costs and the nature of such payments.
11. Disputes under the Premises Directions are disputes for the purposes of the National Health Service (General Medical Services Contracts) (Wales) Regulations 2004<sup>1</sup> ('GMS Regulations') as they are disputes "arising out of or in connection with the contract" (paragraph 99 of Schedule 6 of the GMS Regulations). Paragraph 97 of schedule 6 of the GMS Regulations states that where there is a dispute between GMS contractors and a local health board both parties must make every reasonable effort to communicate and cooperate with each other with a view to resolving the dispute before referring the dispute for

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<sup>1</sup> <http://www.legislation.gov.uk/wsi/2004/478/contents/made>

determination to the Welsh Ministers in accordance with the dispute resolution procedure.

12. In each dispute referred to the Welsh Ministers for resolution under the GMS Regulations, a decision has to be taken in respect of who will determine the dispute. Under the GMS Regulations, the options are:
  - (i) the Welsh Ministers may determine disputes themselves; or
  - (ii) they may appoint an independent adjudicator to consider and determine the dispute; or
  - (iii) the Welsh Ministers, or an independent adjudicator if one is appointed, may determine the dispute but consult with other persons whose expertise they consider will assist in the determination of the matter, for example, consultation with surveyors in disputes relating to rental valuations of GP premises.
13. The Minister for Health and Social Services has approved a system for handling GMS disputes under the Carltona principle, on the basis that a relevant senior official will approve and sign any decision letter on behalf of the Welsh Ministers. This is subject to the exception that officials will refer matters to the Welsh Ministers if they are novel, contentious, politically sensitive or likely to attract significant media attention. Welsh Ministers have a duty to give reasons for any decision reached in relation to determinations made under the GMS Regulations. An independent adjudicator, if one is appointed, also has to give reasons for decisions reached. Determinations made under the GMS Regulations are subject to judicial review.
14. During the course of the Commissioner's investigation, the Welsh Government submitted confidential arguments in support of its application of the exemptions. These representations and the Commissioner's consideration of them are contained within a confidential annex to this notice. This is because any detailed analysis is likely to reveal the content of the withheld information itself. This annex will be provided to the Welsh Government but not, for obvious reasons, to the complainant.

### **Section 36 – prejudice to the effective conduct of public affairs**

15. 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.

16. 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.
17. 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.
18. 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.
19. The Welsh Government has applied each limb of section 36(2) individually to some parts of withheld information and various combinations of limbs of section 36(2) and section 42 as detailed in paragraph 9 above.
20. The Commissioner is satisfied that, under section 36(5) of the FOIA, the First Minister is the qualified person for the Welsh Government.
21. 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. In the submission to the qualified person, separate representations were made in relation to the application of each limb of section 36 claimed. 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".
22. The Welsh Government has applied all three subsections of section 36 to some of the withheld information. It has also applied combinations of

section 36(2)(b) with section 42. 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 42 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**

23. The submission to the qualified person set out the argument that if advice relating to who should adjudicate in a dispute lodged under the GMS Regulations was disclosed, it would severely impair the ability of officials to offer full and frank advice to each or to the Minister. Disputes, by their nature, are contentious, and a decision by the Welsh Ministers (or officials acting on their behalf) as to whether they should exercise their appellate functions under the GMS Regulations or appoint an independent adjudicator is an important one, and is a decision that it susceptible to challenge through the judicial review process.
24. The submission explained that advice given to the Minister in novel and contentious cases is very candid and explores the risks involved should the Minister decide to determine a dispute rather than appoint an independent adjudicator. Advice also weighs up the costs of the various options which is a material factor taken into consideration. The submission to the qualified person argued that advice given by officials in such matters needs to be candid to ensure the decision making power is exercised reasonably. In addition, the Welsh Government argues that advice is often provided as part of an evolving process and may subsequently change. If further investigations result in different conclusions being drawn, preliminary options and advice will not have any far reaching consequences. The prospect of disclosure would be likely to lead to parties being more circumspect in what they say, inhibiting the quality of advice provided at an early stage, which would in turn have a negative impact on the overall quality of the appointment process.
25. The submission to the qualified person explained that the request related to an on-going appeal under the GMS Regulations where active consideration was being given as to who should adjudicate on the dispute – ie Welsh Ministers or an independent adjudicator. It was considered that disclosing the withheld information would be likely to inhibit the free and frank provision of advice in relation to the appeal in question.

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

26. The submission to the qualified person explained that the open exchange of views and opinions for the purpose of deliberation is an important part of deciding who should adjudicate in a particular dispute lodged under the GMS Regulations. A “safe space” is needed to allow officials to discuss issues at an official level in order to reach decisions without being hindered by external comment or influence. In novel or contentious cases, there is a requirement to provide advice and/or options to the Minister - the ability of officials to express a range of options, and if necessary provide clarification, is essential to ensure that the Minister is fully aware of the views of officials before making a decision. The free and frank exchange of views allows the options/recommendations to be discussed in an objective manner by officials and for a variety of options to be considered before arriving at an agreed position. The open expression of views allows discussions to evolve and for a fuller picture to emerge before a decision is made as to who should adjudicate in a particular dispute ie the Welsh Ministers or an independent adjudicator.

### **Is the qualified person’s opinion reasonable?**

27. 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 limited audience within the Welsh Government and were not intended for wider dissemination. 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. Some of the withheld information consists of draft documents which have been circulated in order to obtain advice and exchanges of views before the documents were finalised.

28. Taking into account the nature of the withheld information and the representations provided, the Commissioner is satisfied that it was a reasonable opinion that disclosure 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**

29. The next step is to consider the balance of the public interest. The role of the Commissioner here is to consider whether the public interest in disclosure outweighs the concerns identified by the qualified person.



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 disclosing the requested information**

30. The Welsh Government has put forward the same public interest arguments in favour of disclosure for each limb of section 36 it has claimed. The Welsh Government acknowledges that there is a public interest in it being as transparent and accountable as possible in the way that it operates. Disclosure in this case would allow the public to see how the Welsh government makes decisions in relation to how to interpret and apply the GMS Regulations when considering appeals.
31. The Welsh Government acknowledges that there is a legitimate public interest in knowing how a decision is reached by Welsh ministers with regard to who should act as adjudicator in this particular appeal. This would in turn allow the public to see how these decisions ultimately impact on the delivery of NHS services on Wales.
32. The complainant has raised a number of public interest arguments as to why he feels the information should be disclosed:
  - As far as he is aware, the appeal which is the subject of this request was the first appeal lodged in recent years which involved the Welsh Government writing to the parties involved asking them to agree the appointment of the adjudicator (an official appointed on behalf of the Welsh Ministers).
  - Objections were raised in relation to the appointment as it was believed the individual would be unable to act in an impartial manner.
  - As the parties involved in the dispute were invited to agree the appointment it is reasonable to expect full disclosure of information relating to the appointment process.
  - There are currently no judicial reviews concerning appeals under the GMS Regulations in Wales. If the advice in question supports the procedure that has been adopted by the Welsh Government, the complainant sees no reason why disclosure would prevent the free and frank provision of advice. Rather, he considers that disclosure would establish that the rule of natural justice had been considered and explain the rationale for proceeding with the particular procedure.



- A judicial review in England found against the previous procedure adopted by the NHS. As a result a new procedure for determining appeals was instigated with the appointment of independent chartered surveyors providing reports to the NHS on rents in dispute. The complainant feels disclosure would further public understanding as to why a different procedure has been adopted in Wales which has similar failings to the previous procedure in England, as similar legislation applies in both cases.
- With the exception of any legal advice, other information would be open for discovery if a judicial review is lodged in Wales.

### **Public interest arguments in favour of maintaining Section 36(2)(b)**

33. In relation specifically to the application of section 36(2)(b)(i) the Welsh Government considers it is important that advice provided by civil servants is comprehensive, in order that all relevant considerations are addressed. The free and frank exchange of advice between officials and from officials to Ministers is vital to ensure that any decision is one that is reasonably arrived at.
34. Under the GMS Regulations, Welsh Ministers (or officials acting on their behalf) have a broad discretion in relation to determining who should adjudicate on a particular dispute and the subsequent dispute resolution procedure. In order to be able to exercise this discretion lawfully, taking into account all relevant considerations, free and frank advice is needed in order to be able to exercise the broad discretion afforded under the GMS Regulations in an appropriate manner.
35. The Welsh Government explained that advice provided in novel and contentious cases routinely explores the risks involved should Welsh Ministers decide to determine a particular dispute themselves as opposed to appointing an independent adjudicator. Advice also weighs up the financial cost of various options, which is a material factor taken in consideration in reaching a decision. The Welsh Government considers it important that officials are able to express themselves openly and explore the different risks and options without fear that their advice will be made public.
36. The Welsh Government is of the view that disclosure could damage the Welsh Minister's role as the Minister for Health and Social Services would be making a decision on who should adjudicate in appeals lodged under the GMS Regulations on limited advice and information. This in turn could potentially lead to the decision being judicially reviewed.

37. In relation specifically to the application of section 36(2)(b)(ii) the Welsh Government considers that disclosure would not be in the public interest as it would inhibit the free and frank exchange of views (between officials and between officials and the Welsh Ministers). These exchanges are required so that the Minister for Health and Social Services can understand the context and issues surrounding a particular appeal under the GMS Regulations in order to decide the most appropriate person to determine a dispute.
38. The Welsh Government argues that the free exchange of views between officials and between officials and the Minister is based on trust and the understanding that not all parts of a discussion will become publicly available. The prospect of disclosure would be likely to result in officials being less candid because of the risk of public criticism. If these views were inhibited from an early stage, it would negatively impact on the quality of the overall discussion as to who is the most appropriate adjudicator in this particular dispute and not allow a full consideration of all the facts of the case.
39. The Welsh Government explained that some of the withheld information consists of drafts of documents which were prepared as part of the iterative drafting process. These draft documents do not present the final view of officials and, as such, the Welsh Government is of the view that this weakens the public interest considerations in favour of disclosure of these documents.

### **Balance of the public interest arguments**

40. 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.
41. 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 decision making process in respect of the appointment of an adjudicator in this particular GMS appeal. The Commissioner accepts that this argument is weakened to an extent by the fact that some of the withheld information comprises drafts of documents and as such, they do not represent the concluded view of the Welsh Government. However, the Commissioner considers that there is also a public interest in revealing draft positions so that the public is given a fully informed

picture of the decision making process. Disclosure would be likely to increase public confidence in the process by demonstrating the checks and balances in place within the Welsh Government and would show the range of options considered during the process.

42. The Commissioner recognises that inherent in the section 36(2)(b) exemption is the argument that a public authority should be afforded private space for staff in which issues can be considered and debated, advice from colleagues and be sought and freely given and ideas tested and explored to protect the integrity of the deliberation process. The Commissioner also recognises that public authorities often require a safe space in which to debate issues without the hindrance of external comment and to develop their policies or opinions free from outside interference. However the Commissioner has to consider the specific information in dispute in this case in order to determine whether this safe space is still relevant and important.
43. The Commissioner considers that the need for a safe space will be strongest when an issue is still "live". Once a public authority has made a decision, a safe space for deliberation will no longer be required and the Commissioner has previously adopted the approach that the public interest will sway more towards disclosure.
44. As mentioned earlier in this notice, the withheld information relates to one particular appeal lodged under the GMS Regulations. At the time of the request, a letter had been sent to the parties involved indicating the Welsh Ministers would determine the dispute. The letter provided the name of the official who had been appointed to make the determination on behalf of the Welsh Ministers and asked the parties whether they had any objections to the individual appointed. At the time of the request, the Welsh Government were in receipt of representations from one party in relation to the appointed individual. On 8 October 2012, the Welsh Government informed the parties that an independent adjudicator would be appointed to determine the dispute. On 5 November 2012, the Welsh Government wrote to the parties confirming the name of the independent adjudicator. Therefore, at the time of the request, the appeal itself, and the decision as to the most appropriate person to adjudicate were very much "live" issues. In relation to the severity of the inhibition, the Commissioner considers that the live nature of the subject matter 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.
45. 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 Commissioner understands that the Welsh Government receives between 10 and 20

appeals a year under the GMS Regulations. The GMS Regulations provide that in each dispute referred to the Welsh Ministers a decision has to be taken in relation to the most appropriate person to determine the dispute. The Commissioner accepts that disclosure of information which is likely to inhibit this decision making process would undermine the adjudication process, and the appellate functions of the Welsh Ministers.

46. 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.
47. 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 appeal in question was "live" at the time of the request and weight must be given to protecting the processes relating to the appeal so that relevant parties involved in the discussions can continue to contribute to them with frankness and candour.
48. 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 – ie section 36(2)(c) and section 42. However, the Welsh Government withheld some information under section 42 only. The Commissioner has therefore gone on to consider the application of section 42 to this information.

### **Section 42 – Legal professional privilege**

49. Section 42(1) provides an exemption for information in respect of which a claim to legal professional privilege ("LPP") could be maintained in legal proceedings. This exemption is subject to a public interest test.
50. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal

advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

51. Some documents and parts of documents withheld under section 42 were also withheld under section 36(2)(b). As the Commissioner has found that section 36(2)(b) is engaged and the public interest in maintaining the exemption favours non-disclosure, he has not gone on to consider the application of section 42 to this information. However, the Welsh Government has withheld some information under section 42 alone and the Commissioner's analysis under section 42 refers only to that information.
52. The information which the Welsh Government has withheld under section 42 in this case consists of legal advice requests and responses between the Welsh Government and its legal advisers.
53. Having considered the withheld information the Commissioner is satisfied that it represents communications that, at the time they were made, were confidential; were made between a client and professional legal advisers acting in their professional capacity; and were made for the sole or dominant purpose of obtaining legal advice.
54. Information will only be privileged so long as it is held confidentially. Therefore, the Commissioner has gone on to consider whether the right to claim LPP to this information has been lost because of previous disclosures to the world at large, which would mean that the information in question can no longer be said to be confidential.
55. As far as the Commissioner can see, the legal advice was not publicly known at the time of the request and there is therefore no suggestion that its confidentiality has been lost. The Commissioner is persuaded that the withheld information is legally privileged and therefore engages section 42.
56. As section 42 is qualified exemption and therefore subject to a public interest test 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 disclosing the requested information**

57. The Welsh Government acknowledges that there is a public interest in individuals being able to exercise their rights under the FOIA to enhance

their understanding of the reasons for decision or actions taken by a public body.

58. The Welsh Government also accepts that there is an inherent public interest in ensuring that public authorities are transparent in the decisions they make in order to promote accountability and improve the quality of decision making. In this case, disclosure of the withheld information would assist the public in ascertaining whether there was any incompatibility between the advice provided and the decisions taken and whether any advice provided had been followed.

### **Public interest arguments in favour of maintaining the exemption**

59. The Welsh Government referred to the fundamental importance of the principle of LPP which has been long been recognised by the courts and Information Tribunal cases. It considers there is a strong public interest in protecting the established principle of confidentiality in communications between lawyers and their clients in relation to information subject to LPP.
60. The Welsh Government considers it is important that it is able to obtain whatever legal advice it considers necessary. It argues that without comprehensive legal advice the quality of the Welsh Government's decision-making would be considerably reduced as it would not be able to make fully-informed decisions on the basis of the best advice available, and with a full appreciation of relevant facts.
61. The Welsh Government believes that there must be reasonable certainty relating to confidentiality and the disclosure of legal advice. If there were a risk that it would be disclosed in the future the principle of confidentiality might be undermined and the legal advice less full and frank than it should be.

### **Balance of the public interest arguments**

62. In considering the balance of the public interest under section 42, the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege in order to protect the confidentiality of communications between lawyers and their clients. This confidentiality is essential so that clients can share information fully and frankly with legal advisers in order that any advice is given in context and with the full appreciation of the facts and furthermore that the advice which is given is comprehensive in nature. However, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure.



63. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered whether the advice is likely to affect a significant amount of people, the timing of the request and the status of the advice.
64. The Commissioner accepts that there is a public interest in disclosing information that allows scrutiny of a public authority's role and enhances transparency in its decision making process by allowing the public to understand and challenge those decisions. The Commissioner also accepts that disclosure promotes public debate and the accountability and transparency of public authorities in general. In this case, disclosure would increase transparency in the way that the Welsh Government has handled a particular GMS appeal. The Commissioner also notes that disclosure of the information may reassure the public that decisions had been made about the GMS appeal on the basis of good advice and information and thus increase public confidence in how the Welsh Government will deal with similar appeals in the future
65. The Commissioner considers that Parliament did not intend the principle of legal privilege to be used as an absolute exemption. In the case of *Mersey Tunnel Users Association v ICO & Mersey Travel (EA/2007/0052)* the Tribunal confirmed this point. In that case the Tribunal's decision was that the public interest favoured disclosing legal advice obtained by Mersey Travel and it ordered disclosure of the information requested. The Tribunal placed particular weight on the fact that the legal advice related to issues which affected a substantial number of people, approximately 80,000 people per weekday. In this case the Commissioner has seen no evidence to suggest that there is a large amount of public money at stake or that a large number of people are affected. These are therefore not significant factors to weigh in favour of disclosure.
66. The Commissioner has also considered the circumstances of this particular case and the content of the withheld information. He has considered the timing of the request and the status of the advice. He notes that, at the time of the request as outlined in paragraph 44 of this notice, the appeal to which the request relates, and the decision as to the most appropriate person to adjudicate in the appeal were "live" issues. The legal advice cannot therefore be said to have served its purpose.
67. The Commissioner would agree that LPP cannot be used as a cover for illegal or corrupt behaviour or conduct by public authorities or those



representing them. However, the withheld information requested by the complainant does not show or indicate any such illegal activity. The Commissioner has also considered whether there is any evidence that the Welsh Government has misrepresented the legal advice, a factor which is likely to add to the case for disclosure. In the Commissioner's view, there is not.

68. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the Welsh Government and its legal advisors and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
69. In reaching a view on where the public interest lies in this case, the Commissioner has given significant weight to the general public interest in preserving the principle of legal professional privilege. In addition, he considers that the timing of the request means that significant weight should be attributed to the argument that disclosure of the requested information would adversely affect the candour between the Welsh Government and its legal advisors. In conclusion, whilst the Commissioner considers that the arguments in favour of disclosure have weight, he has determined that in the circumstances of this particular case they are outweighed by the arguments in favour of maintaining the exemption under section 42. The legal advice related to a live matter in that at the time of the request, the appeal in question and a decision on who should adjudicate in the appeal were live issues. He therefore determines that the exemption at section 42 has been applied correctly by the Welsh Government.

## Right of appeal

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70. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

71. 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.

72. 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**  
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**Wilmslow**  
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