

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

### **Decision notice**

**Date:** 27 June 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 a review of hospital services in Wales. The Welsh Government provided some information and withheld other information under various subsections of section 36 of the FOIA. The Commissioner's decision is that although the exemptions are engaged, the public interest in maintaining the exemptions does not outweigh the public interest in disclosure.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To disclose the information withheld under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).
3. The Welsh Government must take this step 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 FOIA and may be dealt with as a contempt of court.

### **Request and response**

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4. On 11 July 2012, the complainant wrote to the Welsh Government and requested information in the following terms:

"Could you provide details of any correspondence between Welsh Government special advisors and Professor Marcus Longley and any of his assistants that worked on the Case for Change document?"

Could you provide details of any attachments linked to the e-mail correspondence already supplied to me?

Could you provide copies of the drafts of the Case for Change supplied to the Welsh Government (civil servants/ministers) by Professor Longley or his staff?

In relation to the Minister of Health's statement to the Assembly on May 9<sup>th</sup>, could you provide any correspondence relating to the drafting of that statement between the Minister, civil servants and/or special advisers?"

5. The Welsh Government responded on 30 August 2012 and stated that the first part of the request was dealt with under a previous information request. It also released some information relevant to the second part of the request. The Welsh Government stated that a response to the third and fourth parts of the request would be issued in due course.
6. The Welsh Government issued a refusal notice on 12 September 2012 stating that it held information relevant to the parts (iii) and (iv) of the request but it considered the information to be exempt under section 36(2)(c) of the FOIA.
7. On 20 September 2012 the complainant requested an internal review of the Welsh Government's decision to withhold information relevant to parts (iii) and (iv) of the request.
8. The Welsh Government provided the outcome of its internal review on 18 October and upheld its decision that the information requested was exempt under section 36(2)(c) of the FOIA.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 23 October 2012 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 11 July 2012, and in particular, the information listed at parts (iii) and (iv) of the request as detailed below.
  - (iii) Drafts of the Case for Change report supplied to the Welsh Government by Professor Longley or his staff.
  - (iv) Correspondence relating to the drafting of the Minister of Health's statement to the Assembly on 9 May 2012.

10. During the course of the Commissioner's investigation, the Welsh Government confirmed that, in addition to section 36(2)(c), it also considered that sections 36(2)(b)(i) and 26(2)(b)(ii) applied to the withheld information.
11. The Commissioner considers this complaint to relate to the Welsh Government's refusal to disclose information held relating to parts (iii) and (iv) of the request of 11 July 2012 and whether any exemptions have been correctly applied.

## **Reasons for decision**

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

12. 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.
13. 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.
14. 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.
15. 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.

16. The Commissioner has also been guided by the Information Tribunal's comments in *Guardian Newspapers & Brooke v Information Commissioner & BBC*<sup>1</sup> (paragraph 91), in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus,
- "does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant".
17. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion, he is restricted to focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
18. The withheld information in this case comprises:
- (i) Drafts of a report that was commissioned to undertake an independent assessment of the evidence on NHS service change, in particular, looking at the best configuration of hospital services for Wales ('the Case for Change reports').
  - (ii) Correspondence relating to, and drafts of, a Ministerial Statement issued on by the Welsh Government on 9 May 2012 relating to the review into the configuration of hospital services for Wales, which was issued when the final Case for Change report was published. ('Ministerial Statement communications').

The Welsh Government has applied section 36(2)(c) to all of the withheld information, and in addition, section 36(2)(b)(i) to the Case for Change reports and section 36(2)(b)(ii) to the Ministerial Statement communications.

19. The Commissioner is satisfied that, under section 36(5) of the FOIA, the First Minister is the qualified person for the Welsh Government.
20. 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

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<sup>1</sup> Appeal numbers EA/2006/0011 & EA/2006/0013

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”.

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

21. Section 36(2)(b)(i) has been applied to the Case for Change reports. The Welsh Government explained that the report was produced by Professor Longley to articulate the reasons why Health Boards needed to change, against the available evidence base. The work was undertaken over a number of months and involved a comprehensive review of available data. It involved investigating a number of issues and developing a working draft report, which was then subject to further evidence gathering as the process developed.
22. The Welsh Government explained that the Case for Change reports are “preliminary documents as part of an iterative drafting process”. It argues that draft reports are necessarily part of an evolving process and subject to change therefore some of the content in earlier drafts would not have been included in the final report.
23. 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 any subject expert who is called upon to advise senior NHS Wales’ management. This is because the prospect of disclosure would be likely to lead to subject experts being less frank when documenting initial assessments which might be provisional in nature and not had the benefit of wider input. The expectation of initial assessments not being disclosed allows senior officers and subject experts to be bolder in preliminary assessments in the knowledge that if different outcomes or conclusions are finally agreed, the preliminary assessments will not have more far reaching implications than necessary. The submission to the qualified person argues that disclosure of preliminary drafts would be likely to lead in the future to subject experts being more cautious in what they say in drafts, or in choosing whether or not to share draft reports with the Welsh Government. This in turn would have a negative impact on the quality of information available to the Welsh Government.

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

24. The Welsh Government applied section 36(2)(b)(ii) to the Ministerial Statement communications. The emails relate to the presentation of a policy in a speech to be made by a Minister. The Welsh Government argues that it needs a “free space” to allow relevant parties to discuss

live issues and to reach decisions without being hindered by external comment and/or media involvement. This “space” is required so that officials can engage in full, open discussions about how a policy is presented and reach an agreed position.

25. The submission to the qualified person set out the argument that disclosure would be likely to inhibit the free and frank exchange of views for the purpose of deliberation between officials and Ministers. It sets out the view that such discussions will, from time to time, cover sensitive matters and it is important that Ministers and officials have confidence that views and opinions expressed, where appropriate, are not widely disclosed. The prospect of disclosure would be likely to fetter officials’ approach to discussion and debate within the Welsh Government, which would in turn lead to a less rigorous and thorough consideration of the issues on which decisions are based.

**Section 36(2)(c) - otherwise prejudice the effective conduct of public affairs**

26. The submission to the qualified person set out the argument that the withheld information was not intended for public release. The Welsh Government does not consider it conducive to the effective conduct of public affairs for un-adopted positions to be exposed to public scrutiny even after the drafting has been completed. This is because it is important to avoid public resources being unnecessarily expended in explaining the non-adoption and/or reasoning for interim positions.
27. The submission goes on to explain that the timing of the request in this case is an important factor as matters relating to changes within NHS Wales had not been finalised and were still the subject of considerable contention among interested parties. As there were still live issues relating to the subject matter at the time of the request, even though the final versions of the documents had been published<sup>2</sup>, the sensitivity of the information had not reduced. As such, the Welsh Government argues that disclosure “would be likely to be detrimental to the effective fulfilment of the management function in these proceedings though disclosure of the information.
28. In further representations the Welsh Government made to the Commissioner during his investigation, it referred to the fact that

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<sup>2</sup> <http://wihsc.glam.ac.uk/news/en/2012/may/09/best-configuration-hospital-services-wales/>  
<http://wales.gov.uk/docs//cabinetstatements/2012/120509hospitalconfigurationen.doc>

information relating to this subject matter was disclosed in response to an earlier information request. This resulted in significant media and press interest<sup>3</sup> and necessitated the Minister being required to provide an oral statement to the Welsh Assembly and for her and other officials to be questioned by the National Assembly for Wales Health & Social Care Committee<sup>4</sup>. This resulted in the diversion of resources in order to provide additional briefings and managing the media attention. The Welsh Government believes that disclosure of the withheld information would be likely to renew the media interest and cause officials to be redeployed to manage the effects of disclosure.

29. During the Commissioner's investigation, the Welsh Government also argued that disclosure would be likely to have an impact on policy making and that it was essential for officials and Ministers to have a safe space to discuss live issues without being hindered by external comment and/or media involvement. However, the Commissioner has been unable to find any evidence that these issues were considered by the qualified person when he decided that section 36(2)(c) was engaged and there does not appear to be any reference to safe space issues or any adverse effect on decision/policy making in relation to section 36(2)(c) within the submission to the qualified person. In view of this, the Commissioner has not considered these arguments in relation to the application of section 36(2)(c).

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

30. 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 relates to the provision of advice and / or the exchange of views.
31. Having examined all the relevant information the Commissioner is satisfied that it was a reasonable opinion that disclosing the Case for

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<sup>3</sup> <http://www.walesonline.co.uk/news/wales-news/2012/07/10/lesley-griffiths-faces-call-to-resign-over-influence-on-independent-report-91466-31364358/>  
<http://www.bbc.co.uk/news/uk-wales-politics-18772277>

<sup>4</sup> <http://www.senedd.assemblywales.org/ieListDocuments.aspx?CIId=227&MIId=926&Ver=4>  
<http://yoursenedd.com/debates/2012-07-10-statement-the-evidence-underpinning-the-case-for-reconfiguring-the-nhs-in-wales>



Change reports would have been likely to inhibit the free and frank provision of advice, and disclosure of the Ministerial Statement communications would have been likely to inhibit 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.

32. In relation to section 36(2)(c), the Commissioner has considered the status of the withheld information, ie that the information in question consists primarily of draft documents and does not necessarily represent settled opinions and views. He has also had regard to the media interest generated when some information relevant to the subject matter was disclosed in relation to an earlier information request. On the basis that the qualified person's opinion is only unreasonable if it is an opinion that no reasonable person could hold, the Commissioner finds that the opinion of the qualified person was a reasonable one, namely, it was reasonable to consider that disclosure would be likely to impact on resources in managing the effect of disclosure. He therefore finds that section 36(2)(c) is correctly engaged.

### **Public interest test under section 36**

33. Sections 36(2)(b) and (c) are qualified exemptions and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian Newspapers & Brooke v Information Commissioner* indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the FOIA:

"The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice." (Paragraph 88)

34. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, the



Commissioner's view is that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

**Public interest arguments in favour of disclosing the requested information**

35. The Welsh Government has put forward essentially 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, particularly in terms of efficiency, effectiveness, and holding spending Departments to account. It also recognises that disclosure would provide a fuller picture of the policy making process to promote transparency.
36. The Welsh Government acknowledges that policies which seek to improve health and social care outcomes and the research which underpins them are matters of legitimate public interest. Disclosure in this case would allow the public to see how this particular report/project (which will have significant consequences for how NHS services are delivered in Wales) evolved and developed, and increase participation in the development of such proposals and decisions.
37. The Commissioner considers that there is also strong public interest in revealing draft positions so that the public is given a fully informed picture of the decision or policy making process promoting transparency and accountability in relation to the activities of public authorities. Disclosure would be likely to increase public confidence in the process and would show the range of options considered during the process. The Commissioner would add to this the fact that the information clearly is part of a major programme associated with change in the health service in Wales which will have a significant impact on the lives of people living and accessing health services in Wales. There is a particularly strong public interest in the public having access to information concerning such matters.
38. The complainant contends that the NHS in Wales is undergoing its biggest changes since devolution, with a great deal of public opposition to the proposed changes. He believes the public is entitled to see whether the author of the Case for Change report felt in his drafts that the evidence supported these changes. Given the importance of health related matters the complainant feels that the public has a right to expect transparency from the Welsh Government in relation to this matter.

39. The complainant also referred to e-mails which were released in relation to the subject matter in July 2012, which led to vigorous political debate and calls for the Minister in question to resign over allegations, with a motion of no confidence brought against her by opposition parties. Opposition parties had claimed that the tone and content of the emails suggested that the Welsh Government had influenced the content of the independent report and the author was pressured into supporting changes that the Minister wanted. A number of media articles relating to these allegations are referred to earlier in this notice in paragraph 28.
40. The complainant does not accept that release of earlier drafts would inhibit policy-makers from offering frank advice. He is of the view that even early drafts of reports are likely to bear some resemblance to the final version. He contends that disclosure of comments made and the sequence of drafts would allow the public to see how the final document developed, what changes were made and why and how policy was developed. As long as any changes were made for good evidence-based reasons, release of earlier drafts on an issue of such public importance would enhance confidence in the policy-making process. He believes that disclosure would allay any fears that the Welsh Government has "something it is anxious to avoid becoming public".

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

41. In relation specifically to the application of section 36(2)(b)(i) to the Case for Change reports, the Welsh Government put forward the following public interest arguments in favour of maintaining the exemption:
- a. The reconfiguration of the NHS in Wales is a significant project, the success of which depends to an extent on the provision of impartial advice from experts with a view to informing future policy making. Such subject experts often require input from officials which they then draw upon when preparing their advice. The prospect of disclosure could lead to a weakening of the relationship between officials and subject experts which in turn would be likely to result in provisional assessments/reports being produced by subject experts which have not had the benefit of wider input.
  - b. Disclosure would be likely to result in subject experts being less bold and open in their approach, leading to a negative impact on the report produced and the quality of the advice ultimately provided. This in turn would have a negative impact on the efficacy of future policy making.

- c. Disclosure is likely to have a disruptive effect on subject experts and the organisations they are advising. Disclosure could result in members of the public dwelling on issues and matters included in early drafts which are no longer relevant and/or were discounted by the expert in their final report, or parts of early drafts may be factually incorrect and subsequently amended in later versions. The Welsh Government consider it likely that this would cause significant disruption and result in resources being diverted away from considering the subject experts' advice in order to respond to queries from the public/media.
  - d. There is a strong public argument in maintaining and protecting the efficacy of the drafting process and to release drafts would not further public understanding and possibly give a misleading impression to the public.
  - e. It is in the public interest that the Welsh Government operates in a way that enables sound decisions to be made, which includes securing independent advice to inform policy making. In this case, this will enable NHS managers to take forward any actions to improve the sustainability, efficiency and effectiveness of healthcare in Wales. Disclosure would be likely to inhibit the future free and frank provision of advice which would in turn impact on this process.
42. In relation specifically to the application of section 36(2)(b)(ii) to the Ministerial Statement communications, the Welsh Government presented the following public interest arguments in favour of maintaining the exemption:
- a. Disclosure could lead to officials being less able to express their views freely and openly in the future and becoming more circumspect in their approach. This in turn could have a negative impact on the advice and consequently affect future policy making.
  - b. Discussions between officials and Ministers will from time to time cover potentially sensitive matters. To enable such discussions, Ministers and officials need to be confident that views and opinions expressed will, where appropriate remain within government.
  - c. The prospect of disclosure would be likely to fetter officials' approach to discussion and debate within the Welsh Government, which would result in a less rigorous and thorough consideration of issues on which decisions are based, thus harming the decision making process.

- d. It is in the public interest that the Welsh Government operates in a way that enables sound decisions to be made, which includes securing independent advice to inform policy making. In this case, this will enable NHS managers to take forward any actions to improve the sustainability, efficiency and effectiveness of healthcare in Wales. Disclosure would be likely to inhibit officials from being so free and frank in how they express their views in the future, which would have a detrimental impact on the quality and comprehensiveness of advice provided to Ministers.
43. The Welsh Government argues that the timing of the request in this case is a very important factor in assessing the public interest considerations. Although at the time of the request the drafting process associated with the Case for Change report had been completed and a final report presented, there were live issues connected with the subject matter and change within NHS Wales was still on-going. In view of this, the Welsh Government is of the view that the sensitivity of the withheld information remained undiminished since the final report was produced in May 2012. At the time the request was received, a number of Health Boards were preparing to consult locally on the future of hospital services in Wales. Two Health Boards completed formal consultation process in October/November 2012, following which they began considering feedback received on proposed changes. Further meetings then took place in January 2013 to consider final plans.

### **Balance of the public interest test – section 36(2)(b)**

44. When assessing the public interest the Commissioner has given due consideration to protecting what is inherent in these exemptions. With regard to section 36(2)(b)(i) and (ii) this includes the avoidance of unwarranted inhibition to the free and frank provision of advice, or to the free and frank exchange of views for the purposes of deliberation.
45. In its public interest arguments, the Welsh Government has referred on a number of occasions to the inhibition caused by disclosure of the withheld information having an adverse effect on the quality of decision making and provision of advice, which would in turn affect future policy making. The correct exemption in relation to the formulation or development of government policy is section 35 of the FOIA. If the withheld information in this case fell under section 35 then it could not be exempt under section 36 as the exemptions are mutually exclusive. Although the Welsh Government did make arguments in relation to the quality of decision making it has not at any stage sought to rely on section 35 in respect of any of the withheld information, and the Commissioner therefore has not considered its arguments in relation to policy development.

46. In its public interest arguments under section 36(2)(b)(i) the Welsh Government referred to disclosure having a disruptive effect and resulting in resources being diverted away to respond to queries from the public rather than actually considering the advice of subject experts. The Commissioner considers that this public interest argument relates to the application of section 36(2)(c) rather than 36(2)(b)(i) and has therefore referred to this in his considerations under section 36(2)(c) later in this notice.
47. In terms of the Welsh Government's view that disclosure of draft documents would possibly give a misleading impression to the public, the Commissioner considers that this argument would only carry some 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 weight to this argument.
48. 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 subject experts can 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.
49. 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.
50. In this case the withheld information relates specifically to a report prepared by Professor Longley relating to potential changes within the NHS in Wales. At the time of the request, the Welsh Government acknowledged that the drafting process had been completed and a final version of the report and the Ministerial Statement had been published. The Commissioner accepts that, at the time of the request, there were still live matters connected to the subject matter of change within the

NHS in Wales and that a number of local Health Boards were in the process of carrying out consultation on proposals for change, including the findings of the Case for Change report. However, the Commissioner considers that the publishing of the report and the Ministerial Statement marked a significant stage in the process and the need for private thinking space had diminished.

51. The Welsh Government has argued that disclosure would inhibit officers and Ministers in the future. 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 and the exchange of views, 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.
52. In this case, again, the Commissioner accepts that the issue of the NHS changes generally was on-going at the time of the request. However, in view of the fact that the Case for Change report had been published, prior to the request, the Commissioner considers that, in effect, this particular stage in the process regarding proposed changes to the NHS in Wales in terms of advice-giving and exchanging of views about the Case for Change report had come to an end. Therefore, the Commissioner has given some weight to the Welsh Government's arguments in terms of any chilling effect and the need for safe space. However, he also considers that the Welsh Government's representations to be fairly generic and wide ranging rather than focussing specifically on this case and the actual withheld information.
53. The Commissioner considers that there is a very strong public interest in the subject matter of this case as any changes to healthcare provision in Wales is likely to have a significant impact on Welsh residents.
54. As outlined in paragraphs 28 and 39 of this notice, a previous disclosure by the Welsh Government of emails relating to the subject matter led to disquiet about the independence of the report. Significant questions were raised in the National Assembly for Wales and the subject was also the focus of a no-confidence vote raised by opposition parties. The Commissioner considers that where there is a suspicion of wrongdoing or a lack of public confidence in a particular process there is a public interest in presenting the full picture. The Commissioner cannot assess whether there has been maladministration or other wrongdoing.



However, in view of the allegations that the Welsh Government sought to influence the author of the report in this case, the Commissioner considers that there is a strong case here for transparency to reassure the public and enhance public understanding as to how the report developed.

55. The Commissioner has considered the withheld information and the wider context that informs the public interest against the principles of transparency and accountability. For the reasons set out above, whilst this is a finely balanced case, the Commissioner considers that in all the circumstances of the case, the public interest in maintaining the exemptions at section 36(2)(b) does not outweigh the public interest in disclosure.

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

56. In relation to section 36(2)(c) (which has been applied to all of the withheld information) the Welsh Government put forward the following public interest arguments in favour of maintaining the exemption:
- a. Disclosure would inhibit future interaction by subject experts who may be called on to draft or contribute to strategic policy documents in the future, thus negatively impacting on future policy making.
  - b. Disclosure has the potential to negatively impact on the openness/boldness of advice from experts (denied the 'safe space' in which to work) which in turn "risks prejudice to future policy making and the conduct of Government business".
  - c. There is a strong public argument in maintaining and protecting the efficacy of the drafting process and to release drafts would not further public understanding and possibly give a misleading impression to the public.
  - d. It is in the public interest that the Welsh Government operates in a way that enables sound decisions to be made, which includes securing independent advice to inform policy making. In this case, this will enable NHS managers to take forward any actions to improve the sustainability, efficiency and effectiveness of healthcare in Wales. Disclosure would be likely to inhibit the future free and frank provision of advice which would in turn impact on this process.
  - e. Disclosure would be likely to renew media interest in the subject matter and this officials would be diverted to manage these disruptive effects and "deny experts and Government officials the 'safe space' by which to present ideas and opinions". Both these



factors would affect the ability to offer an effective public service. It is not in the public interest for resources to be diverted from providing the usual level of service to people in Wales, especially during what is a very sensitive time for changes within NHS Wales have not been finally settled and are still the subject of considerable contention amongst interest parties.

57. The Welsh Government again argued that the timing of the request in this case is a very important factor in assessing the public interest considerations. Although at the time of the request the drafting process associated with the Case for Change report had been completed and a final report presented, there were live issues connected with the subject matter and change within NHS Wales was on-going.

### **Balance of the public interest arguments – section 36(2)(c)**

58. Many of the public interest arguments provided by the Welsh Government relate to the inhibiting effects claimed under sections 36(2)(b) and these have been considered in relation to these exemptions earlier in this notice. Again, the Welsh Government submitted a number of public interest arguments relating to the development of policy. As stated earlier in this notice, the correct exemption in relation to the formulation or development of government policy is section 35 of the FOIA. If the withheld information in this case fell under section 35 then it could not be exempt under section 36 as the exemptions are mutually exclusive. The Welsh Government did not at any stage seek to rely on section 35 in respect of any of the withheld information, and the Commissioner therefore has not considered its arguments in relation to policy development.
59. As stated earlier in this notice, in relation to section 36(2)(c) the Commissioner accepted as reasonable the opinion of the qualified person that disclosure would be likely to impact on resources in managing the effect of disclosure. The only public interest argument that the Welsh Government has submitted in relation section 36(2)(c) to this specific prejudice is detailed at paragraph 56(e) above. The Commissioner acknowledges that the media interest generated when other information was released about the subject matter would have caused staff to be diverted from their core duties in order to manage the impact of that disclosure. He also considers that disclosure of the withheld information would be likely to lead to further media attention and as such the Commissioner had accorded some weight to this argument.
60. As detailed earlier in this notice, the Commissioner accepts that the issue of the NHS changes in general was on-going at the time of the request. However, in view of the fact that the Case for Change report had been published prior to the request, the Commissioner considers

that, in effect, this particular stage in the process regarding proposed changes to the NHS in Wales in terms of advice-giving and exchanging of views had therefore come to an end.

61. In this case, the Commissioner considers there is a very strong public interest in the subject matter of this case as any changes to healthcare provision in Wales are likely to be of significant impact on Welsh residents.
62. The Commissioner considers that where there is a suspicion of wrongdoing or a lack of public confidence in a particular process there is a public interest in presenting the full picture. The Commissioner cannot assess whether there has been maladministration or other wrongdoing. However, in view of the allegations that the Welsh Government sought to influence the author of the report in this case, as referred to in paragraphs 28, 39 and 54 of this notice, the Commissioner considers that there is a strong case here for transparency to reassure the public and enhance public understanding as to how the report developed.
63. For the reasons set out above, whilst the Commissioner acknowledges there are arguments both for and against disclosure and that this is a finely balanced case, he considers that in all the circumstances of the case, the public interest in maintaining the exemption at section 36(2)(c) does not outweigh the public interest in disclosure.

## Right of appeal

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64. 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)

65. 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.
66. 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**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**