

ANNEX 1: Application of exemptions

The Freedom of Information Act 2000 provides a right for anyone to ask a public authority to make requested information available to the wider public. As the release of requested information is to the world, not just the requester, public authorities need to consider the effects of making the information freely available to everybody. Any personal interest the requester has for accessing the information cannot override those wider considerations.

I have decided to withhold the following information under section 40(2) (Personal Data) of the Freedom of Information Act 2000:

- The name of the Welsh Refugee Council representative who submitted a response to the 2021 Consultation on Future Funding for the Equality and Inclusion Programme (Annex 4)
- The names and job titles of the Welsh Government officials who were members of the evaluation panel for C142/2021/2022 Lot 2 (Annex 5)
- The names of Welsh Government officials who undertook the quality assurance checks on procurement as set out in the Contract Award Recommendation (Annex 5)

I have decided to withhold the following information under section 41(1) (Information provided in confidence):

- Transcript of a stakeholder consultation event on 25 March 2021 as part of a consultation on the Future Funding for the Equality and Inclusion Programme

This Annex sets out the reasons for the engagement of sections 40(2) and 41(1) of the Freedom of Information Act 2000.

Engagement of section 40(2) (Personal Data) of the Freedom of Information Act

Section 40(2) of the Freedom of Information Act 2000 (FOIA), together with the conditions in section 40(3)(a)(i) or 40(3)(b), provides an absolute exemption if disclosure of the personal data would breach any of the data protection principles.

‘Personal data’ is defined in sections 3(2) and (3) of the Data Protection Act 2018 (‘the DPA 2018’) and means any information relating to an identified or identifiable living individual. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

I have concluded that, in this instance, the information requested contains third party personal data.

Under Section 40(2) of the FOIA, personal data is exempt from release if disclosure would breach one of the data protection principles set out in Article 5 of the GDPR. We consider the principle being most relevant in this instance as being the first. This states that personal data must be:

“processed lawfully, fairly and in a transparent manner in relation to the data subject”

The lawful basis that is most relevant in relation to a request for information under the FOIA is Article 6(1)(f). This states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”.

In considering the application of Article 6(1)(f) in the context of a request for information under FOIA it is necessary to consider the following three-part test:

1. **The Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
2. **The Necessity test:** Whether disclosure of the information/confirmation or denial that it is held is necessary to meet the legitimate interest in question;
3. **The Balancing test:** Whether the above interests override the interests, fundamental rights and freedoms of the data subject.

Our consideration of these tests is set out below:

1. Legitimate Interest Test

The Welsh Government recognises that there may be a legitimate interest in understanding who responded to the 2021 Consultation on Future Funding for the Equality and Inclusion Programme and which Welsh Government officials were involved in the procurement process for C142/2021/2022 Lot 2. We have not identified any further legitimate public interest that would require the disclosure of this personal data.

2. Is disclosure necessary?

The Welsh Government does not consider it necessary to disclose the personal data requested in order to meet the legitimate interest identified above. The consultation response and procurement process can be understood without identifying the individuals involved. Disclosure of the names and job titles of the individuals concerned would not add materially to public understanding of these matters and is therefore not considered necessary for the purposes of Article 6(1)(f).

3. The Balancing Test

As the Welsh Government has concluded that disclosure of the personal data is not necessary to meet the legitimate interest identified above, the conditions of Article 6(1)(f) are not met. In these circumstances, it is not necessary to undertake a detailed balancing exercise between the rights and freedoms of the individuals concerned and the interests in disclosure.

To conclude, disclosure of the requested personal data would not satisfy the lawful basis set out in Article 6(1)(f). As no other Article 6 condition is considered to apply, disclosure would not be lawful and would therefore breach the first data protection principle. The information has therefore been withheld under section 40(2) of the Freedom of Information Act 2000. Section 40 is an absolute exemption and is not subject to the public interest test.

Engagement of Section 41(1)(a) (Information provided in confidence) of the Freedom of Information Act

A representative of the Welsh Refugee Council was one of a number of stakeholders who attended a virtual consultation event with Welsh Government officials on 25 March 2021 as part of the consultation on the Future Funding for the Equality and Inclusion Programme. A transcript of the discussion is held by the Welsh Government. The transcript records contributions and views provided by multiple stakeholders during the consultation event and was created to assist officials in considering the issues raised through the consultation process. It was not intended for wider publication or circulation.

The Welsh Government considers that the transcript has the necessary quality of confidence. The information recorded in the transcript consists of views, comments and contributions provided by third parties during a stakeholder engagement exercise. The information was obtained from persons outside the Welsh Government and was shared for the specific purpose of informing policy development and consideration of consultation responses.

The circumstances in which the information was obtained gave rise to an obligation of confidence. Participants in the consultation event would have had a reasonable expectation that their detailed contributions would be used by Welsh Government officials for the purposes of the consultation process and would not subsequently be disclosed to the wider public through a Freedom of Information request. Disclosure of the transcript would reveal information provided by stakeholders in confidence and would undermine that expectation.

The Welsh Government considers that disclosure of the transcript would amount to an unauthorised disclosure of confidential information obtained from third parties and could therefore constitute an actionable breach of confidence. The information is therefore exempt from disclosure under section 41(1) of the Freedom of Information Act 2000.

Consideration of the Public Interest Test

In considering whether a public interest defence to a breach of confidence action could apply, the Welsh Government has carefully considered the public interest in disclosure.

The Welsh Government recognises the strong public interest in openness, transparency and accountability in public decision-making. Disclosure can promote public confidence in government processes and support informed public debate.

The 2021 consultation on the Future Funding for the Equality and Inclusion Programme related to funding arrangements for a programme delivered under a previous Welsh Government programme of work and concerned matters of public importance affecting communities across Wales. The consultation was undertaken to inform policy and funding decisions designed to improve outcomes for the people of Wales. There is therefore a legitimate public interest in understanding the issues considered and the evidence and perspectives that informed decision-making.

The Welsh Government has also considered the specific public interest in disclosure of the transcript. Disclosure could provide additional insight into the views expressed by stakeholders during the consultation process and contribute to public understanding of how those views informed policy development at that time.

However, the transcript contains information provided by stakeholders in circumstances giving rise to a duty of confidence. The Welsh Government considers there to be a strong public interest in maintaining that confidence. Disclosure would undermine the reasonable expectations of participants, damage trust between the Welsh Government and stakeholders, and risk discouraging open and candid engagement in future consultation exercises. This would reduce the quality of evidence available to inform future policy development for the benefit of the people of Wales.

Having carefully considered the circumstances of this case, the Welsh Government does not consider that the public interest in disclosure is sufficiently compelling to justify breaching the duty of confidence owed to participants. The public interest in preserving confidences and maintaining the effectiveness of future stakeholder engagement outweighs the public interest in disclosure. The exemption in section 41(1) is therefore engaged.