

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 January 2023

Public Authority: The Welsh Parliament
Address: Cardiff Bay
Cardiff
CF99 1SN

Decision (including any steps ordered)

1. The complainant has requested correspondence between Senedd Commission staff and various parties on the subject of the vote on the introduction of covid passes in Wales. The Senedd Commission (as the corporate body for The Welsh Parliament) provided some redacted information but withheld information at parts 2 and 3 of the request on the basis of sections 36(2)(b)(i), (ii) and (c) of FOIA.
2. The Commissioner's decision is that the public authority has correctly engaged the section 36(2)(b)(i) and (ii) exemptions and the balance of the public interest lies in maintaining the exemption and withholding the information. He requires no steps to be taken.

Request and response

3. On 14 October 2021 the complainant made a request to the Welsh Parliament for information in the following terms:
 - 1) "Correspondence between Commission staff and Gareth Davies (MP for Vale of Clwyd) regarding the vote held on October 5th to introduce covid passes in Wales
 - 2) Correspondence between Commission staff discussing the vote held on October 5th to introduce covid passes in Wales

- 3) Correspondence between Commission staff and the Presiding Officer's office discussing the vote held on October 5th to introduce covid passes in Wales

I would appreciate any correspondence in Welsh or English that answers the above requests that were sent between 4 October and 14 October 2021."

4. The Senedd Commission (the corporate body for the Welsh Parliament or Senedd) responded on 17 December 2021 stating that for part 1 of the request no information was held. For part 2 the Senedd Commission attached information that it held with some redactions for personal data and information it considered engaged section 36(2)(b)(i), (ii) and (c) of FOIA. The information held in relation to part 3 was withheld in its entirety under the same exemptions. This position was upheld at internal review.

Reasons for decision

5. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a Qualified Person (QP), disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
6. The Senedd Commission has applied section 36(2)(b)(i), (ii) and (c) to withhold information at parts 2 and 3 of the request – namely correspondence between Commission staff discussing the vote on introducing covid passes and correspondence between Commission staff and the Presiding Officer's office on the same subject.
7. Arguments under these sections are usually based on the concept of a 'chilling effect.' The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making. As the Commissioner's well established guidance on section 36¹ makes clear, civil servants and other public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice. Nonetheless, chilling effect arguments cannot be dismissed out of hand.

¹ [Section 36 \(ico.org.uk\)](https://ico.org.uk)

8. The Commissioner's guidance on section 36 states that information may be exempt under sections 36(2)(b)(i) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation.
9. In this case, the Senedd Commission argue that disclosing the information would hinder candid discussion about the issues being faced during the course of Senedd proceedings and may dilute the frankness of discussions. An environment in which officials cannot freely express themselves would diminish their capacity to provide robust advice and would be to the detriment of the decision making process. This rationale has been accepted in many previous decisions of the Commissioner.
10. The Senedd Commission has also emphasised the need to preserve the 'safe space' needed to consider advice and discuss options away from public scrutiny to assist the Presiding Officer ("the Llywydd") in making effective decisions.
11. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a QP. The Commissioner is satisfied that the Llywydd was authorised as a QP under section 36(5) of FOIA at the relevant time and that the Senedd Commission did ask for and receive her opinion that all limbs of the exemption were engaged.
12. It is not the role of the Commissioner to substitute his own opinion for that of the QP. A reasonable opinion need not be the most reasonable opinion available. It need only be within the spectrum of opinions that a reasonable person might hold and must not be irrational or absurd.
13. The Commissioner accepts the QP's opinion was a reasonable one based on the risk of a chilling effect and the possible erosion of the safe space need to discuss issues frankly and provide advice away from external influence and distraction. There was a need for officers to be able to provide advice and support to the Llywydd and her Private Office to ensure the smooth running of Senedd proceedings and effective decision making. The Commissioner is therefore satisfied the exemptions in sections 36(2)(b)(i) and (ii) were engaged correctly.

The public interest test

14. When considering whether the public interest favours maintaining the exemption or disclosing the requested information, the Commissioner has taken account of the age of the requested information – only a few days before the request was made and just after announcements were made about the decision to introduce covid passes in Wales for certain

venues. The Commissioner notes the decision to introduce covid passes was approved by extremely narrow margins and the correspondence that has been withheld discusses the voting process.

15. Disclosing details of the correspondence and advice given by officials at this time to inform the decision-making process may have impacted on future discussions on the same issue and affected the candidness of debates on Senedd proceedings. The changing nature of the situation during the pandemic meant decisions often needed to be taken at pace and communications were often more frank. In this case there were sensitive (in terms of time and content) matters that needed to be discussed and resolved effectively and efficiently following the vote and the decision. If officials were concerned that these discussions might be made public, the resultant loss of frankness and candour in the course of discussions and deliberations would be likely to damage the quality of advice to decision makers, and thus inhibit the ability to make informed decisions.
16. The Commissioner accepts that disclosure would inform public debate by providing the public with information on the decision making process and the advice provided to the Llywydd on the vote.
17. The Commissioner considers the public interest in good decision-making and the ability to provide advice freely and frankly to assist in maintaining effective Senedd proceedings to be a compelling argument in favour of maintaining the exemption in this case. He has reached this view by a narrow margin given that disclosure at the time of the request would have contributed to the public interest in knowing more about the vote. While he acknowledges that the public interest in openness and transparency would be served if the information was disclosed, on balance, he finds the public interest in protecting the Senedd Commission's access to unfiltered and frank advice to be the stronger argument, particularly given the timing of the request and the 'live' nature of the issue.
18. Consequently, he is satisfied that, in this case, the public interest favours maintaining the exemption. It follows that his decision is that the Senedd Commission was entitled to rely on sections 36(2)(b)(i) and (ii) of FOIA to withhold the remaining information. He has therefore not gone on to consider section 36(2)(c).

Right of appeal

19. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

20. 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.
21. 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

Jill Hulley
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Wycliffe House
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