

22 April 2024

Dear

ATISN 20385 – Tender process for Business Wales Accelerated Growth Programme Services

Information requested

Thank you for your request. You asked for:

All documentation and information held by your client in respect of both tender exercises (C079/2021/2022 and C077/2023/2024), in accordance with the requirements of the Public Contract Regulations 2015, concerning our client and Newable, including (without limitation):

1. the tenders submitted by our client and Newable;
2. the marking of those tenders by your client;
3. external communications between your client and Newable.

Our response

I have decided that some of the information is exempt from disclosure under sections 21, 32, 40(2) and 43 of the Freedom of Information Act and is therefore withheld. The reasons for applying these exemptions are set out in full at Annex 1 to this letter.

Request 1

For C079/2021/2022 and C077/2023/2024, I confirm that the Welsh Government holds information captured by your request in the form of the tender responses (qualification, technical and commercial responses).

I have decided that the information submitted by Newable International Consulting (Newable) is exempt from disclosure under section 43(2) of the Freedom of Information Act (Commercial Interests) and is therefore withheld.

I have decided that the information submitted by C3/Impact Innovation & Growth Services is exempt from disclosure under section 21 of the Freedom of Information Act (Information accessible to applicant by other means) and is therefore withheld.

Request 2

For C079/2021/2022, I confirm that the Welsh Government holds information captured by your request.

I have decided that the moderated scores and moderated comments are releasable and a redacted copy of these is attached in Doc 1. This information relates to the abandoned procurement where no contract was awarded. However, in the spirit of transparency, we are sharing the level of detail that was issued to Newable as an unsuccessful bidder and in order to comply with our statutory obligations under Public Contract Regulations 2015.

I have decided that individual evaluator comments and scores and the comments by Corporate Procurement Services for both C3/Impact Innovation & Growth Services and Newable are exempt from disclosure under section 43(2) of the Freedom of Information Act (Commercial Interests) and is therefore withheld.

For C077/2023/2024, I confirm that Welsh Government holds information captured by your request.

I have decided that some of this information is exempt from disclosure under section 21 of the Freedom of Information Act (Information accessible to applicant by other means) and is therefore withheld. The information is exempt from disclosure because we have already shared with you the individual evaluator scores by question, the final moderated scores by question, the moderation panel comments by question and the additional comments by Corporate Procurement Services by question for both C3/Impact Innovation & Growth Services and Newable.

Further, we have also already shared with you, the individual evaluator comments by question for C3/Impact Innovation & Growth Services that were contained within the evaluation matrix.

I have decided that Information relating to individual evaluator comments are exempt from disclosure under section 43(2) of the Freedom of Information Act (Commercial Interests) and is therefore withheld.

Request 3

For C079/2021/2022, I can confirm that the Welsh Government does hold external communications between the Welsh Government and Newable captured by your request.

The first pertains to the collection and provision of TUPE information. A redacted copy of this email exchange is attached in Doc 2.

The second is the procurement exercise outcome letter from the Welsh Government to Newable containing their moderated scores and comments along with those of C3/Impact Innovation & Growth Services. I have decided that this information is releasable and a copy of these is attached in Doc 3.

The third is a pre-action protocol letter from Newable to the Welsh Government and the corresponding response. I have decided that this information is exempt from disclosure under section 32 of the Freedom of Information Act (Court, inquiry or arbitration records) and is therefore withheld. The decision to withhold this information was taken under consideration of ICO ruling on a similar case noted in https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1008880/fs_50508730.pdf.

For C077/2023/2024, I can confirm that the Welsh Government does hold external communications between the Welsh Government and Newable captured by your request.

The first pertains to the collection and provision of TUPE information. A redacted copy of this email exchange is attached in Doc 4.

The second is the procurement exercise outcome letter from the Welsh Government to Newable containing their moderated scores and comments. I have decided that this information is exempt from disclosure under section 21 of the Freedom of Information Act (Information accessible to applicant by other means) and is therefore withheld. The information is exempt from disclosure because it is contained in the outcome letter that your client received at the point of conclusion of the procurement exercise (C077/2023/2024).

Next steps

If you are dissatisfied with the Welsh Government's handling of your request, you can ask for an internal review within 40 working days of the date of this response. Requests for an internal review should be addressed to the Welsh Government's Freedom of Information Officer at:

Information Rights Unit,
Welsh Government,
Cathays Park,
Cardiff,
CF10 3NQ

or Email: Freedom.ofinformation@gov.wales

Please remember to quote the ATISN reference number above.

You also have the right to complain to the Information Commissioner. The Information Commissioner can be contacted at:

Information Commissioner's Office,
Wycliffe House,
Water Lane,
Wilmslow,
Cheshire,
SK9 5AF.

However, please note that the Commissioner will not normally investigate a complaint until it has been through our own internal review process.

Yours sincerely

Annex 1

Application of exemptions/exceptions

The Freedom of information Act/Environmental Information Regulations provide 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:

Information being withheld	Section number and exemption name
<p>The qualification, technical and commercial responses submitted by C3/Impact Innovation & Growth Services</p> <p>For C077/2023/2024 Welsh Government completed evaluation Matrix for C3/Impact Innovation & Growth Services</p> <p>For C077/2023/2024, individual assessor scores, moderated scores and comments and CPS comments contained within the Welsh Government completed evaluation Matrix for Newable</p> <p>For C077/2023/2024, Procurement outcome letter to Newable from Welsh Government</p>	<p>Section 21 Information accessible to applicant by other means</p>
<p>For C079/2021/2022, Pre-action protocol letter from Newable to Welsh Government and the corresponding response</p>	<p>Section 32 Court, inquiry or arbitration records</p>
<p>Personal Information contained in correspondence</p>	<p>Section 40(2) Personal Data</p>
<p>The qualification, technical and commercial responses submitted by Newable</p>	<p>Section 43 (2) Commercial Interests</p>

<p>For C079/2021/2022, individual evaluator comments and scores, the comments by Corporate Procurement Services for both C3/Impact Innovation & Growth Services and Newable</p> <p>For C077/2023/2024, individual evaluator comments</p>	
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This Annex sets out the reasons for the engagement of section 43 (2) of the **Freedom of Information Act** and our subsequent consideration of the Public Interest Test.

Engagement of Section 40(2) – Personal Data

Section 40(2) 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.

We 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:-

- **The Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- **The Necessity test:** Whether disclosure of the information/confirmation or denial that it is held is necessary to meet the legitimate interest in question;
- **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 interests

The personal data is the name of correspondents in the correspondence and information captured by this request. There is a legitimate interest in understanding the context of communications, and from which and to which organisations the correspondence was addressed.

2. Is disclosure necessary?

Disclosure of the personal data is not necessary for the legitimate interest, where we can provide the context of the request instead. By replacing the names with the context (e.g. WG Official 1 etc.) we are able to maintain the context for which a legitimate interest exists without disclosing personal data, which affects the fundamental rights of the data subjects under data protection legislation.

3. The balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

Because the redaction meets the legitimate interest and so disclosure of the personal data is not necessary, there is no need to further consider the balance of interests, and the information is withheld.

Engagement of section 43 (2) (Commercial Interests) of the Freedom of Information Act.

This exemption states that:

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

Section 43 is a qualified (public interest tested) exemption. This means that in order to engage it, I must show that the public interest in withholding the information is greater than the public interest in releasing it. I have therefore given consideration to the effects of disclosure of the information to the world at large as the information is made available to anybody and everybody, not just the requestor. As such, when considering your request, I have considered the wider effects of disclosure rather than any personal interest you may have in being provided with the information.

Prejudice test

The qualification, technical and commercial responses as part of the tender submission provided by the bidders contain intellectual property, strategies and plans for delivery of services and related commercial pricing including day rates of personnel. Further the technical responses contain personal information and experience of named individuals cited to deliver the services.

Releasing this information to the public would be likely to damage the bidder's commercial interests in either delivering the services or future tendering opportunities to Welsh Government or other public sector bodies if other potential bidders could access this information. The requested information contains commercial and proprietary business information that is a business asset to each prospective bidder and is not in the public domain.

Putting this into the public domain would allow competitors access to this business information, putting the bidders at commercial disadvantage which would be likely to lead to commercial loss, as they would be unable to undertake competitive bids on an equal footing. Release under FOI is release to the world, and the published information would therefore be expected to lead to such losses.

For these reasons, Section 43 is engaged.

Public Interest Test

In order to satisfy the public interest test in relation to the section 43 exemption, it is necessary to conclude that the public interest arguments in favour of withholding the information are sufficient to *outweigh* the public interest arguments in favour of release.

Public interest arguments in favour of disclosure

Welsh Government acknowledges the public interest in openness and transparency that release of the information would engender. There is also a public interest in how public money is to be, or has been, used to ensure that Government gets the best value from the public purse.

I also accept that anyone bidding on public contracts does so with the knowledge that this is done within an open regime that must be open to public scrutiny.

Public interest arguments in favour of withholding under Section 43

It is not in the public interest that companies tendering for contracts should suffer commercial loss as a result. Release of this information would be likely to cause such commercial loss, which will damage the companies themselves and trust in the tender process.

Balance of public interest test

Release of the information makes it likely that the bidders would suffer commercial loss, as they would be placed at a commercial disadvantage for future bids if their innovative strategies, approaches to delivering the work, budgets, and commercial pricing structures were understood by competitors, where similar information from competitors is not similarly placed in the public domain. This constitutes commercial business information that is a business asset.

An equally strong countervailing public interest in disclosure would be required to make it in the public interest that bidders be put at risk of commercial loss. Although we have identified some public interest in disclosure, there is no specific or sufficiently strong countervailing interest to allow bidders to suffer such loss, so the balance of public interest lies with withholding this information.