



Llywodraeth Cymru
Welsh Government

Parc Cathays/Cathays Park
Caerdydd/Cardiff
CF10 3NQ

Dyddiad/Date: 17 June 2020

Dear

ATISN 13993 MA - ERD Road project - contract number C190/2019/2020

Thank you for your request which I received on **19 May 2020** about releasing the following information with reference to the tender process for ERDF Road Projects, Contract Number C190/2019/2020:

1. A copy of the winning bid documents.
2. A copy of the tender evaluation panel's individual notes and scores to your tender submission.

A copy of the information I have decided to release is enclosed.

I have decided that **some of the information** is exempt from disclosure under section(s) **40 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.

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 to Template Letter 8

I have decided to withhold the following information:

Information being withheld	Section number and exemption name
Names of individuals in SQW's Technical submission.	Section 40 of the FOIA, Personal Data
Names of individuals and rates within SQW's Commercial Submission	Section 40 of the FOIA, Personal Data and Section 43(2), Commercial Interests
Names of the Individual Evaluation Panel members	Section 40 of the FOIA, Personal Data

This Annex sets out the reasons for the engagement of section(s) 40 and 43 of the Freedom of Information Act and our subsequent consideration of the Public Interest Test.

Section 40 – Personal Data

This exemption applies to names and personal information of individuals in the released information.

Section 40 of the FoIA sets out an exemption from the right to know if the information requested is personal information protected by the Data Protection Act 1998 (DPA). Personal data is defined in Section 1(1) of the DPA as:

“personal data” means data which relates to a living individual who can be identified from those data; or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller”.

I have concluded that, in this instance, the withheld information constitutes personal data, being the names of individuals and panel members.

Under Section 40(2) of the FoIA, personal data is exempt from release if disclosure would breach one of the data protection principles. I consider the principle being most relevant in this instance as being the first.

The first data protection principle states:

*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -
(a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

I consider that the withheld information in relation to names and contact details falls within the description of personal data as defined by the DPA and that its disclosure would breach the first data protection principle. The first data protection principle has two components:

1. Personal data shall be processed fairly and lawfully and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met

Guidance from the Information Commissioner's Office (Personal information (section 40 and regulation 13) v 1.4) states:

The starting point is to consider whether it would be fair to the data subject to disclose their personal data.

If disclosure would not be fair, then the information is exempt from disclosure.

This approach was endorsed by the Court of Appeal in the case of Deborah Clark v the Information Commissioner and East Hertfordshire District Council where it was held:

"The first data protection principle entails a consideration of whether it would be fair to disclose the personal data in all the circumstances. The Commissioner determined that it would not be fair to disclose the requested information and thus the first data protection principle would be breached. There was no need in the present case therefore to consider whether any other Schedule 2 condition or conditions could be met because even if such conditions could be established, it would still not be possible to disclose the personal data without breaching the DPA" (paragraph 63).

Our analysis of the ICO's key considerations in assessing 'fairness', as set out in the Guidance, are presented below.

The withheld information amounts to the personal data of individuals who do not have senior and public facing roles, and who would therefore have the reasonable expectation that their personal data would be kept confidential and not released into the public domain in this context.

Thus, we believe release of this information contrary to their reasonable expectation would be unfair and so breach the first data protection principle. For that reason, the information is being withheld under section 40(2) of the Freedom of Information Act. This is an absolute exemption and not subject to the public interest tests.

Section 43 (2) – Commercial Interests

This applies to the rates in SQW's submission, which is information that is not in the public domain, and the knowledge of which could allow competitors, whose own rates are not in the public domain, to gain an unfair advantage over them in bids for future work.

Section 43(2) of the FoIA 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.

Public Interest Test

I recognise the general public interest in openness and transparency and that there is 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.

However, as described above, specific commercial information contained within the bids, such as the rates charged, are not information that the bidder would expect to be made available to the public domain, and merely forms part of a larger overall bid which should be evaluated as a whole. Transparency and open government are satisfied by ensuring overall value and costs of bids are shared, and release of detail such as the rates charged does little to aid transparency.

Nevertheless the release of the information does make it likely that the bidder would suffer commercial loss, as they would be placed at a commercial disadvantage in future bids if their rates are known and understood by competitors, when competitor rates are not similarly placed in the public domain.

As it is likely the bidder would suffer commercial loss from release of this information, it is not, on balance, in the public interest that it should be released and so I am withholding it.