



**Llywodraeth Cymru  
Welsh Government**

Parc Cathays/Cathays Park  
Caerdydd/Cardiff  
CF10 3NQ

21 September 2021

Dear

**ATISN 15453 - CCS Media Limited - Freedom of Information Request**




**Information requested**




Thank you for your request which I received on 23 August 2021. I have set out at Annex 1 the information you have requested in relation to NPS framework agreement reference NPS – ICT-0104-20.



**Our response**

I have decided that some of the information is exempt from disclosure under section(s) 41, 42 and 43 (2) of the Freedom of Information Act and is therefore withheld. The reasons for applying these exemptions are set out in full at Annex 2 to this letter.

The information we hold and can provide against what was requested is as follows:

<b>FOI Request Questions</b>	<b>Our Response</b>	<b>Documents</b>
1. Copies of any documents relating to Clarification 76 in the Procurement.	Framework Schedule 2 (Products and Services Description), paragraphs 6.1 - 6.3 detailing scope of Lot 2.	 Document_01 - Extract from Specifica
	Lot 2 Clarification Log, containing clarification questions and responses issued as part of the tender process.	 ATISN 15453 - 2021-08-24 - Informa
2. Copies of the scoring sheets / records of the individual evaluators in connection with CCS Media's bid in the Procurement.	The export from the Award, used for moderation exercise attached. Redacted to remove the names of individual evaluators.	 ATISN 15453 - 2021-08-24 - Informa

<p>3. Copies of any documents concerning any moderation process undertaken in the Procurement.</p>	<p>The moderation exercise minutes attached.</p> <p>Redacted to a duty of confidentiality arising under Regulations 21 and 22(11) of the Public Contract Regulations 2015 (s. 41 Freedom of Information Act exemption) and, that disclosure would be damaging to the commercial interests of those bidders (s. 43 Freedom of Information Act exemption).</p>	 <p>ATISN 15453 - 2021-08-24 - Inform</p>
	<p>Embedded Moderation report containing individual technical evaluator comments for all tender responses.</p> <p>Redacted to a duty of confidentiality arising under Regulations 21 and 22(11) of the Public Contract Regulations 2015 (s. 41 Freedom of Information Act exemption) and, that disclosure would be damaging to the commercial interests of those bidders (s. 43 Freedom of Information Act exemption).</p>	 <p>ATISN 15453 - 2021-08-24 - Inform</p>
<p>4. Confirmation of which bidders were asked to clarify their pricing and on what date.</p>	<p>All 7 suppliers tendering were asked to clarify their pricing on the 19/04/2021.</p>	<p>N/A</p>
<p>5. Confirmation of what due diligence NPS and/or the Welsh Government undertook to verify the answers given by bidders in response to clarifications concerning pricing.</p>	<p>Pricing clarifications were reviewed and accepted where the response was deemed acceptable.</p>	<p>N/A</p>
<p>6. Copies of all notes and records of NPS's assessment of each bidder's price.</p>	<p>The tenders were assessed in line with the methodology detailed in the ITT attached.</p> <p>Reports containing tenderers pricing would be exempt due to confidentiality arising under Regulations 21 and 22(11) of the Public Contract Regulations 2015 (s. 41 Freedom of Information Act exemption) and, that disclosure would be damaging to the commercial interests of those bidders (s. 43 Freedom of Information Act exemption).</p>	 <p>Document_06 - Invitation to Tender.doc</p>
<p>7. The Regulation 84 report prepared in relation to the contract award decision.</p>	<p>Lot 2 was not awarded, therefore a Regulation 84 report was not drafted for the award of Lot 2. Please see response to question 12.</p>	<p>N/A</p>

8. Confirmation of when was the decision to abandon the Procurement taken.	2 August 2021	N/A
9. Confirmation of how the decision to abandon the Procurement was taken and by whom.	The Deputy Director for Commercial Procurement signed off based on Briefing Note referenced in Question 10 and Legal Counsel referenced in Question 11.	N/A
10. A copy of any report prepared recommending abandoning the Procurement for decision.	<p>The briefing report sent to the Deputy Director for Commercial Procurement attached.</p> <p>Redacted to a duty of confidentiality arising under Regulations 21 and 22(11) of the Public Contract Regulations 2015 (s. 41 Freedom of Information Act exemption) and, that disclosure would be damaging to the commercial interests of those bidders (s. 43 Freedom of Information Act exemption) and on grounds of Litigation Privilege.</p>	 ATISN 15453 - 2021-08-24 - Informa
11. A copy of the minutes / record of the decision to abandon the Procurement.	The minutes of meeting with Welsh Government Legal Counsel has not been disclosed due to exemption on grounds of Litigation/ Legal Privilege (s. 42 Freedom of Information Act exemption).	N/A
12. The Regulation 84 Report reflecting the decision to abandon the Procurement.	<p>The Reg. 84 Report for Lot 2 attached.</p> <p>Redacted to a duty of confidentiality arising under Regulations 21 and 22(11) of the Public Contract Regulations 2015 (s. 41 Freedom of Information Act exemption) and, that disclosure would be damaging to the commercial interests of those bidders (s. 43 Freedom of Information Act exemption).</p>	 ATISN 15453 - 2021-08-24 - Informa

## 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](mailto: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**

1. Copies of any documents relating to Clarification 76 in the Procurement.
2. Copies of the scoring sheets / records of the individual evaluators in connection with CCS Media's bid in the Procurement.
3. Copies of any documents concerning any moderation process undertaken in the Procurement.
4. Confirmation of which bidders were asked to clarify their pricing and on what date.
5. Confirmation of what due diligence NPS and/or the Welsh Government undertook to verify the answers given by bidders in response to clarifications concerning pricing.
6. Copies of all notes and records of NPS's assessment of each bidder's price.
7. The Regulation 84 report prepared in relation to the contract award decision.
8. Confirmation of when was the decision to abandon the Procurement taken.
9. Confirmation of how the decision to abandon the Procurement was taken and by whom.
10. A copy of any report prepared recommending abandoning the Procurement for decision.
11. A copy of the minutes / record of the decision to abandon the Procurement.
12. The Regulation 84 Report reflecting the decision to abandon the Procurement.

## Annex 2

### Application of exemptions/exceptions

The Freedom of information Act 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:

Information being withheld	Section number and exemption name
Information relating to question 3: The moderation minutes and the individual technical evaluations of all suppliers, embedded in the minutes.	Section 41 Information Provided in Confidence Section 42 Legal Professional Privilege Section 43 (2) Commercial Interests.
Information relating to question 10: Report recommending the abandonment of the tender, containing: <ul style="list-style-type: none"><li>• information relating to legal advice sought from Counsel; and</li><li>• Information relating to individual tenderers</li></ul>	Section 41 Information Provided in Confidence Section 42 Legal Professional Privilege Section 43 (2) Commercial Interests.
Information relating to question 11: Minutes from Welsh Government meeting with Legal Counsel	Section 42 Legal Professional Privilege
Information relating to question 12: Regulation 84 Report	Section 41 Information Provided in Confidence Section 42 Legal Professional Privilege Section 43 (2) Commercial Interests.

This Annex sets out the reasons for the engagement of section(s) 41, 42 and 43 (2) of the **Freedom of Information Act** and our subsequent consideration of the Public Interest Test.

## **Engagement of section 41 (Information Provided in Confidence) of the Freedom of Information Act.**

ICO guidance states that:

Information will be covered by Section 41 if;

- it was obtained by the authority from any other person,
- its disclosure would constitute a breach of confidence.
- a legal person could bring a court action for that breach of confidence, and
- that court action would be likely to succeed

Some aspects of the information including techniques, methods, systems, financial models and costing mechanism provided were provided in confidence, such that disclosure of that information by us would form an actionable breach of confidence. We also understand that action by suppliers would be likely in the event of its disclosure. Section 41 of the FOIA is therefore engaged.

Section 41 is an absolute exemption and not subject to the public interest tests.

### **Section 42 – Legal Professional Privilege**

Legal professional privilege (LPP) covers communications between lawyers and their clients for the purpose of obtaining legal advice, or documents created by or for lawyers for the “dominant” (main) purpose of litigation. The information in question clearly falls within the scope of this exemption as it consists of legal advice provided by a qualified solicitor to procurement officials within the Welsh Government.

The section 42(1) exemption is qualified, which means that it is subject to a public interest test. This requires the Welsh Government to decide whether the public interest arguments in favour of withholding the information are sufficient to outweigh the public interest arguments in favour of disclosure. Our consideration of the public interest test is set out below.

#### **Public interest arguments in favour of disclosure**

There is a public interest in individuals being able to exercise their rights under FOIA to enhance their understanding of the reasons for decisions or actions taken by a public body and in some cases challenge decisions affecting the lives of members of the public.

There is an inherent public interest in ensuring that public authorities are transparent in the decisions they make in order to promote accountability and improve the quality of their decision making.

The disclosure of the legal advice might enable the public to ascertain whether there was any incompatibility between the advice provided and the policy decisions that were taken and whether any advice which had been provided was followed.

## **Public interest arguments in favour of withholding**

There is a strong public interest served in public authorities being able to access advice which benefits from LPP. This was a point which was noted in *Bellamy v the Information Commission and DTI* [EA/2005/0023] in which the Tribunal said:

*"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...".*

The Welsh Government is of the firm view that it is highly important to maintain LPP and that, in the absence of at least equally strong countervailing considerations, any attempt to undermine that principle would result in substantial harm.

Legal advisers need to be able to present the full picture to their clients. In this case, the advice was provided by a qualified solicitor from the Welsh Government's Legal Services Department. This advice includes arguments in support of final conclusions and any relevant counter-arguments.

It is important that Government can obtain whatever legal advice it considers necessary in order to ensure that any decision that is ultimately taken is one that has been the subject of the most careful consideration.

It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view. If recipients or providers of legal advice believe that it is likely that the legal advice would be published, then it is unlikely that comprehensive advice would be commissioned or provided. This would be likely to have a negative impact on the quality of decision-making since it would not be fully informed. It would also undermine the ability of legal advisers and their clients to rely confidently on the protection afforded by the principle of LPP.

Moreover, disclosure of legal advice has a significant potential to prejudice the governments' ability to defend its legal interests - both directly by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour.

In weighing up the arguments for and against disclosure, the Welsh Government considers that the public interest arguments in favour of withholding the information clearly outweigh those in favour of disclosure.

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

Copies of any documents concerning any moderation process undertaken in the Procurement, notes and records of NPS's assessment of each bidder's price, a copy of any report prepared recommending abandoning the Procurement for decision and the Regulation 84 Report reflecting the decision to abandon the Procurement.



Releasing this information to the public would be likely to damage the bidders' commercial interests in current work and future tendering opportunities if other potential bidders could access this information. The requested information contains commercial and business information that is a business asset and not in the public domain.

Because of the nature of this business information, 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.

For this reason, 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 insurance information 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.