

Dear [ICO],

I write in response to your letter dated 25 August 2021 concerning the formal review requested by ### ## following our response to his request for the winning tender submission to our Design Consultancy contract (ICO Case Reference: IC-94480-B9X1). Your questions, and our answers to them, are collated below.

- 1. It is possible that information, which was considered exempt say several months ago, may be disclosable now. It is also the ICO's view is that any company tendering for public sector contracts should be aware that public authorities are subject to FOI and should expect some information they submit to be disclosed to the general public, particularly when this information concerns the utilisation of public funds. In light of this, if TfW is able to disclose any of the withheld information, it should be supplied directly to the complainant, copying the ICO in. Where information is disclosed, it will no longer form part of the ICO's investigation.**

We have reviewed Rype Office's winning tender submission and have released what we consider is not exempt from disclosure (the ICO has been copied into this correspondence with the applicant). The balance of the contract in question was weighted towards the qualitative solution, with an emphasis on sustainability and innovation in addition to the requirements of a typical tender, such a products and pricing. We therefore maintain that significant amounts of the bid remain redacted.

- 2. Please provide a copy of any information which has been withheld in relation to the request, which will not be released to the complainant. This will allow the ICO to make an informed decision about TfW's use of exemptions. As you are relying on more than exemption, please ensure that the withheld information is clearly marked to indicate which exemption(s) are considered applicable to each part of the withheld information.**

Please see the following email attachments to accompany this letter:

- i) Tender questionnaire response
- ii) Commercial response
- iii) Level 3 design
- iv) Works programme

- 3. Explain and provide evidence to support the position that any of the withheld information constitutes a trade secret. For example, is the information is used to gain a competitive advantage but it is not generally known in that trade or business? Are steps taken to keep the information secret?**

It is our firmly held assertion that a significant proportion of the information tendered by Rype Office is a trade secret. Though it is the case that their service offering is not a trade secret, it is the design and the delivery of the solution proposed outlined in their winning tender submission which constitutes the trade secret in this instance. As stated above, in order to win the contract, the successful bidder had to demonstrate a qualitative solution with significant emphasis on sustainability and innovation. The solution outlined in Rype Office's winning bid is what secured them the contract. The solution, and the methodology behind the delivery of that solution, is unknown to the wider industry, and is the trade secret of Rype Office. Understandably, Rype Office have not advertised the detail of their solution to the advantage of their competitors. Disclosure of this information would provide competitors with an informative insight into how Rype Office structured its winning bid; revealing the overall solution, level of detail, the topics and issues issued covered, the design and layout.

Notably in this case, the applicant is the ### of ### ###, which offers assistance to organisations making tender applications. As such, there is a significant risk that beyond the commercially sensitive information pertaining to products, services and pricing; the applicant could benefit from the winning solution outlined in the tender submission, potentially giving an unfair advantage to both ### ### and Rype Office's other competitors. We do not believe that this request has been made in the true spirit of the Freedom of Information Act, as the applicant is likely pursuing a private business interest rather than a public one.

- 4. Concerning the prejudicial effect of disclosure: As it is not clear from the TfW's correspondence with the complainant responses to date, please confirm which threshold of likelihood TfW is relying on. The lower threshold states that disclosure 'would be likely' to have a prejudicial effect. The higher threshold states that disclosure 'would' have a prejudicial effect.**

TfW is relying on the lower threshold of prejudicial effect. However, it should be noted that our reason for relying on the lower threshold is due to the fact that we cannot say with absolute certainty that disclosure of this information *would* have prejudicial effect; yet, it is our argument that there is a *significant* risk that disclosure could have a prejudicial effect. Our full argument is outlined in response to question 6.

- 5. Please confirm whose commercial interests you consider would or would be likely to be prejudiced through disclosure of the withheld information (ie: TfW's own interests, any third party's interests, or both.)**

Disclosure of this information would be prejudicial to the commercial interests of Rype Office and their partners. As stated in our response to the applicant's request for an internal review, it is speculation to suggest that no other public sector organisation will undertake a move identical to that made by TfW in the future. On the contrary, we have evidence that other Welsh public sector organisations and organisations subject to the Utilities Contracts Regulations will procure very similar projects in the near future. The furnishment of TfW's new head office in Pontypridd was itself inspired by the refurbishment of Swansea Library in 2015 and of Public Health Wales in Cardiff and Swansea in 2016; and since completing the furnishment of our head office, we have been approached by Audit Wales and Dwr Cymru Welsh Water inquiring as to how our tender process was arranged (note that the actual bids were not shared) as they wish to achieve similar outcomes (see correspondence included as email attachment).

Notably, should any other Welsh public sector organisations design a new office space, they would be subject to the same requirements as TfW in light of the Wellbeing of Future Generations Act (Wales) 2015 and other Welsh sustainability requirements/principles. As such, it is highly probable that the same applicants of the TfW tender in question would make a bid for a similar tender in the future, including Rype Office. Further, in light of TfW's rapidly expanding remit, there is the likelihood that we may run a similar tender process in the future if additional office space is required to accommodate our growing organisation. We are already in the early stages of making arrangements for TfW accommodation in North Wales. Any future furniture tender will likewise need to comply with the same Wellbeing of Future Generations and sustainability principles.

Disclosure of the information may also prejudice TfW's commercial interests both in terms of narrowing the market for future similar contracts for furnishing TfW premises where we may lose supplier confidence; and for any other contract we procure given the Welsh Public sector's emphasis on sustainability, the well-being of future generations, the circular economy and innovation.

- 6. Provide a detailed explanation to support the position that disclosure of the withheld information would/would be likely to prejudice any party's commercial interests. Provide evidence which demonstrates a clear link between disclosure of the information actually requested and any**

prejudice to commercial interests which may occur. Explain how disclosure would prejudice the party's commercial interests.

There is clear, undisputable link between disclosing Rype Office's winning tender submission and prejudice to their commercial interests. In this instance, there is a risk that the applicant (who is in the business of drafting tender applications) could utilise the original ideas, approach, concepts and innovations contained within Rype Office's tender submission when assisting competitors with their bid writing. This could give an unfair advantage to ### and Rype Office's competitors when drafting future tender submissions. Should TfW receive numerous near-identical bids for a similar tender in the future as a result of disclosing this information, Rype Office would no longer rightly stand out as the true source of their innovative solution and instead, would have to compete on a playing field that has been artificially manipulated to the advantage of other competitors and not themselves. In this circumstance, it is likely that a contract could be awarded to any one of Rype Office's competitors, resulting in a direct loss of business for the company. It is clear that by disclosing this information, TfW would be giving away Rype Office's trade secrets and unique selling points of their bid which led to them winning the contract in question.

7. You state that disclosure would/would be likely to prejudice the commercial interests of parties other than TfW. Clarify on what basis you established this and provide copies of any correspondence the authority has had with any third parties in relation to this request.

In my capacity as TfW's Head of Corporate Governance, I have discussed this matter directly with Rype Office's managing director both by telephone and by email (correspondence included as email attachment). Rype's managing director was clear in what he deemed as trade secrets and even stated that he would be less willing to release the qualitative aspects of the bid than the commercial aspects, although he also emphasised that in his opinion, the commercial aspects should remain as undisclosed.

8. You state that disclosure would allow other contractors to utilise the information to their advantage. If you are arguing that disclosure would disadvantage the current contract holder when they come to retender, you need to show that you expect them to retender. If your concern is that disclosure might prejudice the current contract holder's commercial interests when tendering for contracts with other organisations, you need to demonstrate:

- a) the likelihood of them engaging in other tendering exercises;
- b) the extent to which it would involve similar information; and
- c) why its disclosure would/would be likely to, disadvantage them. Provide your comments on this point, and any evidence you have in support of your position.

It is our belief that disclosure will prejudice the current contract holder's (Rype Office's) commercial interests when tendering for contracts with other organisations.

- a) The likelihood of Rype Office engaging in other similar tendering exercises is very high. More information of the projects completed by Rype Office can be found here: [Rype Office Projects: Wonderful workspaces that are attractive, sustainable and lower cost](#). Rype Office will continue competing for such contracts amid increasing demand for sustainable workspaces, as this is the very nature of their business.
- b) There is a legal responsibility for the majority of the Welsh public sector to comply with the Wellbeing of Future Generations Act (Wales) 2015, the Welsh Government's sustainable development principle, to promote the circular economy and encourage innovation. As such, it is likely that an increasing number of Welsh public sector bodies looking to furnish the workplace will conduct a tender exercise very similar to ours. This argument is supported by the fact that one public sector organisation and another Welsh company subject to the

Utilities Contracts Regulations have made enquiries about our specification for this contract as they wish to achieve a similar outcome (see question 5).

c) Our argument in relation to this point is outlined in full in answer to question 6.

9. Confirm what information was provided to prospective tenderers at the start of this tender exercise about what would happen to the information they provided as part of their tender.

Please see the extract below, taken from Appendix A of our Invitation to Tender:

6. Appendix B: Freedom of Information Act 2000

6.1 This Notice is to make Potential Providers aware that the Freedom of Information Act 2000 came into force on 1st January 2005. The Act makes provision for any information which is held by public authorities to be made available to the public upon request. The Welsh Government is legally obliged to comply with the provisions of the Act and may impose the same requirements upon the *Employer*.

6.2 Therefore, upon the Welsh Government receiving a written request from a member of the public to release information in its possession, the public authority must comply unless it is able to apply one of the limited exemptions available under the Act to such a request.

6.3 Such a request could relate to your tender submission. The *Employer* may therefore have a statutory duty to release all or part of the contents of the tender submission to a third party. Should Potential Providers have any concerns or require any further information about the workings of the Act, it would be advisable that they seek independent legal advice.

6.4 Potential Providers are required to complete the section below and return this form with their tender submission.

6.5 I/We, the undersigned, hereby confirm that I/We acknowledge and accept the provisions of the Freedom of Information Act 2000 and how they may apply to my/our tender submission.

10. What public interest arguments in favour of disclosing the information were taken into account?

11. What public interest arguments in favour of upholding section 43(1) and 43(2) were taken into account? Provide separate representations for each exemption.

12. Explain why you consider that on balance the public interest in maintaining the exemption outweighs that in disclosing of the withheld information. Please include details of any particular weighting exercise that has been carried out.

The following is given in response to questions 10, 11 and 12:

TfW understands the need to consider public interest arguments objectively, recognising that there are almost always arguments to be made on both sides. We acknowledge that there is a public interest in transparency and accountability to promote public understanding and to demonstrate good decision-making by public bodies. Yet in this instance, we are unable to present an argument in favour of disclosure beyond these considerations in an attempt to balance our argument against the disclosure. It is noted in the ICO guidance concerning the Public Interest Test that *'the requester's private interests are not in themselves the same as the public interest, and what may serve those private interests does not necessarily serve a wider public interest'* (page 7, para 13). Given the arguments outlined in response to questions 4 and 6, we believe that there is a significant risk that

the private business interest of the applicant in this case does not serve the wider public interest, and that only harm will arise from disclosure. It is for this reason that we make the argument for upholding sections 43(1) and 43(2). To clarify, we have applied section 43(1) to almost the entire tender submission as the designs and methodology outlined in the document constitute a trade secret (as outlined in question 3), whilst we have applied section 43(2) to the commercially sensitive information contained within the tender submission (such as products, services and pricing information).

It is essential that TfW is careful to maintain the integrity of its procurement process in order to achieve the best value for taxpayer's money. Disclosing this information would negatively, and significantly, impact that integrity. If TfW was to undermine the trust and confidence of those organisations keen to work with us on our journey to delivering the Welsh Government's vision of a high-quality yet affordable transport network by revealing their trade secrets and USP to competitors as reward for successfully securing a contract, it is highly likely that these organisations would be reluctant to ever engage in a TfW (or a wider public sector) tender exercise again. This distortion of the market is simply not in the public interest, as it is essential that we attract a wealth of competitors to ensure due consideration is given to achieving value for Welsh public money, quality of product, a wide range of innovative solutions and commitment to wellbeing of future generations principles, sustainability and circular economy requirements. It is also noted in ICO's guidance on the Public Interest Test that *'there is public interest in upholding standards of integrity, in ensuring justice and fair treatment for all, in securing the best use of public resources and in ensuring fair commercial competition in a mixed economy'* (page 5 para 9). Our argument for withholding this information achieves exactly that.

13. Confirm when this contract was awarded and also when you are likely to retender the contract in the future. Provide any information or evidence you have that the contractor concerned was or would be likely to tender for similar contracts in the future with other organisations.

This contract was awarded on 14 August 2020 – see:

https://www.sell2wales.gov.wales/search/show/search_view.aspx?ID=SEP345923.

We will not be retendering this exact contract as it is not a recurring tender, however, should the need arise to expand into further workspace as our organisation grows, a similar tender exercise will be conducted with the same requirements in alignment with the Wellbeing of Future Generations Act (2015) and Welsh sustainability and circular economy requirements. As previously stated, we are currently reviewing accommodation options in two locations in North Wales. Our argument that the contractor concerned would be likely to tender for similar contracts in the future with other organisations is outlined in the answer to question 8.a.