



# Walsall Council

## Resources & Transformation

Your ref: 529474-3bdf2bd5  
Our ref: RFI1562/18  
Date: 29/03/19  
Please ask for: Mark Halliwell  
Direct Line: 01922 658923  
Email:  
InformationRights@walsall.gov.uk

Dear Mr Davies,

### **Freedom of Information Request RFI1562/18**

Please accept my apologies for the delay in responding to your request for a review of your Freedom of Information Request. Your response should have been responded to much more promptly than it has, however I have tried to ensure that this review has been as thorough as possible and provides you with full detail about the process that has been followed in order to arrive at the conclusions and decision below. In particular it did take longer than anticipated to reach a satisfactory final decision on the application of the public interest test and to consider the relative merits of withholding or disclosing all - or some - of the information contained within the monitoring reports.

Your request was originally received by us on 31<sup>st</sup> October 2018. A belated response was issued to you on 17<sup>th</sup> January 2019.

In this response it was stated in regards to a number of the questions you raised that *"We are unable to provide this information due to it being commercially confidential and therefore subject to exemption under Section 43 of the Freedom of Information Act."*

On 21<sup>st</sup> January 2019 you contacted the council again in regards to this request, specifically in regards to the council's application of Section 43 of the Freedom of Information Act in regards to the Monitoring Reports. You went on to ask:

*"Could you please explain how a request for monitoring reports would or would be likely to prejudice commercial interests within the meaning of the Act?  
Could you also furnish me with the details of any discussion around the Public Interest criteria which you have used to prevent disclosure? Given the outcry when this contract was awarded At what meetings of the Board were these monitoring reports discussed?"*

On reviewing your request for an appeal, we have identified 3 questions/issues:  
1 – A further explanation of how the disclosure of monitoring reports would qualify for section 43

- 2 – To provide details of the Public Interest Test that was carried out in regards to the considerations for the application of section 43
- 3 – To confirm at what meeting of the Board these monitoring meetings were discussed.

I have detailed below a response to each of these 3 issues.

**1 – A further explanation of how the disclosure of monitoring reports would qualify for section 43**

**2 – To provide details of the Public Interest Test that was carried out in regards to the considerations for the application of section 43**

When the request for information was first received and considered, the service area in question raised some concerns in regards to the disclosure of the information.

These concerns at the time were as follows:

- That the information within the monitoring reports was confidential between the council and the contractor, to be discussed privately within monitoring meetings and performance boards
- That sharing the information within the monitoring reports would negatively affect the business interests of the contractor

These concerns were considered by the responding officer and discussed with the service area, and ultimately the decision to withhold the information was made. However we have subsequently reviewed this request and the information.

When processing requests, The Council should approach them with a view to disclose *unless* it can be evidenced that when all facts and circumstances are considered the information is subject to one of the exemptions detailed in the Freedom of Information Acts.

Further, the exemption should be applied to the information only to the extent to which it is appropriate.

Any application of an exemption should also make clear to the requestor why the information is not being disclosed, and, unless it would also breach the exemption to do so, should also confirm if the information is held.

Upon examining the case file for this request, and reviewing information provided by the service area I believe that the decision to withhold the information *in its entirety* was incorrect, and therefore section 43 was incorrectly applied.

As such I have reconsidered the disclosure of this information and provide further details below.

With regard to the initial public interest test, verbal discussions took place between officers within the Assurance Team and between the Assurance Team and the relevant service area around the relative merits of disclosing or withholding all the information in the monitoring reports. This information should have been included in your initial response of 17<sup>th</sup> Jan.

**3 – To confirm at what meeting of the Board these monitoring meetings were discussed.**

Monitoring is discussed at the quarterly monitoring meetings involving CGL and officers from Walsall Council Children's Services and at the directorate management board.

It is also planned to discuss the reports at year-end (April 2019) with the Partnership Board.

### **Reconsideration of the request for Information**

Following your request for an appeal of our handling of this request, and further to our finding that Section 43 was incorrectly applied to the entirety of the information (monitoring reports), we have reconsidered your request for information.

However, as the owning service areas have expressed concerns, we have reconsidered these also, to see if Section 43 is applicable to any part of the information.

We detail below considerations as to whether the information contained within the 'Early Help 0-19 Walsall South and Central Performance Monitoring Framework 2018-19' has the potential to prejudice the commercial interests of the contractor and/or the local authority.

There are a number of circumstances in which a public authority might hold information with the potential to prejudice commercial interests. In identifying the commercial interests which might be prejudiced in this case, the focus has been on the category of 'procurement' and performance, where Walsall Council has purchased a service from a Third Party, i.e. CGL and where the performance monitoring framework contains performance information about that third party.

In order to be fair to all parties involved in this case we have consulted with CGL and in discussions with the council they expressed concerns that publishing the monitoring reports:

*Has the potential to impact on their commercial interests and affect their ability to tender for similar contracts with other local authorities and to re-tender for the current contract with Walsall Council when it comes up for renewal after the 3 year period.*

In order to consider these concerns in the context of the information contained within the monitoring reports, I have reviewed the nature of that information and to what extent it would give a reflection of the commercial activities of the third party, CGL, and how well or not the company is performing in its current contract with Walsall Council.

I have established that the information falls into 2 main categories: a) Performance related information e.g. performance outturns and improvement actions and b) non-performance information. e.g. KPI definitions, evidence required, and data sources;

Following a review of this information, it can be confirmed that any decision to withhold information on the grounds that details of performance could prejudice commercial interests, should apply only to the parts of the monitoring reports containing quarterly performance information – category 'a' above.

I have concluded that the release of the performance, direction of travel and improvement actions information in the final 2 columns of the reports **would be likely to prejudice the current and future commercial interests of the third party.**

Publication of this information would be likely to put the contractor at a disadvantage to competitors when bidding for contracts – both in terms of a competitor having knowledge of their performance, and in terms of another local authority having access to that information when making contract award decisions. The current contract runs for 3 years and is scheduled to be re-tendered in 2021.

Section 43 of the Act is a qualified exemption and requires the consideration of the Public Interest Test (PIT). We must carry out a PIT where we are considering using any of the qualified exemptions in response to a request for information.

### **Consideration of Public Interest Test**

#### ***Arguments in favour of disclosure of performance information in this case:***

Release of all the information within the monitoring reports – both under category ‘a’ and ‘b’ would provide some indication to the public of how efficiently public money is being spent by the council and what levels of performance the council is getting from a third party service provider (CGL).

It would also correspond with a policy of openness and transparency in giving insight to the public in how the council operates, how it monitors performance, and how effectively it deploys its resources.

There is a degree of public interest in knowing how a new provider – CGL’s contract began in April 2018 - is performing against the key performance indicators of the monitoring framework reports – both in their own right and in the context of the service provided by previous supplier.

#### ***Arguments in favour of maintaining the exemption***

In favour of maintaining the exemption, the performance and direction of travel information, and improvement actions are part of regular information shared between the client (Walsall Council) and contractor (CLG) as part of the contract monitoring framework. There is a public interest in allowing public authorities to withhold information about a third party, which if disclosed, would reduce its ability to negotiate and compete in such an environment and potentially contribute to loss of business in the future.

There is a strong public interest in the council being able to demonstrate effective contract monitoring arrangements by holding private, regular monitoring meetings including discussions about the performance of the third party against the contract, without concern that the detail of those discussions might be disclosed. There is a public interest in ensuring both parties are able to have the open and confidential discussions necessary to ensure effective decision making.

Establishing a precedent of disclosing information that has the potential to negatively impact on a supplier could dissuade other contractors from engaging with the council, potentially means opportunities for savings and services are lost.

There is a public interest in public bodies being able to contract out services effectively so anything which prevents that - (such as companies being fearful that commercially sensitive information be disclosed to their competitors) - will not be in the public interest. Generally speaking, it is not in the public interest for services to be distorted through, for example, a company’s ability to compete being damaged.

Taking into account the considerations set out above, it is my view that, on balance, the public interest in maintaining the exemption for the performance, direction of travel and actions information outweighs the public interest in disclosure.

I consider that disclosing category 'b' information within the reports i.e. non-performance information - i.e. KPI definitions, evidence required, and data sources - is in the public interest. It is in the public interest to know what performance measures and targets are being used to monitor the third party's ability to deliver against the contract.

As such, the information request has been disclosed and is attached, however the information to which the exemption applies has been redacted to reflect this decision.

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I hope that the information provided is useful to you. However, if you are dissatisfied, you should set out in writing your grounds for complaint and send to: Information Risk & Governance Manager, Business Change, Civic Centre, Darwall Street, Walsall, WS1 1TP.

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner's Office (ICO) for a decision. Please remember that, generally, the ICO cannot make a decision unless you have first exhausted the complaints procedure provided by the council. The Information Commissioner can be contacted at: The Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

Again I would like to offer my apologies for any inconvenience the delay to your request may have caused you

Yours sincerely

Mark Halliwell