

20<sup>th</sup> January 2021

**Re: Freedom of Information request 202101- Request Refused.**

Dear ,

I refer to your request, dated and received on 6th January 2021 which you have made under the Freedom of Information Act 2014 (FOI Act) for records held by the Land Development Agency (LDA).

*(..) a copy of all other tenders received in relation to the above process under FOI per the email below.*

I wish to inform you that I have decided to refuse your request on the 21 January 2021.

The purpose of this letter is to explain that decision.

**1. Findings, particulars and reasons for decisions to deny access.**

Upon receipt of your request, a search was conducted in the Procurement Sections of the LDA and as a consequence a number of records were identified. The sections of the FOI Act which deny access to information are known as its exemptions. An exemption under the FOI Act has been applied to the records identified in response to your FOI request.

In accordance with the Office of the Government Procurement Public Guidelines, the Procurement Section sought quotes from companies involved in the payroll and administration. Two companies supplied tender response documentation and these records have been considered in compliance with your request. An exemption under the FOI Act have been applied to these records to refuse the release of same.

Paycheck Plus were successful in meeting the specifications of tender to provide payroll and administrative service to the LDA. There is one other company that submitted tender responses that was unsuccessful in securing the initial tender. The following information is relevant to all two tender documents.

The content of the tender responses is detailed and provides scientific and technical specifications of their product, internal test analysis results and matters specific to the manner in which the product sought is provided and quality assured. The level of detail provided is suitable for the purpose it was designed for and specific to the LDA needs. As this is a commercially based competition, the details contained in the tender responses are highly sensitive when considered in the context of current and future competitiveness within payroll industry. Inclusive are the associated costs and pricing of service provided to the LDA. Based on the detail provided in the tender response regarding the product, it is highly probable to expect the release of such information would be detrimental to the commercial viability of Paycheck Plus in this and other future competitions. Within the tender response are comments and considerations provided by the company that would reveal their own tradecraft within the payroll and administration industry. The tender document highlights expertise and draws upon their experiences when considering certain aspects of the payroll. This type of explicated

knowledge benefits the company when submitting a tender response and is considered trade secrets within the payroll industry.

Specific consideration should also have been given to the company who did not secure the contract and the possible adverse commercial impact it could have, should its name be released as unsuccessful tenderer for the LDA payroll and administration. Certain conclusions could be drawn from their failure that would be prejudicial to the company in the absence of explanations and contextualisation relating to the reasons for its unsuccessful bid.

In summation, the release of commercial information submitted as part of the tender process will prejudice the tenderer's positions in future competitions while proving unfairly advantageous to competitors who seek to secure contracts in the same commercial field and competitions. The prospect of prejudicing the commercial and competitive position by releasing a detailed tender response is not within the remit of the purpose of the FOI Act and Section 36 of the Act provides safeguards in that respect.

Section 36 1(a), (b) and (c) states:

#### *Commercially Sensitive Information*

*(1) Subject to subsection (2), a head shall refuse to grant an FOI request if the record concerned contains:*

- (a) trade secrets of a person other than the requester concerned,*
- (b) financial, commercial, scientific or technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, or*
- (c) information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.*

#### **Public Interest Test**

There is a Public Interest Test associated with Section 36 of the FOI Act whereby my decision must be made having fully considered the public interest relevant to this request.

I have considered the public interest issues which arise in this case and have taken account of the following factors in favour of release:

- Ensuring openness and transparency of organisational functions to the greatest possible extent.
- The public interest in members of the public exercising their rights under the FOI Act.
- That there is more than just a transitory interest by the public in this information being released.
- The right to commercial confidentiality is outweighed by the needs of the public regarding the expenditure of public funds by a public body.

In considering the public interest factors which favour withholding the records I have taken account of the following:

- Allowing a public body to hold commercial information without undue access by members of the public.
- The best course of action which is in the public interest with regard to these records.
- That the LDA can conduct its business with external contractors in a confidential manner.
- That there is a reasonable and implied expectation by contractors that financial information pertaining to services provided will be held in a confidential manner.
- That there is no overriding public interest that outweighs the right to privacy by an individual or in this case the financial activities of a service provider.

Having balanced the public interest factors both for and against the release, I decided that the public interest in preserving the information and the reasonable expectation that information can be maintained by the LDA without prejudicing future financial endeavors by external service providers outweighs the public interest which would be served were the records released to you.

I have considered the provisions of Section 36(2) and decided that they do not have any bearing on the decision as the overriding interest is to protect the sensitive commercial and financial information in this case.

### ***Harm Test***

Section 36 also requires a harm test to be carried out as part of the decision-making process. I am of the view that by releasing Paycheck Plus pricing structure could reasonably be expected to result in a material financial loss by the company as it could prejudice their competitive position in the conduct of their business. The advertising of details pertaining to the payroll and administration into the public domain could also reasonably be expected to give a competitive advantage to other companies seeking similar contracts with public bodies. The company's present customers may become aware of a difference in pricing structures being offered to the LDA if applicable, which could in turn prejudice any current or future negotiations with these customers.

In this regard, to release copies of the tender responses received for tender may prejudice the future ability of the two companies to tender for future contracts both within the LDA and outside the organisation. In addition, the company selected to provide the service will be disadvantaged if its information was released into the public domain thus reducing competitiveness.

### ***Access to Part of Records- Section 18***

I believe that if the tender response of Paycheck Plus was now to be released in its current format, the substantial redactions under Section 36 of the FOI Act would mean the report will be subject to Section 18. It will be released out of context and in a misleading fashion. I refer to the decision of Mr Peter Tyndall, Information Commissioner (case number I 60 I 99) in which he states:



*Finally, section 18 of the FOI Act provides that if it is practicable, records may be granted in part, by excluding the exempt material. Section 18 shall not apply if the copy of the record provided would be misleading. I take the view that neither the definition of a record under section 2 nor the provisions of section 18 envisage or require the extracting of particular sentences or occasional paragraphs from records for the purpose of granting access to those particular sentences or paragraphs. Generally speaking, therefore, I am not in favour of the cutting or "dissecting" of records to such an extent.*

The tender response could be misleading when Section 36 has been applied and should therefore be withheld.

## **2. Right of Appeal**

In the event that you are unhappy with this decision you may appeal this it. In the event that you need to make such an appeal, you can do so by writing to the Freedom of Information Unit, Land Development Agency, 2<sup>nd</sup> Floor, Ashford House, Tara Street, Dublin 2 or by e-mail to [foi@lda.ie](mailto:foi@lda.ie). You should make your appeal within 4 weeks from the date of this notification, where a day is defined as a working day excluding, the weekend and public holidays. However, the making of a late appeal may be permitted in appropriate circumstances. The appeal will involve a complete reconsideration of the matter by a more senior member of the staff of this body.

Please be advised that the Land Development Agency replies under Freedom of Information may be released into the public domain via our website at [lda.ie](http://lda.ie).

Personal details in respect of your request have, where applicable, been removed to protect confidentiality.

Should you have any questions or concerns regarding the above, please contact me by telephone on (01) 9103400.

Yours sincerely,



Monika Szyszko,  
Compliance Officer

<b>Requester name:</b>		<b>Request Re:202101</b>			
<b>Page number</b>	<b>Description of document</b>	<b>Deletions</b>	<b>Relevant section of FOI Act</b>	<b>Reasons for deletion</b>	<b>Decision Maker's decision</b>
1-42	Tender Response	42	Section 36	Commercially sensitive	refuse
1-38	Tender Response	38	Section 36	Commercially sensitive	refuse
		<b>Total number of pages</b>			80
		<b>Total number of pages for full release</b>			
		<b>Total number of pages for partial release</b>			
		<b>Total number of pages being withheld</b>			80

