

Freedom of Information Act 2000 ('FOIA')
Environmental Information Regulations 2004 ('EIR')
Decision notice

Date: 30 March 2016

Public Authority: Cambridgeshire County Council
Address: Shire Hall
Castle Hill
Cambridge
CB3 0AP

Decision (including any steps ordered)

1. The complainant has requested information relating to a street lighting contract. The Commissioner's decision is that Cambridgeshire County Council has failed to demonstrate that the exception at regulation 12(5)(e) where disclosure would have an adverse effect upon the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest is engaged.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
3. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 2 February 2015, the complainant wrote to Cambridgeshire County Council ('the council') and requested information in the following terms:
"Initial request for information

Street lighting replacement programme: contract terms and viability assessment including PFI aspect

Please provide copies of:

1. Relevant contracts with the significant supplier(s) – presumed to be Balfour Beatty, but maybe others
 2. "The final business case" referred to in the report to cabinet in relation to street lighting for cabinet meeting 26th Oct 2010
 3. advice from Price Waterhouse Coopers on financial aspects of the replacement programme".
5. The council responded on 15 May 2015 under the terms of the EIR. It refused to supply a copy of the PFI contract using the exception under regulation 12(4)(b). It provided a copy of the business case requested, however it made some redactions using the exception under regulation 12(5)(e), and it refused to supply the financial advice received from PriceWaterhouse Cooper ('PWC') in its entirety using the exception under regulation 12(5)(e). The council said that the public interest did not favour disclosure in relation to any of the withheld information.
 6. The complainant asked for an internal review of the refusal on 23 July 2015.
 7. The council completed its internal review on 7 August 2015. It said that it wished to maintain that its decision to withhold the information had been correct.

Scope of the case

8. The complainant contacted the Commissioner on 19 September 2015 to complain about the way his request for information had been handled. He referred to another complaint made to the Commissioner stating that it refers to similar matters.
 9. In his initial letter to the council regarding this case, the Commissioner noted that the council had recently received a decision notice relating to the same contract in which he found that regulation 12(4)(b) was not engaged¹. He informed the council that, assuming it is not seeking to
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¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560041/fer_0586068.pdf

appeal the decision notice, it will also need to provide a fresh response to the complainant in this case as well and if it wishes to withhold any information it should provide a refusal notice to the complainant in accordance with its obligations under regulation 14(1) of the EIR. He also informed the council that if any information can be disclosed, it should disclose it directly to the complainant.

10. In its response to the Commissioner, the council confirmed that it had provided the complainant with a redacted version of the contract. It said that information contained in Parts 1 and 4 of Schedule 25 is being withheld under regulations 12(3) and 13 and that the remainder of the redactions have been made under the exception at regulation 12(5)(e).
11. As the council has retracted its reliance on the exception at regulation 12(4)(b), the Commissioner has considered the application of the exception at regulation 12(5)(e) to the withheld information.
12. The complainant confirmed to the Commissioner that he is not interested in personal data. Therefore the application of the personal data provisions at regulations 12(3) and 13 has not been considered.

Reasons for decision

Regulation 12(5)(e)

13. Regulation 12(5)(e) provides that information will be exempt where its disclosure would have an adverse effect upon "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."
14. Regulation 12(5)(e) can be broken down into a four-stage test, which was adopted by the Information Tribunal in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association*². All four elements are required in order for the exception to be engaged:
 - The information is commercial or industrial in nature.
 - Confidentiality is provided by law.

² Appeal number EA/2010/0012

- The confidentiality is protecting a legitimate economic interest.
- The confidentiality would be adversely affected by disclosure.

15. The Commissioner has considered each of these factors in turn.

Is the information commercial or industrial in nature?

16. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
17. The council said that the requested information is the contract that is in place between it and Balfour Beatty, the final business case for that contract, and the financial advice from PWC in which an analysis of the financial details that were submitted by Balfour Beatty as part of their submissions to obtain the contract is provided. It explained that Balfour Beatty are providing a service to the council to replace and improve the street lamps throughout the county and that Balfour Beatty has entered into the contract as part of their commercial enterprise and therefore the information is of the commercial nature required for this exception.
18. Having considered the council's submissions and referred to the withheld information, the Commissioner is satisfied that the withheld information is commercial in nature. Therefore, this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

19. In relation to this element of the exception, the Commissioner has considered whether the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.
20. The council said that in this instance, the confidentiality is provided for through both the common law of confidence and under contract, with both parties owing a duty of confidence to each other.
21. In relation to the common law duty of confidence, the Commissioner considers that the key issues to consider are whether the information has the necessary quality of confidence, which involves confirming that the information is not trivial and is not in the public domain, and whether the information was shared in circumstances creating an obligation of confidence.

22. The council explained that the withheld information is considered to be of a sensitive nature by representatives from both the council and Balfour Beatty and it is not published and is not otherwise available to members of the public. In relation to the contract, it said that it represents a negotiated position which is bespoke to this contract and disclosure of certain elements of which would be prejudicial to the commercial interests of Balfour Beatty and the council. In relation to the final business case, it said that such information was submitted by Balfour Beatty as part of their submission for the contract, disclosure of which would be prejudicial to the commercial interests of Balfour Beatty and the council. In relation to the financial advice from PWC, it said that it represents a detailed analysis of the financial details provided by Balfour Beatty disclosure of which would be prejudicial to the commercial interests of Balfour Beatty and the council.
23. The Commissioner notes that the council has not specifically stated that the information was shared in circumstances creating an obligation of confidence. Instead, it has stated that disclosure would be prejudicial to the commercial interests of Balfour Beatty and the council. However, using the test of whether a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence, the Commissioner is satisfied that that the information was shared in circumstances creating an obligation of confidence.
24. The council also explained that the contract includes a binding confidentiality clause under part 35(1)(b) and (c) of the contract which provides that:

"35(1)(b) – Clause 35.1(a) shall not apply to the provisions of this contract or a project designated as Commercially Sensitive Information and listed in Part 1 and Part 2 of Schedule 22 (commercially sensitive information) which shall, subject to clause 35.2, be kept confidential for the periods specified in that Part 1 and Part 2.

(c) - Each party shall keep confidential all Confidential Information received by one party from the other party relating to this contract, the Project Documents and / or the project and shall use all reasonable endeavours to prevent their respective employees and agents from making any disclosure to any person of such Confidential Information."
25. It said that this provides a contractual obligation of confidentiality to the information which, if breached, would leave the council open to legal action by the other parties to the contract.
26. The council also said that, in addition, Schedule 22 to the contract contains a list of all the information within the contract that Balfour

Beatty considers to be commercially confidential where disclosure would have an adverse effect on their commercial interests and their ability to compete effectively and that when considering release of the contract, Balfour Beatty said that having reviewed all the contract documents it finds that all of Schedule 22 to the Project Agreement contents are still valid exclusions. In relation to the final business case, the council said that under Part 2 of Schedule 22, the financial model, financing agreements and financial sections of the bid documents submitted by Balfour Beatty are considered commercially confidential. In relation to the financial advice from PWC, the council said that Part 2 of Schedule 22 makes reference to evaluation papers by the council or its financial advisers in respect of bid documents submitted by Balfour Beatty.

27. Taking all of the above into consideration, the Commissioner is satisfied that the information is subject to confidentiality provided by law. Therefore, this element of the exception is satisfied.

Is the confidentiality provided to protect a legitimate economic interest?

28. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.

Whose interests?

29. In relation to the contract and the final business case, the council has said that the economic interests to be protected are those of Balfour Beatty and the council. In relation to the financial advice from PWC, the council said that release of the information would have an adverse effect on the legitimate economic interests of each of the bidders and PWC.
30. The Commissioner considers that if it is a third party's interests that are at stake, the public authority should consult with the third party unless it has prior knowledge of their views. It will not be sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party. This principle was established by the Information Tribunal in *Derry City Council v Information Commissioner*³. That case related to the commercial interests exemption under FOIA,

³ Appeal no. EA/2006/0014, 11 December 2006

but it is equally applicable to third party interests under regulation 12(5)(e).

31. The Commissioner informed the council of the above and asked it to obtain the third parties views, unless it already has evidence of them, and to provide him with evidence of the third parties views. The council did not respond specifically to this point and did not supply copies of any correspondence it may have had with Balfour Beatty in relation to this request. However, when describing how the confidentiality is provided by law, the council said that, when considering release of the contract, Balfour Beatty provided the following comments:

"Having reviewed all the contract documents we still find that all of Schedule 22 to the PA contents are still valid exclusions. Time so far has not eroded their competitive position – especially the Financial Model and Financing Arrangements; it would still be strongly prejudicial to our trading/operation. For the avoidance of doubt re the PA (Project Agreement) we think the wording of Column 1 at least intends to include the following (over and above what we discuss further below): Schedules 4 (but only Table 1), 8, 15, 21, 24, 25 and 26.

Furthermore, Schedule 3 to the PA contains BB's specific and innovative solutions in providing the service, we feel issuance would allow competitors to reproduce this and thus unfairly compete against us in the market place. The Method Statements contain how the SP is going to meet the standards set out in Schedule 2; therefore, in terms of performance of the actual how it is undertaken is not relevant to the compliance to the standards or otherwise (and noting the actions/methods of Sch3 do not relieve the SP of its obligations under Sch2)."

32. It is not clear to the Commissioner whether the above comments from Balfour Beatty were as a result of this particular request. However, the Commissioner is satisfied that the arguments reflect Balfour Beatty's concerns.
33. In relation to the legitimate economic interests of other bidders and PWC, the council did not confirm that its submission represents its prior knowledge of other bidders or PWC's concerns and did not supply copies of any correspondence it may have had with other bidders or PWC in relation to this request. As such, the Commissioner cannot consider the arguments in relation to other bidders or PWC. For that reason the Commissioner has not deemed it necessary to state such arguments in this decision.

Legitimate economic interests and disclosure would cause harm

34. The Commissioner considers that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.
35. In order for the exception to be engaged the Commissioner considers that it must be shown that disclosure would adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. A public authority needs to establish, on the balance of probabilities, that disclosure would cause some harm. In addition to being able to explain the nature of an implied adverse effect, public authorities must be able to demonstrate the causal link between any such affect and the disclosure of the specific information.
36. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. He accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".

The contract

37. The council said that releasing information that is the result of specific negotiation and discussions between two parties to a contract will have a prejudicial effect on the legitimate economic interests of both parties. It said that, in particular, the redacted information includes method statements and detailed financial models and financing arrangements submitted by Balfour Beatty which provide significant detail about the unique way in which they will approach, finance and fulfil the contract.
38. It argued that releasing this information into the public domain will allow Balfour Beatty's competitors valuable insight into how they address their service provision and that Balfour Beatty has spent time and expertise developing these processes and they carry an intrinsic commercial value to the organisation which will be compromised by disclosure into the public domain as competitors will gain knowledge of the processes that give them their leading competitive edge.

39. The council also submitted that disclosure of truly confidential information in breach of the contract will also leave it at a serious risk of legal action from the other parties which will have a prejudicial effect on the legitimate commercial interests of the council.

The final business case

40. The council said that releasing information that has been provided by one party as part of their submissions to obtain a contract will have a prejudicial effect on the legitimate economic interests of both parties. It said that the final business case contains market-sensitive information relating to the innovative approach and competitive advantage of Balfour Beatty in the market and the detailed pricing and funding solution for the project. It argued that both are useful to competitors in the market-place in which Balfour Beatty operate and will impair their ability to maintain their competitive edge and to compete effectively in future bidding processes.
41. It argued that due to the competitive nature of this sector, the commercial terms Balfour Beatty agrees are particularly sensitive. There is a clear level of competition within this industry and permitting disclosure of the commercial arrangements and financial information contained within the final business case would adversely affect Balfour Beatty's bargaining position during future transactions of this nature and compromise Balfour Beatty's ability to secure competitive advantage in contractual negotiations and in the market-place more generally.
42. The council also repeated the arguments described in paragraphs 38 and 39.

The financial advice from PWC

43. The council said that releasing a detailed analysis and advice of the information provided by Balfour Beatty will have a prejudicial effect on the legitimate economic interests of both parties. It said that the document includes detailed analysis of the financial breakdowns that were provided by each of the bidders, along with advice to the council.
44. It argued that financial information provided by Balfour Beatty was done so with an expectation of confidence, bearing in mind the confidential nature of the financial information and the real risk that its disclosure might have to the commercial and economic interests of the providers. It said that releasing the detailed financial information that was provided by Balfour Beatty during the tender process into the public domain would allow their competitors to gain an insight into how these contracts are approached and into how the charging structures are applied and that this would have an adverse effect on the ability of the bidders to

compete effectively in future tender processes as competitors would be able to use this information to undercut their pricing structures.

45. The council also said that this would in turn affect the legitimate economic interests of the council by discouraging potential providers to submit such detailed information in response to future tender processes.
46. The council also repeated the argument described in paragraph 39.

The Commissioner's position

47. The Commissioner has firstly considered the council's arguments in relation to its own economic interests.
48. In relation to the argument that disclosure will leave it at a serious risk of legal action from the other parties which will have a prejudicial effect on the legitimate commercial interests of the council, the Commissioner notes that public authorities cannot contract out of their obligations under the EIR through confidentiality clauses. He considers that legal action against the council may result in damage to its financial interests but it doesn't necessarily follow that damage would be caused to its commercial interests and the council has not explained how this would occur in this case.
49. In relation to the argument that potential providers will be discouraged from submitting detailed information in response to future tender processes, the Commissioner considers that, in practice, many companies may be prepared to accept greater public access to information about their business as a cost of doing business with the public sector. He considers that private companies will still need, and want, to bid for lucrative public sector contracts regardless of disclosure under the EIR or FOIA. He also considers that the council will still be able to stipulate what information it requires from businesses to assess their suitability for procurements.
50. Turning now to the arguments presented in relation to Balfour Beatty's economic interests. The Commissioner notes that the arguments are couched in general terms. For example, in relation to paragraphs 37 and 38, the council has not explained how providing information on method statements and detailed financial models and financing arrangements will allow Balfour Beatty's competitors valuable insight into how they address their service provision and this is not clear to the Commissioner, particularly as the council has said that the withheld information represents a negotiated position which is bespoke to this contract.
51. The Commissioner does not consider that the arguments presented are sufficiently detailed to demonstrate the adverse effect. No precise

examples have been provided of how the release of specific information would result in the effects claimed. The Commissioner notes that this is a bespoke project and considers that each street lighting project will have various factors to take into account.

52. Whilst the Commissioner can follow the general chain of consequences identified, he does not consider that the council has linked such consequences to the specific redacted information or sufficiently explained the causal sequence.
53. The Commissioner considers that although the council appears to have consulted with Balfour Beatty in relation to this matter, the arguments relating to adverse effect are couched in generic terms and are not specifically linked to the withheld information in this case. He considers that there is little clarity around the specific nature of the alleged adverse effects which disclosure could cause and how this would be generated by the withheld information. This lack of clarity suggests that the council either does not properly understand what the effects of disclosure would be or has struggled to meet the evidential and explanatory burden set by the exception.
54. As stated earlier, in order for the exception to be engaged it is necessary to demonstrate that disclosure of information would result in specific harm to a party or parties' economic interests and to explain the causal sequence. He considers that the council's arguments, whilst identifying possible effects, fails to make these effects sufficiently concrete and fails to identify the causal link with the withheld information. He considers that it is for public authorities to fully explain the relevant causes and effects.
55. The Commissioner considers that the council has been given sufficient opportunity to provide evidence and arguments in support of its position. When making his enquiries in this case, the Commissioner informed the council that his general approach is to allow one further opportunity for a public authority to submit thorough arguments in support of its position, with reference to the specific withheld information and the precise circumstances of the case, before recommending a decision. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exceptions are engaged, the Commissioner is not obliged to generate arguments on a public authority's behalf or to provide the causal link. In this case, the Commissioner does not consider that sufficient arguments have been provided in relation to the third and fourth elements required in order for the exception to be engaged, as referred to in paragraph 14, those being whether the confidentiality is protecting a legitimate economic interest, and the confidentiality would be adversely affected by disclosure.

56. The Commissioner has decided that the council has failed to demonstrate that the exception is engaged. As the exception is not engaged, the Commissioner has not gone on to consider the public interest.

Right of appeal

57. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

58. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
59. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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