

## **Freedom of Information Act 2000 (FOIA)**

### **Environmental Information Regulations 2004 (EIR)**

#### **Decision notice**

**Date:** 3 July 2019

**Public Authority:** Wiltshire Council  
**Address:** Bythesea Road  
Wiltshire  
BA14 8JN

#### **Decision (including any steps ordered)**

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1. The complainant requested from Wiltshire Council (the Council) information relating to a highways contract. The Council disclosed some of the information and withheld other information under section 43(2) (commercial interests) of the FOIA. During the Commissioner's investigation the Council reconsidered the request under the EIR and withheld some of the information under the exception for commercial confidentiality – regulation 12(5)(e).
2. The Commissioner finds that the Council initially handled the request incorrectly under the FOIA and breached regulation 5(1) and regulation 14 of the EIR.
3. The Commissioner's decision is that the Council correctly applied regulation 12(5)(e) of the EIR to the withheld information. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

## Request and response

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4. On 11 September 2018, the complainant wrote to the Council and requested information in the following terms:

*"With regard to Balfour Beatty's contract whether or not this involved a joint venture (j/v):*

*1. Is (or was) it Balfour Beatty (or the j/v) that pursued Third Party Drivers for damage to Crown Property; street furniture, such as barriers, signs and the road surface.*

*2. What is / was the basis of Balfour Beatty (or the j/v) charging you for damage to Crown Property.*

*3. What is / was the basis of Balfour Beatty (or the j/v) their charging Third Parties for road works following damage to crown property.*

*I am seeking:*

*4. The means by which the schedule of charges is compiled and whether they differ at '2' and '3' above.*

*5. The rates charged to the council and TP's and make up during the contract period for:*

*a. An Operative - road worker*

*b. a 2.5T van*

*c. 7 an 18T TM Rig*

*6. The last complete Balfour Beatty or j/v schedule of rates for operatives, plant and materials."*

5. On 20 September 2018 the Council asked the complainant for clarification of question 4 of his request and asked him to expand and elaborate on this.
6. On the same day the complainant provided his response.
7. On 2 October 2018 the Council responded and confirmed that it held some of the information requested and provided its response to each part of the request.
8. On 4 October 2018 the complainant asked the Council to clarify and *"provide the full schedule in which the above rates were located."*

9. On 16 October 2018 the Council informed the complainant that a review request was created.
10. On 16 November 2018 the Council provided its internal review response and considered part of the request commercially sensitive under section 43(2) of the FOIA.
11. On 20 November 2018 the complainant asked the Council to clarify and explain its response to some parts of his request and asked for a review of the exemption which it had applied.
12. On 22 November 2018 the Council responded to the complainant's concerns and clarified his points. The Council also guided him to the ICO if he remained dissatisfied.
13. On the same day the complainant asked the Council for a further explanation.
14. The Council responded and stated the following:

*"The service area have advised they should not have disclosed any of the pricing structure in the first instance, this was human error."*
15. The Council said that it does not "*conduct reviews of reviews*" and that its internal review was complete. It also informed the complainant that his request for further information and clarification had been addressed.

### **Scope of the case**

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16. The complainant contacted the Commissioner on 22 November 2018 to complain about the way his request for information had been handled.
17. The information which remains withheld is for parts 5 and 6 of the request. This is the full schedule in which the rates were located.
18. During the investigation, the Commissioner decided that given the nature of the request, it was likely that the information was environmental and to be considered under the EIR. Therefore, the Council was directed to reconsider the request under the EIR in its entirety. The Council agreed with the Commissioner and confirmed that it was relying on the exception at regulation 12(5)(e) to withhold the information in parts 5 and 6 of the request.
19. The following analysis focuses on whether the Council correctly withheld some information under regulation 12(5)(e).

## Reasons for decision

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### Is it Environmental Information?

20. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
21. Regulation 2(1) of the EIR defines what "environmental information" consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is information in any material form on:

*"(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements..."*

22. The Commissioner considers that the phrase "any information...on" should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
23. In this case the withheld information relates to contractual arrangements for highways and street-scene service, street furniture, including barriers, signs and the road surface. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be on a measure affecting or likely to affect the environment. This is in accordance with the decision of the Information Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001).

24. In view of this, the Commissioner has concluded that the Council initially handled the request incorrectly under the FOIA and breached regulation 5(1) of the EIR. As the Council subsequently corrected its handling of the request, the Commissioner does not require the Council to take any steps regarding this.

#### **Regulation 14 – refusal to disclose information**

25. In the circumstances of this case the Commissioner has found that although the Council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the Council will have failed to comply with the provisions of the EIR.
26. In these circumstances the Commissioner believes that it is appropriate to find that the Council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the Council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the Council actually dealt with the request under FOIA.
27. Since the Council has subsequently addressed this failing, the Commissioner does not require it to take any steps in this regard.

#### **Regulation 12(5)(e) – commercial confidentiality**

28. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect “the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”.
29. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
- Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality provided to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?

*Is the information commercial or industrial in nature?*

30. The Commissioner notes that the information relates to a contract between the Council and the contractor - Balfour Beatty (BBLP) - for the provision of services to the Council. Therefore, the Commissioner is satisfied that the information is commercial in nature.

*Is the information subject to a duty of confidence provided by law?*

31. 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.
32. 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.
33. The Council said it considers the requested information to be subject both to a common law duty of confidentiality and a statutory provision by virtue of regulation 43 - Public Contract Regulations 2006<sup>1</sup>. It stated that the requested information consists of information provided by BBLP, in confidence to the Council as part of a tendering process.
34. Regulation 43 provides that:

*"Confidentiality of information*

*43.—(1) Subject to the provisions of these Regulations, a contracting authority shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential.*

*(2) In this regulation, confidential information includes technical or trade secrets and the confidential aspects of tenders."*

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<sup>1</sup> <http://www.legislation.gov.uk/ukxi/2006/5/contents/made>

35. A schedule of information was included in the submission from BBLP in connection with their tender and which BBLP considered to have been provided in confidence. This schedule, the Council explained, included the Price List for the contract and the Council provided this to the ICO. It also provided some content of a letter from BBLP to the Council dated 20 December 2018 in which it reported the following:

*"We certainly consider at this time that the information with regard to our rates remains commercially sensitive information (but would also consider that this may still be the case when the novated contracts come to an end).*

*The rates provided by Balfour Beatty within the submission were, as you state, only provided on the understanding that the information was provided in confidence and the council would respect the duty of confidence that Balfour Beatty has in relation to these rates as they are unique to our business".*

36. The Council confirmed that the information was provided under an obligation of confidence, that it is not available from other sources and is not trivial in nature.
37. Having taken all of the above into account and considering the nature of the information, the Commissioner is satisfied that the information is subject to a duty of confidence provided by law. Therefore, this element of the exception is satisfied.

*Is the confidentiality provided to protect a legitimate economic interest?*

38. 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.
39. The information relates to a previous tender for contracts which has been terminated. However, some novated contracts remain in force until 2020. The Council has indicated that it proposes to put these novated contracts back out to tender, and it intends to start this process in September 2019. The Council considers that BBLP are likely to tender for the new contracts.

40. The Council explained that there are six highways sub-contracts still in operation between the Council and BBLP until May 2020. It argued that disclosure of the withheld information, which includes rates in the existing contract, would disadvantage them if the rates were known to other bidders for these future contracts. It said that this would be a detriment to the Council as other bidders would be able to adjust their prices accordingly when submitting its own bids.
41. The Council provided further content of the letter received from BBLP dated 20 December 2018 in which it reported the following:

*"...if the requested information was disclosed and obtained by Balfour Beatty's competitors, it would have two consequences: firstly, competitors would have a significant insight into not only Balfour Beatty's commercial models and pricing, but also the level of commercial risk they are willing to absorb, putting it at a clear disadvantage in competitive situations. Secondly, disclosure would put Balfour Beatty at a disadvantage in future and new competitions, which could rule it out of any future bids for publicly and privately tendered works, thus impacting competitiveness and leading to market distortions".*
42. In relation to the Council's argument that disclosure of the information would be detrimental to its future tender bids, the Commissioner accepts that it would be a disadvantage to the Council if the rates were known to other bidders as this would enable the other bidders to change their prices. She also accepts that disclosure would put BBLP at commercial risk because competitors would be aware of its pricing structure and the commercial risk strategies it employs.
43. The Council further argued that disclosure would have an impact on future and new competitions because the contractor could be excluded from any future bids for publicly and privately tendered works which would affect competitiveness and result in market distortions. The Commissioner disagrees with this particular argument since she was not provided with a sufficient explanation of why the contractor would be excluded from future and new competitions.
44. If the Council is arguing that the contractor may not bid for public contracts in the future because sensitive information may be disclosed, the Commissioner does not consider this holds a significant degree of weight. Public contracts are highly lucrative and may form a large part of the contractor's actual or potential commercial activities in the future. The suggestion that a large contractor such as BBLP, with a history of working with public authorities to deliver contracts of a sizeable nature, would exclude themselves from bidding for public contracts in the future, appears to the Commissioner to be unlikely.



45. However, the Commissioner accepts that commercial harm would be caused by the disclosure of the information. Releasing the information would adversely affect BBLP's ability to tender on fair terms during a future retendering process if this information were to be disclosed.
46. In relation to the contractor's interests, as recommended in the code of practice issued under regulation 16 of the EIR<sup>2</sup>, the Council consulted with the contractor and sought its views in relation to the request. The Council supplied to the Commissioner a letter from BBLP that confirmed that BBLP's position was against disclosure of the requested information.
47. It is noted that a decision notice FS50798266<sup>3</sup> has already been issued in relation to an identical request made to a different public authority. In that case, the Commissioner concluded that the public authority had failed to demonstrate that the criteria for a "legitimate economic interest" had been met and therefore regulation 12(5)(e) was not engaged. However, the Commissioner considers each case on its own merit, taking into account all the information that was made available to her.
48. In terms of what the legitimate economic interests are here, in relation to the Council it is to secure best value for public money when awarding contracts. In relation to the contractors, it is the legitimate economic interest of protecting their market position.
49. Having considered the information and the arguments submitted by the Council and BBLP, the Commissioner is satisfied that a degree of harm would occur to the contractor's and the Council's legitimate economic interests.

*Would the confidentiality be adversely affected by disclosure?*

50. On this point, the Council stated that disclosure of the information requested (part 6 – schedule of rates) would have the following consequences:

*"Specifically the disclosure of the price schedule would:*

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<sup>2</sup> Part VII of the EIR code: [https://ico.org.uk/media/for-organisations/documents/1644/environmental\\_information\\_regulations\\_code\\_of\\_practice.pdf](https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf)

<sup>3</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614515/fs50798266.pdf>

*Give competitors a significant insight into BBLP's commercial models, pricing and commercial risk appetite putting BBLP at a clear commercial disadvantage across its whole business.*

*Disadvantage the current contractors in the retendering process if their prices were known to other bidders.*

*Be likely to result in disadvantage to the Council as other bidders taking part in the retendering process would be able to adjust their prices accordingly. Provide an insight to the pricing and risk strategy of BBLP's supply chain, a number of which are still delivering services to the Council under the terms of the original contract."*

51. The Commissioner considers that the disclosure of truly confidential information into the public domain would invariably harm the confidential nature of that information. In other words, if the first three criteria are met then the exception will be engaged. Consequently, the Commissioner has concluded that the Council was correct to engage the exception at regulation 12(5)(e).

### **Public interest test**

52. Regulation 12(5)(e) is subject to the public interest test. This means that even when the exception is engaged, public authorities have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure. Even where the exception is engaged, the information may still be disclosed if the public interest in disclosing the information is not outweighed by the public interest in maintaining the exception.
53. There is always a public interest in the accountability and transparency of public authorities, and in processes that promote good decision making and uphold integrity. The EIR implement the EU Directive 2203/4/EC on public access to environmental information and the public interest in this is clearly stated:

*"Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."*

54. As the Commissioner has accepted that regulation 12(5)(e) is engaged, the public interest test will apply to this information.

*Public interest in favour of disclosing the information*

55. In its submissions to the Commissioner the Council was of the view that disclosure of the information would increase transparency of its functions and decision-making processes. The Council said that there was an inherent public interest in ensuring competition for public sector contracts and obtaining value for money for the Council.

*Public interest in favour of maintaining the exception*

56. The Council explained that it would be more difficult to achieve value for money when awarding contracts if the price structure of one of the bidders was known to all other bidders. The Council considered that this would be detrimental to the public purse and therefore contrary to the public interest. It said that disclosure would be prejudicial to the Council as the release of this information may discourage companies from bidding for the Council's highways contracts. Disclosure of the information may also help bidders structure bids that would be economically disadvantageous to the Council.
57. A disclosure of the information would also be likely to undermine the level playing field in the upcoming tendering process. There is a strong public interest in protecting the level playing field in such exercises.

*Balance of the public interest arguments*

58. The Commissioner accepts that there is a strong public interest in public bodies demonstrating effective decision-making and obtaining best value for public funds. She also accepts that there is public interest in providing details of its expenditure and requirements for the highways and street scene service, as these will affect a substantial section of the public and cost significant amounts of public money.
59. However, the Commissioner considers that it is important for public bodies to be given space to negotiate and to discuss various options in relation to financially and environmentally significant future provision of the service. This relates to the tender and renegotiation of the new contracts, not the existing contracts.
60. The Commissioner notes that the Council is currently tendering for future contracts. Disclosing the information would provide indicative information on the likely bids which BBLP might make with regards to costs and pricing for the new contracts which are being put to tender. It would also provide information on how BBLP manages its commercial risk. This would damage BBLP's ability to tender for these contracts on a fair and equal basis, and the Council's ability to obtain the best deal it can. This would not be in the public interest.

61. Given all the factors in favour of disclosure and of maintaining the exception as set out in regulation 12(5)(e) of the EIR, the Commissioner's conclusion is that the public interest in the maintenance of the exception outweighs the public interest in the disclosure of the withheld information. Her finding is, therefore, that the Council acted correctly when it refused to disclose the information in question.

## Right of appeal

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62. 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@justice.gov.uk](mailto:grc@justice.gov.uk).

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

63. 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.
64. 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 .....**

**Ben Tomes**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**