

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

**Date:** 14 February 2022

**Public Authority:** Environment Agency  
**Address:** Horizon House  
Deanery Road  
Bristol  
BS1 5AH

**Decision (including any steps ordered)**

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1. The complainant has requested the Environment Agency (EA) to disclose a copy of the contract between District Enforcement (DE) and the EA for the management of moorings on the non-tidal River Thames. The EA disclosed some information by refused to disclose the remainder, citing regulation 12(5)(e) and 13 of the EIR.
2. The complainant confirmed that he has no interest in the personal data redacted. The Commissioner's investigation therefore focussed on the EA's application of regulation 12(5)(e) of the EIR.
3. The Commissioner's decision is that the EA is entitled to refuse to disclose the remaining withheld information in accordance with regulation 12(5)(e) of the EIR.

## Request and response

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4. On 19 February 2021, the complainant wrote to the EA and requested information in the following terms:  
  
"You now have a contract between District Enforcement and yourselves to manage moorings on the non-tidal Thames. As this is certainly in excess of the recognised level of £10,000 please could you publish full details of the contract and the financial agreement as commercial confidentiality would not appear to be a reason for non-disclosure."
5. As the complainant received no response, he requested an update on 8 March 2021.
6. The EA responded on 11 March 2021. It disclosed some information but refused to disclose the remainder citing regulation 12(5)(e) and 13 of the EIR.
7. The complainant requested an internal review on 13 March 2021.
8. As the complainant received no response, he chased the matter up on 7 May 2021.
9. The EA carried out an internal review and notified the complainant of its findings on 13 May 2021.

## Scope of the case

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10. The complainant contacted the Commissioner 13 May 2021 to complain about the way his request for information had been handled. The complainant is concerned that the contract contains unfair conditions for boaters and that District Enforcement (DE) are taking advantage of the EA, running up costs that will eventually rebound onto the boater. The complainant believes that the full details of the contract should be shared with users so that they can see if the EA have negotiated a fair contract that properly manages short term mooring use.
11. The complainant confirmed to the Commissioner that he has no interest in pursuing the personal data redacted under regulation 13 of the EIR; only the information withheld under regulation 12(5)(e).
12. During the Commissioner's investigation further recorded information was disclosed to the complainant on 10 December 2021 and 24 January 2022. The remainder of this notice will therefore focus on the remaining withheld information and the EA's application of 12(5)(e) of the EIR.

## Background

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13. The EA explained that in August 2013 it began a six-month trial of employing contract law and civil enforcement arrangements at a small sample number of its short stay visitor mooring sites along the non-tidal River Thames. This was to improve compliance with the terms and conditions of use, which was unacceptably poor with too many boat owners staying for longer than it allowed and/or not paying the applicable fees.
14. To address this, the EA said that it engaged DE to introduce private 'car-park' style terms and conditions of use at these sample sites, DE being an experienced provider of this service to many clients. The EA deemed the trial to be a success, and the arrangements at the four pilot sites remained in place while a procurement exercise was carried out for a provider to manage similar arrangements at a larger number of sites for a longer period.
15. As a result of this procurement exercise, NSL Ltd, were appointed, and in September 2015, similar arrangements to those managed by DE began being rolled out to additional EA short-stay visitor mooring sites on the non-tidal Thames.
16. In November 2016, the EA began an additional year-long pilot with a small start-up company called Thames Visitor Moorings (TVM). TVM provided a bolt-on customer facing service at its short-stay visitor mooring sites through which users could record their arrival at sites covered by the pilot, and pay the fees owing for stays of 2-3 days via TVM's website.
17. The EA confirmed that at the end of April 2017 its contract with NSL Ltd expired. Due to resourcing issues and other operational priorities, a procurement exercise to appoint another provider (or re-appoint NSL Ltd) was not carried out. From this date, the EA once again became responsible for taking its own legal action against users of its short-stay visitor mooring sites itself (if necessary), although TVM remained employed by the EA to help monitor and manage usage at some of its sites and take payments of fees on EA's behalf.
18. In 2019, the EA's contract with TVM (which had been extended beyond the original 12-month period) ended and it once again became wholly responsible for managing usage at all its short stay visitor mooring sites along the non-tidal River Thames. This was until, following another procurement exercise, the EA appointed DE in October 2020 to introduce and manage arrangements at all EA owned sites along the non-tidal Thames (except at its lock sites) to ensure that all boats

mooring at those sites, were doing so in accordance with the terms and condition they introduced on the EA's behalf.

19. The service DE were re-employed to provide was essentially that which had previously been provided by NSL Ltd and TVM working in tandem but would be provided solely by DE in a one-stop-shop solution. DE would wholly be responsible for monitoring sites under their management and dealing with any breaches of terms and conditions. The EA explained that its staff would not need to be involved other than in very exceptional circumstances, freeing up time for the EA staff to spend on other, more essential activities.

## Reasons for decision

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### Regulation 12(5)(e) – commercial interests

20. Regulation 12(5)(e) of the EIR states that a public authority can 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.
21. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the authority must demonstrate that:
  - the information is commercial or industrial in nature;
  - the information is subject to confidentiality provided by law;
  - the confidentiality provided is required to protect a legitimate economic interest; and
  - that the confidentiality would be adversely affected by disclosure.
22. In accordance with regulation 12(2) the public authority should apply a presumption in favour of disclosure. So, a public authority should only refuse to disclose the information if it considers the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception.
23. Dealing with the first bullet point, the Commissioner is satisfied that the remaining withheld information is commercial in nature. The remaining withheld information is part of a commercial agreement between the EA and DE. DE provides commercial services to the EA at a cost and others and is therefore commercial in nature.

24. Turning now to the second bullet point, EA considers the remaining withheld information is covered by the common law duty of confidentiality. It stated that the remaining withheld information was provided to the EA in confidence as part of a tender for a commercial activity. The information is not trivial and is commercially sensitive as disclosure would adversely affect DE's commercial interests. It therefore has the necessary quality of confidence.
25. The Commissioner notes that there is no obvious confidentiality clause in the withheld information he has seen. However, he considers it is not necessary for there to be a formal confidentiality clause for this element of the exception to be met. If the withheld information has the necessary quality of confidence (more than trivial and not otherwise publicly known) it can be said that it is protected by a common law duty of confidence.
26. The EA has stated that the information is commercially sensitive and disclosure would adversely affect the commercial interests of DE. It therefore regards the withheld information as having the necessary quality of confidence. The Commissioner does not consider the withheld information is trivial in nature for these reasons and he is not aware of the withheld information being otherwise publicly available. For these reasons he is satisfied that a common law duty of confidence is owed and this element of the exception is met.
27. Turning now to the third and fourth bullet point, the EA confirmed that it contacted DE about the request and the possibility of the disclosure of the remaining withheld information and it said that the remaining withheld information is:

“commercially sensitive methodologies that are unique to DE and form the competitive edge of the unique service we deliver. To disclose these ‘trade secrets’ in the public domain would damage DE’s future prospects.”
28. The EA confirmed that the remaining withheld information is specific to the way DE carries out the services it offers. It considers disclosure would cause real and significant harm to DE, as the remaining withheld information would be advantageous to its rivals. It reflects a pricing strategy and other commercial strategies which are unique to DE. Disclosure would allow DE's competitors (in a competitive marketplace such as this) to copy DE's processes and help them to gain a competitive edge. They could use the information to structure their own strategy and service delivery accordingly and outbid DE in future procurement exercises.

29. The EA stated that the remaining withheld information distinguishes DE from its competitors and details the unique service it would provide as part of the contract and for what price. If the remaining withheld information was disclosed it would weaken DE's commercial bargaining position in future negotiations and could put competitors at an unfair advantage in relation to any future procurement exercise and allow them to undercut DE's pricing.
30. The Commissioner has reviewed the remaining withheld information and he is satisfied that disclosure would adversely affect the legitimate economic interests of both DE and the EA. He notes from the background information the EA has supplied that the contracts are fairly short term and for very similar services. Since it was deemed that the initial trial in 2013 was a success, there has been several procurement exercises for the services the EA requires, with different companies securing those contracts. The Commissioner considers the remaining withheld information would be very useful to DE's competitors when the current contract comes to end and a further procurement exercise is required. DE's competitors could use the remaining withheld information to tailor their bids accordingly and outbid DE. Disclosure would therefore create an unlevel playing field and hinder DE's ability to compete fairly when the current contract comes to an end.
31. Disclosure would also adversely affect the EA's ability to secure the best possible terms and conditions it can. Disclosure would reveal what terms and conditions were secured with DE and at what cost. This would allow those wishing to compete for the contract at renewal to see what DE offered and secured and enable them to tailor their bids accordingly.
32. For the above reasons, the Commissioner is satisfied that bullet points three and four of paragraph 22 are met and therefore regulation 12(5)(e) of the EIR is engaged.

### **Public interest test**

33. The EA said that it has taken into account the presumption in favour of disclosure on environmental information under the EIR, in accordance with regulation 12(2). It also recognises the importance of openness and transparency, as this allows the public to hold public authorities to account with regards to how decisions are made and how public funds are spent.
34. However, it considers there is also a public interest in protecting the commercial interest of private companies and that of public authorities when they are exercising commercial related functions. It argued that there is a substantial benefit to the wider public in preserving the principle of commercial confidentiality. The EA stated that this principle,

together with its position that disclosure would harm DE's and the EA's economic interests, are weighty factors in favour of withholding the remaining withheld information.

35. The EA went on to say that in a competitive market place and where companies are of different size, awareness of each other's pricing breakdown and commercial strategy would disrupt a fair and balanced market place which is not in the public interest. It would prevent public bodies and private companies from obtaining best value and service for money.
36. It confirmed that it is not in the public interest to disclose commercially sensitive information such as pricing breakdowns and commercial strategies, as this information is unique to each company. The EA argued that DE has certain processes in place that are unlikely to be identical to those of its competitors. Accordingly disclosing the remaining withheld information would give an unfair insight into DE's practices and costing systems and this information could be used by its competitors to enhance their bids for similar contracts.
37. The EA confirmed that there is a strong public interest in ensuring fair competition in a mixed economy and it considers this overrides the public interest arguments identified in favour of disclosure.
38. The Commissioner acknowledges the public interest in openness and transparency and in providing the public access to information to enable them to understand more clearly why certain decisions are made by public authorities. Disclosure of the remaining withheld information would enable those interested in the services provided to scrutinise the terms and conditions secured and at what cost and evaluate for themselves whether value for money has been obtained.
39. It is also noted that there has been problems in tackling and monitoring compliance with the terms and conditions of use for short stay mooring sites along the non-tidal River Thames for several years and there has been a number of contracts since 2013 between the EA and private companies aimed at improving the management of these arrangements. The latest contract sees DE managing all the EA owned sites along the non-tidal River Thames and being wholly responsible for monitoring all sites and dealing with any breaches of terms and conditions. Disclosure of the remaining withheld information would enable those interested in the contract and the management of these sites to see how DE secured this work and how it priced the various different elements of the services it has agreed to offer.
40. However, in this case the Commissioner considers the public interest arguments in favour of maintaining the exception are stronger. It has



been identified that the remaining withheld information details DE's pricing structure and commercial strategy. The Commissioner considers this information would be very useful to DE's competitors during future procurement exercises for these services and similar. It would allow them to see how it has priced the contract and what EA was willing to accept. This would enable them to tailor any future bids accordingly and to outbid DE. It would also hinder the EA's ability to secure the same or more favourable terms for the tax payer. Such consequences of disclosure are not in the wider public interest. Instead it is in the public interest to protect DE and the EA's ability to compete fairly to ensure that the best possible terms and conditions, and price, is secured. If the EA is hindered from negotiating for the best possible terms, and secure these, it could potentially lead to it paying more for these services or similar and this would be detrimental to the public purse.

41. For the above reasons, the Commissioner is satisfied that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.



## Right of appeal

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42. 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: 0203 936 8963

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)

43. 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.
44. 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

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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