

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

Date: 13 October 2015

Public Authority: Gloucestershire County Council
Address: Shire Hall
Westgate Street
Gloucester
GL1 2TG

Decision (including any steps ordered)

1. The complainant has requested information relating to the Javelin Park incinerator. The Commissioner's decision is that Gloucestershire County Council has failed to demonstrate that the exception 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 (regulation 12(5)(e)). The Commissioner has also decided that Gloucestershire County Council has failed to demonstrate that regulation 6(1)(b) applies.
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 13 February 2015 the complainant wrote to Gloucestershire County Council (the "council") and requested the following information:

"....a full copy of the Javelin Park contract and particularly the sections relating to what compensation would have to be paid to UBB in the event that the project did not go ahead."
5. The council responded on 13 March 2015 and disclosed some information; other information was withheld under the EIR exception for the confidentiality of commercial or industrial information (regulation 12(5)(e)) and personal data (regulation 13) and the FOIA exemptions for prejudice to commercial interests (section 43(2)) and personal data (section 40(2)).
6. Following an internal review the council wrote to the complainant on 13 April 2015. It stated that it was maintaining its position.

Scope of the case

7. On 23 April 2015 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. During the course of the Commissioner's investigation, the council disclosed some of the formerly withheld information to the complainant. In addition to maintaining its reliance on section 40 and 43(2) of the FOIA and regulations 12(3) and 12(5)(e) of the EIR, the council also said that section 43(1) applies some of the information, section 21 of the FOIA and regulation 6(1) of the EIR apply to Schedule 7 'Site Information' and some information within Schedule 3 'Service Delivery Plans'.
9. The Commissioner has not considered the application of section 40(2) of the FOIA or regulation 12(3) of the EIR as there has not been a specific complaint in relation to this. The Commissioner outlined the scope of the investigation to the complainant as relating to whether the council is entitled to rely on the exemption at section 43(2) of the FOIA and the exception at regulation 12(5)(e) of the EIR and this was not disputed.
10. The council initially supplied its response to the Commissioner's enquiries in relation to the withheld information except Schedule 3. It said that in so far as the information is environmental it has considered release under the EIR and that where these regulations do not apply it

has considered release under the FOIA, for example the contractors hourly rates. It provided a table entitled 'List of documents comprising the EIR request' with the following columns:

- Document
 - Document description
 - Supplied
 - Redacted
 - Details of redacted information
 - Exemption and harm in releasing the specific information
11. In relation to each document, the final column doesn't specify whether the information is being withheld under section 43(2) or regulation 12(5)(e) but states both. In the case of schedules 9 and 29, the final column states that the information is being withheld under sections 43(1), 43(2) and regulation 12(5)(e). The withheld information as supplied to the Commissioner is not marked with whether the information is being withheld under sections 43(1), 43(2) or regulation 12(5)(e). Neither does the withheld information, as sent to the Commissioner, clearly identify which documents relate to which schedule in all cases.
 12. After issuing an Information Notice, the Commissioner received the council's response regarding Schedule 3. It said that the exemptions being relied upon are regulation 12(5)(e) or the EIR and sections 43(1) and 43(2) of the FOIA "on account of the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest". It also said that whilst the response explains the exemptions being relied on for the 'Method Statements' (the Commissioner understands this to refer to Schedule 3), as redacted information within these statements is cross referenced in other parts of the contract, these arguments should also be applied to all redactions the council wishes to apply across the full contract. As above, the withheld information as supplied to the Commissioner is not marked with whether the information is being withheld under sections 43(1), 43(2) or regulation 12(5)(e).
 13. The Commissioner has not been able to identify whether the council considers specific information to fall under the FOIA or EIR. The arguments initially supplied by the council are headed as per the required elements of regulation 12(5)(e) and the wording as to why redactions are made in relation to Schedule 3, as stated in the above paragraph, reflects the wording of regulation 12(5)(e). As the

information relates to a measure which clearly affects the environment, the Commissioner has considered it appropriate to consider whether the exception at regulation 12(5)(e) of the EIR applies rather than the exemptions at sections 43(1) or 43(2) of the FOIA. For the same reasons, he has also considered whether regulation 6(1) applies rather than section 21.

14. For clarity, the Commissioner has considered the application of regulation 6(1) and 12(5)(e) of the EIR to the remaining withheld information.

Reasons for decision

15. The reasoning for the Commissioner's decision in this case is set out in another decision notice which relates to a complaint about a comparable request for information (ICO reference: FER0579974). The relevant reasoning is also attached as an annex to this decision notice.

Right of appeal

16. 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

17. 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.
18. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

Regulation 12(5)(e)

1. 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."
2. 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*¹. 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.
 - The confidentiality is protecting a legitimate economic interest.
 - The confidentiality would be adversely affected by disclosure.
3. The Commissioner has considered each of these factors in turn.

Is the information commercial or industrial in nature?

4. 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.
5. The Council said that the redacted information within the contract and schedules relates to a commercial activity, either of the council or the contractor in relation to the Gloucestershire residual waste project, the electricity project and other commercial activities, which are carried out by the council and/or the contractor. It further explained that the redacted information contains information relating to the commercial positions agreed between the council and the contractor as follows:

¹ Appeal number EA/2010/0012

"Some of the redacted information is financial and reflects the costs and uniquely negotiated positions that are bespoke to the Gloucestershire residual waste project.

Some of the redacted information contains data relating to electricity revenue which is a commercial position agreed between the Council and the contractor. Such information is likely to form the commercial strategy for the Council in future projects and therefore relates to its commercial positions/strategy/assumptions."

6. 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?

7. 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.
8. The council said that it has considered whether the information has the necessary quality of confidence, whether the information was shared in circumstances creating an obligation of confidence, and whether there are contractual obligations of confidence.
9. In relation to the necessary quality of confidence, the Commissioner's view is that the information must not be trivial or in the public domain. The council said that the redacted information is not trivial, as it relates to the financial or business affairs of the council and the contractor. It confirmed that the redacted information is not available by other means, has never previously been disclosed publicly, and that knowledge and access to redacted information is carefully controlled on a need to know basis.
10. The council said that the information was shared in circumstances creating an obligation of confidence as it was part of the procurement process and has been incorporated into the Residual Waste Project Contract which itself contains obligations of confidentiality. It said that there is an inherent duty of confidentiality when information is submitted to councils in procurement exercises and that the Public Contracts Regulations 2006, and their precursor, require that where a contractor obtains information as part of a procurement process the council should accede to reasonable requests from the contractor that information passed to the council as part of the procurement process is treated as confidential. The council also said that sensitive financial,

design, business and unique methodology information provided to the council by third parties has been done on a confidential basis and that this is brought to the attention of the council by third parties when providing the council with such information. It said that unauthorised disclosure of the information would be likely to result in legal action being taken against the council.

11. In relation to the contractual obligations of confidence, the council explained that there is a provision in the Residual Waste Project Contract itself that certain information is confidential and therefore it would be a breach of contract on the part of the council to disclose that commercially sensitive information. The Commissioner notes that the council did not identify either the specific provision in the contract relating to confidentiality nor the information covered by such provision.
12. However, having regard to the contents of the information and the council's submissions, the Commissioner is satisfied that the information is subject to a common law duty of confidence. Therefore, this element of the exception is satisfied.

Is the confidentiality provided to protect a legitimate economic interest?

13. 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?

14. The council has said that the economic interests to be protected are those of the contractor and the council.
15. 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.
16. The Commissioner asked the council to clarify on what basis it has established that prejudice to a third parties interests may occur and to provide copies of correspondence the council has had with third parties in relation to this request. The council said that it has been consulting with the contractor throughout the process but did not supply copies of any correspondence. It is not clear to the Commissioner whether the consultations were as a result of this particular request. However, the

Commissioner is satisfied that the arguments in this case reflect the third party's concerns.

Legitimate economic interests and disclosure would cause harm

17. 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.
18. 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.
19. 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".
20. The council said that it has identified the information that should remain withheld as falling into the following categories:
 - Proprietary methodology, equipment and design (trade secrets). It said that this has tended to break down into two areas: Information that relates to products for example the design and operational ranges of major pieces of equipment such as the furnace itself and its operational methods, and bespoke working practices such as turnaround for vehicles and staffing structures.
 - Prejudice to commercial interests categorised as: contractor's staffing; third party suppliers and customers; measurements - time and distance; quantities.
 - Financial data and targets.

21. It explained, in general terms, what constitutes a trade secret. As the Commissioner is considering the request under the EIR, he has examined the council's arguments in relation to the exception at regulation 12(5)(e), which doesn't specifically refer to trade secrets, as opposed to the exemption at section 43(1) of the FOIA which is class based exemption for information that constitutes a trade secret.
22. The council has said that the redacted information contains sensitive information regarding the agreed commercial positions and financial information relating to the council and the contractor and that disclosure of these specific details would be likely to adversely affect the legitimate economic interests of the Council and the contractor. The Commissioner notes that this argument is couched in very general terms.
23. It also said that the contract contains information provided by the contractor as to when and how it intends to carry out the contract and provide waste management services. It said that some of this information is proprietary in nature and provides a detailed overview of the way the contractor approaches such contracts. The contractor states that disclosure would provide information on its unique methods of business which may be of advantage to its direct competitors, thereby negating its ability to develop a commercial advantage when tendering for other contracts. Again, the Commissioner notes that this argument is couched in general terms. It does not explain how providing information on the contractors methods of business may be of advantage to its direct competitors and this is not clear to the Commissioner, particularly as the council has also stated that the 'uniquely negotiated positions ...are bespoke to the Gloucestershire residual waste project'.
24. The council said that the contractor's original, highly valuable and much sought after concepts and designs would be seized upon by competitors, with loss of competitiveness to the contractor which could lead to the contractor losing future contracts. It said that the fine detail of the contractor's offering fall within the scope of its unique and differentiating service provision and release would enable its competitors to remove any competitive edge. It explained that information revealing working practices show how the contractor can offer services within the contract prices and quality required and highlights areas where the contractor effectively reduces its costs and profit margins and that release would be likely to impact on its trading position as it could allow competitors to analyse and use the information to their advantage. It also said that disclosure of information relating to third party suppliers and customers, including, for example, the cost of third party equipment, costs associated with running and maintaining the equipment, details of insurance and pricing, would be likely to help competitors analyse likely profit margins and use to their advantage which would potentially negate the contractor's ability to establish a competitive position in

relation to its rivals. The Commissioner notes that this argument relates to information that may help competitors analyse costs and profit margins rather than disclosure of costs and profit margins themselves.

25. It also said that the release of planned dates would enable competitors to understand the unique programme of delivery and use this to their advantage and at the expense of the contractor. In addition it said that time periods and distances are commercially negotiated and bespoke to this project and release would be likely to cause commercial harm to both the contractor and council in future procurements.
26. Another argument submitted by the council is that information relating to quantities would highlight areas where the contractor effectively reduces its costs or been subject to heavy negotiations in order to facilitate lower overall costs to council and disclosure could allow competitors to analyse and use such information to their own advantage potentially negating the contractor's ability to establish a competitive position. It said that disclosure of performance targets and guarantees would prejudice the commercial interests of the contractor and the council as this information was subject to lengthy deliberation and heavy negotiation and the guarantees are directly related to performance of equipment and are in part a trade secret. It explained that the guarantees are specifically bid in relation to this contract. It also said that disclosing detailed costs would put the contractor at disadvantage when tendering for other work against rival companies and explained that the contractor is still in the process of tendering for work of this nature else elsewhere in UK and the withheld information is likely to be used by other contractors when competing for future contracts.
27. The Commissioner does not consider that the arguments contained in the above three paragraphs 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 effect claimed. The Commissioner notes that this is a bespoke project and considers that each waste project will have various factors to take into account.
28. The council said that disclosing the information is likely to delay or otherwise adversely affect the progress of the waste project, the facility once it is operational and the electricity project and that such delays would cause harm to the financial interests of those dependent on it. The Commissioner does not consider that the council has linked this argument to specific information and has not explained how or why delays would occur.

29. The council also submitted the following argument:

“Disclosure of the redacted information would be of advantage to other businesses competing against the contractor or for Council projects in any future procurement, thereby negating the Council or the contractor’s ability to develop a commercial advantage as purchaser/supplier when procuring/bidding for other contracts and providing competitors with access to commercially valuable information which they would not have had otherwise. Disclosure of the redacted information would therefore impact on the Council and the contractor’s revenue and income, ability to succeed in future negotiations and projects, gain value for money and would cause significant damage to the projects at issue.”

Whilst the Commissioner can follow the general chain of consequences identified here, he does not consider that the council has linked such consequences to the specific redacted information or sufficiently explained the causal sequence.

30. The council said that companies would be likely to be discouraged from participating in council schemes if they felt it could result in the disclosure of information relating to their general business that could damage their business. The Commissioner considers that the council has not specifically tied this argument to the legitimate economic interests of the council as required for this exception. He also considers that private companies will still need, and want, to bid for lucrative public sector contracts regardless of disclosure under the EIR or FOIA.
31. The council also said that its role in future procurements is likely to be compromised because suppliers could withhold sensitive information in the future if it would significantly affect their bargaining or negotiating positions in future transactions meaning that the council's ability to negotiate effectively to secure best value could be reduced and it's decision could be less informed. As stated above, the Commissioner 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.
32. Another argument the council has made is that detailed technical and methodological information on the equipment and systems used by the contractor is commercially sensitive and could be studied and adopted by competitors of the suppliers of the equipment. It appears to the Commissioner that this does not relate to the councils or contractors legitimate economic interests but instead relates to the suppliers of the

equipment used by the contractor. He therefore does not consider this to be relevant.

33. The council explained that some of the performance indicators and time periods have been removed. It said that these are only in circumstances where they could be influenced by factors beyond the control of the contractor. It said that due to the sensitivity of the situation, activists/campaigners could use this information to cause disruption beyond these limits, causing financial damage to the contractor for factors outside of its control. The council said that there is evidence to show that campaigners would go to significant lengths to disrupt the proposals and running of the waste plant and therefore, this represents a real risk on the ability of the contractor to meet the contract requirements. It said that being put in breach of contract through no fault of their own would result in being subject to penalties which would have a negative impact on finances and impact on their trading position. The Commissioner notes that this argument does provide some detail as to the causal link, however, the council did not provide him with evidence to show that campaigners would use the redacted information to force the contractor into a position where it is in breach of contract and subsequently subject to financial penalties. The Commissioner also considers that if this situation did occur, for example, if the contractor could not meet a certain requirement due to campaigners blocking deliveries, then it is feasible that the contractor could argue, and the council might accept, that the breach was clearly outside of the contractor's control and therefore financial penalties may be waived. It should be noted that this example of campaigners blocking deliveries has not been provided by the council but has been envisaged by the Commissioner.
34. In relation to the information redacted from the electricity schedule (Schedule 33) and related information, the council said that this details its commercial strategy on future sales of electricity generated by the energy from waste facility. It explained that the council will own the electricity produced from the waste facility, the value of which is around £6m per annum at 2015 prices and the sale of this is likely to be subject to at least two future procurements. It said that a premature release would be likely to have a negative impact on its future plans and lead to the council not achieving the best financial position possible. It said that once the relevant strategy is operational the commercial sensitivity may reduce but disclosing the predicted finances for this work would be likely to encourage suppliers to adjust their prices accordingly and effect the bargaining position of the council. The Commissioner does not consider that this argument clearly evidences the causal link between disclosure of this information and harm to the council's legitimate economic interest. He notes that the full 30 page schedule has been withheld and

the council hasn't specified or given examples of which information would have a negative impact.

35. The Commissioner considers that although the council has consulted with the contractor in relation to this matter the majority of 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.
36. 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. The Commissioner notes that the majority of the arguments supplied by the council are worded in terms of 'would be likely' rather than wording denoting a stronger likelihood of 'would' occur. 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.
37. The Commissioner understands the general principle that information relating to commercial negotiations will carry some sensitivity whilst such negotiations are ongoing. However, he considers that it is for public authorities to fully explain the relevant causes and effects.
38. The Commissioner considers that the council has been given sufficient opportunity to provide evidence and arguments in support of its position. 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.
39. In this instance, 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.

Regulation 6 – Form and format of the information

40. Regulation 6(1) states that;

"Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless –

(a) it is reasonable for it to make the information available in another form or format; or

(b) the information is already publicly available and easily accessible to the applicant in another form or format.”

41. In relation to Schedule 7 'Site Information', the council has said that it is 'not required to provide information in a particular form or format if the information is already publicly available and easily accessible to the applicant in another form or format'. It said that the information is reasonably accessible from the Land Registry and provided the following link:

<https://land-registry-online.com/>

42. In relation to Schedule 3, the council said that information is already available from other bodies namely: Environmental Permits, which are available from the Environment Agency; and Information relating to Restrictive Covenants on the site, which are available from the Land Registry.
43. The complainant has said that he disputes the withholding of this information as it is not clear whether the information that is held within withheld Schedule 7 is fully available in the public domain via the Land Registry. He commented that the Schedules to the Project Agreement make reference to Parts 1, 2 and 3 to Schedule 7 which could imply that there is additional information held in the schedule that may not necessarily be within the set of information held by the land registry.
44. The council has not confirmed to either the complainant or the Commissioner whether all the information is available from the Land Registry and Environment Agency and has not provided links directly to the information, instead it has provided a link to land registry's search website.
45. The Commissioner has decided that the council has not provided sufficient information to establish that the information contained within Schedules 3 and 7 is already publicly available and easily accessible to the applicant in another form or format. Therefore, he considers that the council has failed to demonstrate that regulation 6(1)(b) applies in this case.

Other matters

Emissions

46. Regulation 12(9) provides that to the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).
47. Given the nature of the request, the Commissioner asked the council to confirm whether any of the information constitutes information on emissions or relates to information on emissions. He informed the council of his opinion that the EU Directive, upon which the EIRs are drawn, emphasise that the term emissions should be interpreted broadly.
48. The council's response said it had very carefully considered the ICO's guidance on this matter and that none of the withheld information constitutes information on emissions.
49. The Commissioner considers it feasible that some of the redacted information could constitute information on emissions, or relate to information on emissions. For example, the technical and design proposals could include information on emission levels likely to be generated in the handling of waste.
50. However, given that the decision in this case is that the exception at regulation 12(5)(e) is not engaged, and therefore the required step is for full disclosure to be made, the Commissioner has not deemed it necessary to make a decision as to whether any of the withheld information constitutes information on emissions.