

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

Date: 9 November 2017

Public Authority: Norfolk County Council
Address: County Hall
Martineau Lane
Norwich
Norfolk
NR1 2DH

Decision (including any steps ordered)

1. The complainant has requested information relating to a terminated contract to develop a waste to energy facility. Norfolk County Council refused the request, citing the FOIA exemptions for legal professional privilege (section 42) and commercial interests (section 43(2)). It subsequently relied on EIR exceptions for the course of justice (regulation 12(5)(b)) and commercial confidentiality (regulation 12(5)(e)) to withhold the requested information.
2. The Commissioner's decision is that Norfolk City Council:
 - Correctly engaged regulation 12(5)(b) but that the public interest favours disclosing the information and,
 - Failed to demonstrate that regulation 12(5)(e) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
4. The public authority must take these steps 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.

Background

5. In March 2011, Norfolk County Council agreed to award a 25 year contract with Cory Wheelabrator (the "contractor"), to build and operate a power and recycling centre at the Willows Business Park in Saddlebow, near King's Lynn. The contract was worth around £600m.¹
6. In April 2014 the council voted to recommend terminating the contract. On 1 December the council reported that it had agreed to pay a full and final termination settlement to the contractor of £33.7m.²

Request and response

7. On 11 December 2016 the complainant wrote to Norfolk County Council (the "council") and requested information in the following terms:

"Please provide me with copies of all correspondence (emails, letters including attachments) between NCC officers and councillors and legal advisors Sharpe Pritchard, prior to signing the contract with Cory Wheelabrator in February 2012, wherein Sharpe Pritchard advises anyone at Norfolk County Council of the impact of the delay by Defra awarding the PFI on the dates in the contract, thereby threatening the PFI under the terms and conditions.

Please also provide me with copies of all correspondence (emails, letters including attachments) between officers and councillors and Sharpe Pritchard, prior to signing the contract with Cory Wheelabrator in February 2012, wherein Sharpe Pritchard advises anyone at Norfolk County Council of the risks and/or merits of NCC taking on the risk of foreign exchange rates, and the risks and/or merits of signing the contract in February 2012."

8. The council responded on 9 January 2017. It stated that it was withholding the information under section 42 of the FOIA and regulation 12(5)(b) of the EIR; it also indicated that the exemption in section 43(1) of the FOIA and exception in regulation 12(5)(e) were "likely" to apply to the information.

¹ <https://www.norfolk.gov.uk/news/2014/12/agreement-reached-to-terminate-energy-from-waste-contract>

² Ibid.

9. Following an internal review the council wrote to the complainant on 12 April 2017. It stated that it was maintaining its position.

Scope of the case

10. On 13 June 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
11. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information.
12. During the course of her investigation the Commissioner advised the council that, in her initial view, the request fell to be considered under the EIR in its entirety and that she would discount its arguments in relation to the FOIA. The council did not dispute this view and provided submissions in this regard.

Reasons for decision

Regulation 12(5)(b) – course of justice

13. Regulation 12(5)(b) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

“...the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.”

14. The council has withheld an email exchange between one of its officers and Sharpe Pritchard (a firm of solicitors).
15. In reaching a decision as to whether the council has correctly applied the exception, the Commissioner has considered some relevant Tribunal decisions which clarify how the exception works. In the case of *Kirkaldie v ICO & Thanet District Council* [EA/2006/0001] the Tribunal stated that:

“The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve

this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation".

16. The Commissioner has also noted the views of the Tribunal in *Rudd v ICO & The Verderers of the New Forest* [EA/2008/0020], which stated that:

"...the Regulations refer to 'the course of justice' and not 'a course of justice'. The Tribunal is satisfied that this denotes a more generic concept somewhat akin to 'the smooth running of the wheels of justice'...Legal professional privilege has long been an important cog in the legal system. The ability of both parties to obtain frank and comprehensive advice (without showing the strengths or weaknesses of their situation to others) to help them decide whether to litigate, or whether to settle; and when to leave well alone has long been recognised as an integral part of our adversarial system".

17. Legal professional privilege ("LPP") protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal in *Bellamy v ICO & DTI* [EA/2005/0023] as, *"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation"*³.
18. There are two types of privilege – legal advice privilege and litigation privilege.
19. The council has confirmed that it is relying on the advice privilege limb of LPP. It has stated that the withheld information constitutes a communication between its solicitors, Sharpe Pritchard, and council officers. The communication constitutes legal advice in relation to the council's contract with the contractor.
20. The council has stated that no part of the advice has been disclosed and that the privilege attached to the communication is, therefore, intact.

³ EA/2005/0023, para 9

21. The Commissioner is satisfied that there is a real potential that disclosure would result in the council being discouraged from seeking legal advice, particularly in the context of contentious matters such as those relating to planning, which are potentially damaging to its interests and which would inhibit the effectiveness of its public function. The Commissioner has concluded that it is more likely than not that disclosure of the withheld information would result in adverse effect to the course of justice.
22. As regulation 12(5)(b) is subject to a public interest test the Commissioner has gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

The public interest test

23. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out his assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest in disclosure

24. The Commissioner considers that some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities. The council has acknowledged the value of these principles and their relevance to the public interest in disclosing the information.
25. The complainant has noted that the contact in question would have cost Norfolk taxpayers some £600 million over 25 years. The termination of the contract at a cost of some £33 million, in their view, enhances the need for the public to scrutinise the council's actions in this respect, specifically to be reassured that it received sound advice and acted on it.
26. The complainant has also highlighted that the legal advice can no longer be "live" as the contract has been terminated for almost 3 years. They have also noted that, whilst the council has raised the possible risk of litigation, it has also acknowledged that this risk is remote.

Public Interest in maintaining the exception

27. The council has argued that:

"If legal advice cannot be given in confidence, or if it is subject to later disclosure, then such advice would be compromised in that it is likely the writers of such advice could not set out the weaknesses or risks on a given issue, in case they are used in litigation or other similar action against the public authority. If full and comprehensive legal advice cannot be given, then it prejudices the ability of decision makers to make the most appropriate decisions."

28. The council has also argued that, whilst the matters to which the advice relate are no longer live, there remains a risk of legal challenge. It has qualified this, however, by confirming that the risk of litigation is remote.

Balance of the public interest

29. The Commissioner appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible. Those affected by public authority actions may feel they have better understood the process if they know how a public authority reached its decisions and its legal justification for pursuing a particular development.
30. The Commissioner, following the Tribunal, considers that there will always be a strong public interest in maintaining LPP due to the important principle behind it which safeguards openness in all communications between client and lawyer to ensure access to full and frank legal advice. The Commissioner acknowledges that LPP is, in turn, fundamental to the administration of and course of justice.
31. The Commissioner considers that there is a need for enhanced transparency and scrutiny of decision making in cases involving significant public expenditure. This is particularly the case where information relates to matters that affect large numbers of people or have specific environmental implications.
32. In this case, in addition to cancelling a large waste project, the council had to pay the contractor some £33 million for terminating the contract. In view of these factors, the Commissioner considers that, in this case, there is an enhanced need for transparency to serve the public interest in being reassured that the council has received and acted on sound advice.
33. The Commissioner has accorded due weight to the inbuilt public interest in preserving LPP, however, she has not been provided with any specific arguments which justify its continued preservation in this case. The

relevant facts are that the contract has been terminated and, by the council's own admission, the possibility of litigation is remote. The Commissioner is left with the impression that the council has applied the exception in blanket form without due regard to the specific circumstances.

34. Having viewed the withheld information and the relevant context, the Commissioner considers that the public interest in transparency and accountability in this case carries considerable weight and provide a clear rationale for disclosure. Whilst she acknowledges and does not diminish the public interest weight in maintaining LPP, she has concluded that, in this case, the specific public interest factors in favour of disclosure provide weight which is simply lacking in the council's arguments in support of maintaining the exception.

Regulation 12(5)(e) – commercial confidentiality

35. The council has applied regulation 12(5)(e) to withhold the email exchange withheld under regulation 12(5)(b) and an extract from the contract with Cory Wheelabrator.
36. 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".
37. 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?

38. The withheld information relates to a contract to build and operate a power and recycling centre. The Commissioner is, therefore, satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

39. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
40. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
41. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
42. In this case the withheld information comprises extracts from the contract between the council and the contractor. The council has pointed to specific elements of the contract and stated that this is subject to confidentiality provisions. It has argued that, aside from explicit contractual obligations of confidentiality, the information is also subject to an implied common law duty of confidence.
43. The Commissioner accepts that, at the very least there is a clear implied obligation of confidence in the information shared between the parties. Furthermore, she notes that there is an explicit understanding between the parties that the information should be considered to be confidential. In addition to this, it is clear to the Commissioner that the information in this category is not trivial in nature. The Commissioner also understands that the information has not been placed in the public domain
44. The Commissioner considers that it is reasonable to assume that the information has been shared with the council in circumstances creating an obligation of confidence. The Commissioner accepts that, since the passing of the EIR, there is no blanket exception for the withholding of confidential information, however, for the purposes of this element of the exception, she is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest?

45. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.

46. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure.
47. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She 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".
48. The council has argued that confidentiality in this case protects the legitimate economic interests of the contractor, or the consortium members of the contractor. The council has further confirmed that the original contractor has been dissolved, it being a special purpose company set up for the specific power and recycling project.
49. The council has stated that the withheld information contains advice on and details of termination provisions in the contract. It has confirmed that it "...reflects the commercial terms the parties were negotiating on...". It has argued that disclosing the information "...*would give anyone seeking to negotiate similar terms an unfair insight into possible negotiating positions and terms that may be agreed.*"
50. The Commissioner notes that the council has not directed her to any specific elements of the withheld information, nor has it described how disclosure of specific elements would result in harm to future negotiating positions. It has not explained how a specific contract for a particular development might be transposed to other development or otherwise utilised to the detriment of the contractor or its consortium members.
51. The Commissioner further notes that the contractor in this case has been dissolved and, therefore, as regards the specific terms of the contract, no longer exists. Furthermore, the council has provided no evidence that it consulted with or otherwise sought the views of the contractor or consortium members as to the effects of disclosure on their legitimate economic interests.
52. The Commissioner is of the view that when a public authority wants to withhold information on the basis that to disclose the information would adversely affect the legitimate economic interests of a third party, it must have evidence that this does in fact represent the concerns of that

third party. It is not sufficient for the public authority to speculate on the prejudice which may be caused to the third party by the disclosure.^{4 5}

53. In addition to the generic nature of the harm ascribed in its submissions, the Commissioner notes that the council's arguments do not directly reflect the views of the putative affected party. In addition to being vague and undeveloped, the Commissioner notes that the council's submissions are, therefore, highly speculative.
54. The Commissioner's letter of enquiry to the council clearly set out that she provides public authorities with one opportunity to set out a final position before formalising her conclusions in a decision notice.
55. On the basis of its submissions in relation to regulation 12(5)(e) the Commissioner has concluded that the council has failed to show how disclosure would adversely affect a any party's legitimate economic interest. It follows that confidentiality, in this case, does not protect a legitimate economic interest and that the exception is, therefore, not engaged. The Commissioner has not, therefore, gone on to consider the public interest.

⁴ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

⁵ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i69/Derry.pdf>

Right of appeal

56. 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

57. 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.
58. 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