

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **5 October 2022**

Public Authority: **Breckland Council**

Address: **Elizabeth House
Walpole Loke
Dereham
Norfolk
NR19 1EE**

Decision (including any steps ordered)

1. The complainant requested copies of the Planning Services contract agreed between Breckland Council (the council) and Capita Symonds Limited (Capita) in 2009, and some associated documents.
2. The council initially withheld the requested information under section 43(2) - commercial interests, and section 12 - cost limits, of the Freedom of Information Act (FOIA).
3. During the course of the Commissioner's investigation, the council reconsidered the request under the EIR and, after conducting a series of further reviews, released the majority of the requested information.
4. However, the council has continued to withhold some information under regulation 13 - personal information, which the complainant does not contest, and regulation 12(5)(e) - confidentiality of commercial information, of the EIR.
5. It is the Commissioner's decision that the council is entitled to withhold some, but not all, of that information which it claims to be subject to the exception at regulation 12(5)(e).

6. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - Disclose the information set out within the confidential annex attached to this decision notice.
7. The council 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 FOIA and may be dealt with as a contempt of court.

Request and response

8. On 23 December 2020, the complainant wrote to the council and requested the following information:

“Hi, Grateful for a copy (redacted where necessary) of the contract and variations to that contract that you hold with Capita for the provision of Planning Services, planning related services including Building Control, 2 Land Charges and other related services. I understand the current contract with Capita was awarded c. 2009.”
9. On 15 February 2021, the council issued a refusal notice, citing section 43(2) of FOIA. At the internal review stage, the council upheld its previous decision; however, it stated that it now considered that section 12 of FOIA was also engaged, as the cost to provide the relevant information in a redacted format would exceed the appropriate limit.

Scope of the case

10. The complainant initially contacted the Commissioner on 5 March 2021, to complain about the council's decision to refuse their request for information in its entirety.
11. At the start of the Commissioner's investigation, the council confirmed it now considered the request to fall under the EIR. However, it maintained its view that all the relevant information should be withheld, setting out a number of exceptions in support of its decision.
12. During the course of the Commissioner's investigation, the council then issued a series of revised responses to the complainant, and provided some of the requested information.

13. Whilst the council has now gone on to release the majority of the information held that is relevant to the request, it has continued to withhold some information under regulation 13, and regulation 12(5)(e), of the EIR.
14. The complainant remains dissatisfied with the way in which their request has been handled. They do not contest the council's decision to withhold details such as names and signatures of individuals under regulation 13 of the EIR; however, they do not accept that the remaining information which continues to be withheld by the council, is subject to the exception at regulation 12(5)(e) of the EIR.
15. The Commissioner will therefore decide whether, following the recent release of information, the council is entitled to continue withholding the remainder of the information contained within the contract (with the exception of that information identified as third party personal data), under regulation 12(5)(e) of the EIR.

Reasons for decision

Correct Access Regime

16. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR, rather than FOIA, if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.
17. Regulation 2(1)(c) of the EIR says that any information on measures such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
18. The information that has been requested relates to a contract to provide planning services on behalf of the council. It is the Commissioner's view that the withheld information is integral to a measure which will, or will be likely to, affect the environment, particularly the land.
19. Therefore, the Commissioner considers that the withheld information is environmental under regulation 2(1)(c) of the EIR, and that the request should be considered under this access regime.

Regulation 12(5)(e) – confidentiality of commercial or industrial information

20. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information, if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
21. The construction of the exception effectively imposes a four-stage test and each condition as set out below must be satisfied for the exception to be engaged:
- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial?

22. The withheld information is contained within a 244 page contract agreed between Capita and the council. It sets out detailed information about the planning services to be provided by Capita on behalf of the council; it also includes financial information relating to the provision of the services described.
23. It is the Commissioner's opinion that the withheld information relates to a commercial activity, that being the financial arrangement between the council and Capita for the provision of planning services; he is therefore satisfied that it is commercial in nature.

Is the information subject to confidentiality provided by law?

24. The Commissioner considers this to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute.
25. The council states that there is an obligation of confidence clause within the contract that both parties are bound by. However, the Commissioner notes that this clause clearly states that the council is not prohibited from disclosing information if certain conditions are met; this includes information that is already in the public domain, or where the council has an obligation to release information under FOIA.

26. The Commissioner has found that in 2009, and 2010, part of the withheld information was included within other documents published by the council on its website.¹
27. The Commissioner does not regard the withheld information which is already in the public domain to have the necessary quality of confidence; he therefore requires the council to disclose this information, which is set out within the confidential annex attached to this decision notice, to the complainant.
28. As far as the Commissioner is aware, the remaining withheld information is not in the public domain; furthermore, he is of the view that it is not trivial in nature, and that such information has the necessary quality of confidence.
29. The Commissioner therefore considers that the second stage of the test is met with regard to the remaining withheld information.

Is the confidentiality provided to protect a legitimate economic interest?

30. The Commissioner considers that, in order for the third condition of the exception to be satisfied, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
31. It should be noted that economic interests are wider than commercial interests, and can include financial interests.
32. The council has confirmed that the relevant contract is currently listed to end on 3 June 2024. It states that it is not yet clear whether the contract will then be extended, or if it will go out to tender.
33. The council argues that if a new tender process does take place in 2024, it is highly likely that the withheld information, if accessible to competitors, would be used in an effort to successfully bid for the Planning Services contract. It states that it would reveal some of

¹ [Microsoft Word - A16Capitafinalreport30.doc \(breckland.gov.uk\)](#)

[Microsoft Word - Contract Monitoring Doc Appendix.doc \(breckland.gov.uk\)](#)

[Microsoft Word - CapitaOSReportDec090.doc \(breckland.gov.uk\)](#)

[Microsoft Word - CapitaOSReportApr100.doc \(breckland.gov.uk\)](#)

Capita's commercial tactics, and its bargaining position, and this would give an unfair advantage to commercial competitors. The council goes on to say that it would also be of detriment to Capita in terms of future commercial venture opportunities, specifically in relation to the Planning and Building Control contracts.

34. The council also claims that the disclosure of the withheld information would cause detriment to its own commercial interests. It states that it may lead potential bidders to undercut Capita in a bid to win the contract; one of the council's largest contracts could then be awarded to a company that cannot fulfil the requirements. The council argues that this could result in poor service and unexpected additional costs which would be commercially detrimental to the council and to the taxpayer.
35. The Commissioner accepts that the withheld information is not standardised contractual information and contains specific and unique terms negotiated and agreed between the two parties.
36. It is the Commissioner's view that despite the passage of time since the original terms of the contract were agreed, disclosure of the withheld information would still undermine the position of both Capita and the council in a competitive marketplace. It would impact on Capita's ability to compete fairly with its competitors, and the council's ability to get best value for the works to be carried out, as its commercial bargaining position would no longer be protected.
37. The Commissioner is therefore satisfied that disclosure of the withheld information (not identified within the confidential annex attached to this decision notice) would adversely affect the legitimate economic interests of both Capita, and the council, and that this stage of the test is met.

Would the confidentiality be adversely affected by disclosure?

38. Although this is a necessary element of the exception, should the first three tests set out in paragraph 19 of this decision notice be met, the Commissioner considers it inevitable that this element will also be satisfied. In his view, disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would harm the legitimate economic interests that have been identified.

Public interest test

39. As the exception under regulation 12(5)(e) is engaged, the Commissioner has gone on to consider whether the public interest in the disclosure of the requested information is outweighed by the public interest in maintaining the exception. When carrying out the test, the

Commissioner must take into account the presumption towards disclosure provided in regulation 12(2).

The council's position

40. The council has provided the following arguments in favour of disclosure:
- There is an inherent public interest in ensuring that there is openness and transparency in the spending of public money.
 - Transparency is likely to increase confidence in procurement procedures and planning decisions made by the council.
 - It will enable the public to understand whether the council is getting value for money from its purchasing decisions.
41. The council has provided the following arguments against disclosure:
- That it must ensure that public sector contracts are awarded with the best outcome for the taxpayer.
 - Competitors might copy elements of Capita's bid in order to win work without actually having the internal mechanisms (capacity, staffing skills, etc.) to deliver the product or service at the level and price outlined. This could then lead to an overspend of the budget or procurement disputes, which would then have to be funded from the public purse.
 - Disclosure of the information would have a detrimental impact on the competitive bidding process, and the council would be placed in a weaker negotiating position. Given the importance of using public funds in the best way possible, this would not serve the public interest.
 - Disclosure would sour the council's current partnership relations. Companies may avoid bidding for contracts with public bodies, if there is a realistic possibility that commercially sensitive information will be disclosed; this could reduce the competition for tenders for council contracts, which would not be in the public interest.

The complainant's position

42. The complainant has argued that the redactions were unnecessary, and unfair to the public. They argue that the council should be open and transparent about the terms of the contract as it relates to the spending of public funds.

The Commissioner's position

43. The Commissioner considers that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability which, in turn, promotes greater public engagement and understanding of the decisions taken by public authorities. It can also improve the wider public's confidence of the decisions made by a public authority.
44. The Commissioner appreciates that it would not be unreasonable for the public to expect a greater degree of transparency and openness about contracts which involve the expenditure of substantial amounts of money, and being able to ascertain if the council is getting best value. Furthermore, it is also in the public interest to know whether a contractor is meeting the terms agreed with the public authority.
45. However, in the Commissioner's opinion, there is a strong and inherent public interest in ensuring fairness of competition, and it would be firmly against the public interest if the council's commercial interests are harmed. This would be of detriment to the council, and the public purse.
46. In addition, in the Commissioner's view, a fundamental part of the procurement process is that tender exercises are perceived to be fair and equal to all. It is therefore essential that companies like Capita are assured that successfully bidding for a contract with a public authority will not cause detriment to their ability to compete for similar tenders in the future.
47. It is the Commissioner's view that the information in the public domain goes some way in satisfying the public interest with regards to the contract. It provides a good understanding of the costs and savings to the council from the use of a contractor, and also the delivery of planning services. Information has also been published about reviews and updates to the contract, and there have been opportunities for the public to raise any concerns that they may have about its delivery.²

² [Microsoft Word - A16Capitariskappendix0.doc \(breckland.gov.uk\)](#)

[Microsoft Word - A16Capitapostdudiligence20.doc \(breckland.gov.uk\)](#)

[Modern.gov \(breckland.gov.uk\)](#)

48. In the Commissioner's opinion, the harm which would be caused to the economic interests of the council, and to Capita, should this information be released at a time when the contract is ongoing and potentially up for renewal, carries considerable weight in favour of withholding the information. It would not be in the public interest if the competitive position of Capita in the marketplace was eroded. In addition, if the council was unable to achieve best value in terms of the delivery of its planning services, then this would have a direct, and detrimental, impact on the public purse.
49. It is the Commissioner's opinion that there is a strong public interest in protecting the council's commercial interests, its ability to get best value for money, the right tenders, choices of commercial options available, and maintaining trust with its contractors. Furthermore, there is a strong public interest in protecting the integrity of the procurement system by allowing companies like Capita to be able to compete on a level playing field.
50. Given this, the Commissioner is satisfied that the balance of the public interests lies in the exception being maintained, and that the information has therefore correctly been withheld.
51. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*³:

"If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure... the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).
52. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(e) was applied correctly.

³ [Vesco v \(1\) Information Commissioner and \(2\) Government Legal Department: \[2019\] UKUT 247 \(AAC\) - GOV.UK \(www.gov.uk\)](#)

Right of appeal

53. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

54. 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.
55. 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

Suzanne McKay
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