

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

Date: 13 March 2023

Public Authority: Breckland District Council
Address: Elizabeth House
Walpole Loke
Dereham
Norfolk
NR19 1EE

Decision (including any steps ordered)

1. The complainant requested information from Breckland District Council ("the Council") about grounds maintenance contracts for the Thetford area, specifically a copy of the relevant contract(s). The Council disclosed part of the relevant contract but withheld further information within the contract and the related GIS shapefiles under the confidentiality of commercial information exception under regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that the Council was entitled to rely on regulation 12(5)(e) of the EIR to refuse to provide the withheld information.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 14 June 2021, the complainant wrote to the Council and requested information in the following terms:

"I am writing to you on behalf of the Cloverfield and the Willows Residents' Association (CAWRA), which represents this housing estate in Thetford. At a recent meeting there was some concern expressed over the maintenance of public areas on our estate by the Council's contractors. We would like to know the details of what should be being done, so we see if there are any issues that need to be raised.

We would therefore be grateful if you could supply us with a copy of the current Grounds' Maintenance contract(s) you have (including any relevant schedules, appendices, etc.) for work such as mowing public grass areas, weed treatment, litter picking and emptying public waste bins in Thetford.

(I assume the following will already be covered by the contract, but in case not... We would be particularly interested in details of the areas covered and the required frequency of work. Additionally, we would like to know if there are any stipulations for the treatment of parts of grassed areas near posts, fences etc. Can these be left un-cut, do they have to be strimmed, or is weed-killer permitted to be used? It would also be good to know of any policies to leave grassed areas to grow wild for parts of the year, e.g. to promote wild flowers and bees.)"

5. The Council responded on 6 July 2021. It disclosed part of the contract, specifically the following sections: Grass cutting Standard and Specification, Use of Chemicals, and Litter picking Bin emptying. It also provided some information about its "cut less, cut later" approach, designed to help bees and other pollinators to thrive. It withheld the rest of the contract under section 43(2) of FOIA, the commercial interests exemption.
6. On 27 July 2021 the complainant requested an internal review. In addition to wider concerns about the Council's application of section 43(2) of FOIA, one of the points they raised was that the Council had not provided any maps or descriptions of the specific grassed areas to be cut and their types, nor the locations of bins to be emptied.
7. Following an internal review the Council wrote to the complainant on 19 October 2021. It stated that it had reconsidered the request under the EIR (the Commissioner agrees that the EIR is the correct access regime). The Council stated it was withholding the majority of the

information previously withheld under section 43(2) of FOIA (the commercial interests exemption) under regulation 12(5)(e) of the EIR (the confidentiality of commercial information exception). It disclosed the contract section headings and the following information: Grounds Maintenance areas and the litter and dog bins in Thetford, areas listed to promote wildlife and biodiversity and grounds maintenance performance standards. It stated it did not hold any relevant maps.

8. Subsequently on 10 May 2021 the Council confirmed it did in fact hold maps, in the form of GIS data, specifically polygon shapefiles, within the scope of the request and refused to disclose them. On 14 December 2021 the Council issued a refusal notice, regarding the polygon shapefiles, citing the exceptions at regulation 12(5)(c) (intellectual property rights), 12(4)(d) (material in the course of completion, unfinished documents and incomplete data) and 12(5)(e) (confidentiality of commercial or industrial information). On 28 January 2022 the Council subsequently stated that regulation 12(5)(e) had been cited in error.
9. During the course of the Commissioner's investigation the Council revised its position. It disclosed some more information to the complainant, some of which was redacted to remove personal data and revised its basis for withholding the polygon shapefiles. The Council's final position is that (other than the small amount of personal data that was redacted) all of the information it is continuing to withhold, that is the remainder of the information within the contract not already disclosed and the polygon shapefiles, is withheld under regulation 12(5)(e) of the EIR (the confidentiality of commercial or industrial information exception).

Reasons for decision

Regulation 12(5)(e) - the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest

10. The following analysis sets out why the Commissioner has concluded that the Council was entitled to rely on the confidentiality of commercial information exception under regulation 12(5)(e) of the EIR in this particular case.
11. The information withheld by the Council under regulation 12(5)(e) comprises:
 - a) Some parts of the contract. The contract that covers the services the complainant requested information about is a contract for the

provision of waste services awarded to Serco Group PLC ("Serco") between the Council, King's Lynn and West Norfolk District Council ("KLWNDC") and North Norfolk District Council ("NNDC"). The Council sought permission from the other parties of the contract to disclose the requested information. KLWNDC and NNDC authorised disclosure of information which was relevant to Breckland District Council only. Therefore some information within the contract has been withheld as it refers to services delivered in the other two Council areas. In addition some information specific to services delivered in the Council's own area has also been withheld as the Council considers the information to be commercially sensitive, this includes pricing schedules and some specific information about how Serco delivers services to the Breckland District Council area.

- b) The GIS data comprising polygon shapefiles which show the specific location of points and areas referred to in the contract.
12. 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.
13. 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?
14. For clarity, if the first three parts of the test are met, the final test will automatically be met as information disclosed under the EIR would cease to be confidential.

Is the information commercial or industrial?

15. Regarding the parts of the contract that have been withheld, the Commissioner is satisfied this information is commercial in nature as it relates to terms of a contract for the provision of services by a commercial business.

16. Regarding the GIS data, the Council argues that the GIS data requested, which is created by the Council, is intrinsically linked to the maps on which it is built / presented because they refer to mapping references that would not otherwise be available. The Council has argued that the map used is the creation and property of Ordnance Survey ("OS") and it uses OS maps under licence with OS. It further argues, "the license in place recognises that the map is confidential data that should not be released by licensees except in specific circumstances. Therefore, we have concluded that the information requested is of a commercial nature."
17. The Commissioner is satisfied that the GIS data is commercial data in that it is relevant to the commercial interests of OS.
18. The Commissioner is therefore satisfied that all of the information is commercial in nature for the reasons given by the Council.

Is the information subject to confidentiality provided by law?

19. The Commissioner considers this to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute.
20. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself. For purely internal information, the question will be whether the employees or members of the public authority are under an obligation of confidence imposed by the common law, contract or statute.
21. The Council argues that the information within the contract that has been withheld is subject to confidentiality by contractual obligation. The contract contains a confidentiality clause which requires each party to safeguard confidential information belonging to the other parties and to gain prior written consent of the relevant party in order to disclose confidential information within the contract.
22. The Council has stated that the GIS data requested, which is created by the Council, is intrinsically linked to the maps on which it is built / presented because they refer to mapping references that would not otherwise be available. The Council has argued that the map used is the creation and property of OS and it uses OS maps under licence with OS. The Council confirmed that the licence in place recognises that the map is confidential data that should not be released by licensees except in specific circumstances.
23. The Commissioner is satisfied that all of the withheld information is subject to confidentiality provided by law for the reasons set out above.

Is the confidentiality required to protect a legitimate economic interest?

24. The Council argues that the confidentiality is required to protect the economic interests of the Council, KLWNDC, NNDC, Serco and OS.
25. The Council argues that to disclose the withheld parts of the contract would prejudice the commercial interests of Breckland Council, NNDC, KLWNDC and Serco. This is because it would reveal commercially sensitive information.
26. Regarding Serco's economic interests, the Council has argued that disclosure would put Serco at a commercial disadvantage to its competitors as the withheld information includes confidential pricing and procedural information that would be used by competitors putting Serco at an economic disadvantage.
27. Regarding the Council's own economic interests and those of NNDC and KLWNDC, the Council has argued that disclosure would likely result in the councils not getting the best value for money for this or similar contracts in the future as it would result in the councils being put in a weaker negotiating position. The Commissioner notes that the Council has consulted NNDC and KLWNDC and they objected to the information pertaining to them being disclosed.
28. The Council argues that to disclose the GIS data would prejudice OS's commercial interests. It argues that, "OS are a commercial entity that creates and markets assets. The OS licensing model allows for the release of their assets in circumstances where an end user signs an agreement with the licensee that stipulates the terms of use for the requested data. Without licensing terms being agreed to, the OS asset would be available for use in the public domain without constraints to protect OS's commercial activity. Therefore individuals and organisations would be able to use OS assets without paying OS which would result in a loss of income to OS through their licensing model".
29. The Commissioner accepts that disclosing the withheld information would harm the economic interests of the Council, KLWNDC, NNDC, Serco and OS for the reasons given by the Council.

Would the confidentiality be adversely affected by disclosure?

30. As the first three parts of the test are met, the Commissioner's decision is that the confidentiality would be adversely affected by disclosure and that therefore the exception is engaged. He has gone on to consider the public interest test below.

Public interest test

The Council's position

31. The Council states that it took into account the following public interest factors in favour of the disclosure of the information:

- "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."
- "Disclosure enables the public to see the expenditure local authorities pay for contracted public services."

32. The Council states that it took into account the following public interest factors in favour of withholding the information:

- "Disclosing details and contractual information within the contract would adversely affect the Council's ability to enter into contractual agreements. Private limited companies are not going to enter into confidential agreements should sensitive commercial information be disclosed to the world at large, including their competitors."
- "Third party tenderers would not be operating from a level playing field as the information would disclose confidential information which would highly likely be used within a bid. For example, disclosure of a winning tenderer's bid to a competitor could lead to the competitor copying elements of the 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 would lead to awarding future contracts to unsuitable vendors which could result in the council being over budget or procurement disputes, which would be contrary to the public interest as they would have to be funded from the public purse. This would have a severe impact on the statutory services we provide as funds would have to be diverted to this."
- "Disclosure would likely result in the Council not getting the best value for money for this or similar contracts as it would result in the Council being put in a weaker negotiating position. Given the importance of using public funds in the best way possible, this would not serve the public interest."

- "There is a real risk that it would make it less likely that private sector companies seeking contracts with Breckland Council or any local authority would provide the Council with information during the tendering process in the future, resulting in less scrutiny by Council (Members and Officers)."
 - "Disclosure would sour our current partnership relations, and question any confidential agreements signed by the Council with other third parties. This contract delivers services to not only Breckland residents, but two other districts in Norfolk, with a total population of approximately 400,000 people across the county. If the service were disrupted any further or withdrawn for any party, this key service which includes; refuse collection, grass cutting, bin emptying, waterways cleaning, footpath sweeping, contaminated needle collection and fly-tip collection would cease."
 - The Council has also argued that to disclose the GIS data against the terms of its user license with OS may result in OS revoking the Council's licensing or refusing to renew it in future. It has argued that this would have a huge impact on the council's ability to map geospatial information which in turn would reduce its ability to deliver frontline services or identify potential efficiency savings for the public.
33. The Council's position is that the public interest in withholding the information outweighs that in disclosure.

The Commissioner's view

34. The Commissioner recognises the public interest in transparency regarding how public money is spent and the contractual obligations of the service provider under such contracts.
35. However, in the Commissioner's view, the information that has already been disclosed, goes a long way in meeting this interest.
36. In addition, from the wording of the request, the Commissioner understands that the complainant wishes to understand the contractors obligations so that they can identify where these have not been met. He notes the Council have encouraged the complainant to report any potential issues to the Council so that they can monitor whether all obligations are being met. In the Commissioner's view this also goes some way to meet the public interest in ensuring the obligations are being met.
37. In deciding the exception is engaged the Commissioner has already acknowledged that to disclose the withheld information within the

contract would adversely affect the economic interests of the Council, NNDC and KLWNDC. In the Commissioner's view, a disclosure of this information would be likely to prevent the councils from getting the best value for money for this or similar contracts in the future as it would result in the councils being put in a weaker negotiating position, which would not be in the public interest. He considers this to be a weighty factor in favour of maintaining the exception.

38. Regarding the disclosure of the GIS data, the Commissioner notes that the complainant considers it unlikely that disclosure of the GIS data would impact on future licensing agreements with OS. However, the Commissioner accepts the Council's argument that disclosure of information in violation of a user agreement may limit the access of public authorities to OS's services in the future, which would not be in the public interest. This is consistent with his position in previous decision notice IC-168884-H4J3¹.
39. The Commissioner's decision is that the public interest in maintaining the exception outweighs that in disclosure, and therefore the Council was entitled to rely on regulation 12(5)(e) of the EIR to refuse to provide the withheld information.

Other matters

40. The Commissioner notes that there was a considerable delay in the Council disclosing some of the information in this case, due to it previously having stated that it was withholding the information, a position which it revised during the course of the Commissioner's investigation.
41. The Commissioner also notes that after the internal review the Council identified further information within the scope of the request, specifically the GIS data, which it had stated it did not hold. All information within scope of the request should have been identified within 20 working days of the request.
42. In addition, the Commissioner notes that the Council changed its mind several times regarding its basis for refusing to provide the withheld information. The Council should clearly state its grounds for refusal at

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022971/ic-168884-h4j3.pdf>

the earliest opportunity and should, as far as is possible, avoid repeated changes in position.

Right of appeal

43. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

44. 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.
45. 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

Victoria James
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