

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 9 February 2015

**Public Authority:** Cambridgeshire County Council

**Address:** Shire Hall  
Cambridge  
CB3 0AP

#### **Decision (including any steps ordered)**

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1. The complainant has requested copies of Cambridgeshire County Council's Network Board Meeting minutes for 2014. The minutes relate to a Private Finance Initiative contract for street lighting in the county.
2. The Commissioner has determined that the minutes are confidential in nature and that they contain commercially sensitive information. He has therefore decided that that the Council has correctly applied Regulation 12(5)(e) and it is therefore entitled to withhold the information sought by the complainant.
3. The Commissioner requires no further action to be taken by the Council in this matter.

#### **Request and response**

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4. On 8 August 2014 the complainant wrote to Cambridgeshire County Council ("the Council") and asked to be sent copies of the minutes of all meetings held in 2014 in respect of the Council's Network Board meetings.
5. The Council responded to the complainant's request on 9 September, advising him that the information he seeks is exempt from disclosure under Regulation 12(5)(d) – confidentiality of proceedings and Regulation 12(5)(e) – confidentiality of commercial or industrial information, of the Environmental Information Regulations 2004.
6. The complainant wrote to the Council on 14 September to ask for a review of its decision to withhold the minutes of the Network Board meetings. He asserted that, "there is an overwhelming public interest

that these PFI contracts are managed transparently to ensure public confidence in the County Council's ability to manage such projects".

7. The Council wrote to the complainant again on 9 October, having completed its review of its handling of his request. The conclusion of the internal review was to uphold the Council's original decision to withhold the information sought by the complainant.

## Scope of the case

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8. The complainant contacted the Commissioner 10 October 2014 to complain about the way his request for information had been handled.

9. The complainant stated:

"I do not find it acceptable that a PFI contract can be used as a way of blocking public scrutiny. Also, my business experience leads me to believe that there is little, if any, commercial confidential content of the minutes of these meetings."

10. The focus of the Commissioner's investigation of this complaint has been to determine whether the Council is entitled to withhold the minutes of its Network Board Meetings in reliance of Regulations 12(5)(e) and 12(5)(d). This notice sets out the Commissioner's decision.

## Reasons for decision

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### Is the information 'Environmental Information'?

11. Information is 'environmental information' if it satisfies the definition set out in regulation 2 of the EIR and if it does, it must be considered for disclosure under the terms of the EIR rather than the FOIA.
12. Under regulation 2(1)(c) of the EIR, any information on activities affecting or likely to affect the elements or factors of the environment listed in regulation 2 will be environmental information.
13. The Commissioner has considered the nature of the information sought by the complainant. He has determined that the information is environmental information on the grounds that the minutes of the Network Board meetings concern street lighting – specifically, the Private Finance Initiative ("PFI") contract between the Council and Balfour Beatty, to replace and improve street lighting throughout Cambridgeshire.

### **Regulation 12(5)(e) – Commercial confidentiality**

14. Regulation 12(5)(e) of the EIR allows a public authority to refuse to disclose recorded information where the disclosure would adversely affect “the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”.
15. For the 12(5)(e) exception to be appropriately applied, the Commissioner considers that the following conditions need to be met:
- 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 of the information?

*Is the withheld information commercial or industrial in nature?*

16. For the withheld information to engage the exception provided by regulation 12(5)(e) it must relate to commercial activity or be industrial by its nature. The information must relate to the commercial activity of either the public authority concerned or to that of a third party.
17. The Commissioner considers that the essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
18. The Commissioner has examined the Network Board Meeting minutes. He has also considered the representations made by the Council and notes that the information contained in the minutes relates to a PFI contract entered into between the Council and Balfour Beatty to replace and improve street lighting.
19. The Commissioner considers that the information contained in the minutes cannot be separated from the actual PFI contract. As such the Commissioner easily finds that the minutes are commercial in nature and this element of the exception is satisfied.

*Is the information subject to confidentiality provided by law?*

20. For this element of the exception to be satisfied the information must be subject to confidentiality provided by law. This may include confidentiality imposed under a common law duty of confidence, a contractual obligation or be provided by statute.

21. The Council asserts that the Network Board Meeting minutes attract confidentiality by virtue of the common law and under the terms of the PFI contract. It has assured the Commissioner that both parties of the PFI contract (the Council and Balfour Beatty) consider the minutes to be of a sensitive nature, and further, that they are not published or made otherwise available to members of the public. Furthermore, the attendees of the Network Board Meetings have the expectation that the matters under discussion will not be divulged outside the meetings and that the confidential nature of the proceedings will be maintained.
22. There contract between the Council and Balfour Beatty contains the following confidentiality clause at part 35(1)(c):  
  
*"Each party shall keep confidential all Confidential information received by one party from the other party relating to this contract, the Project Documents and/or the project and shall use all reasonable endeavours to prevent their respective employees and agents from making any disclosure to any person of such Confidential Information,"*
23. The Council accepts that it cannot contract out of its obligations under any of the access to information legislation. However, in this case the Council asserts that there is a genuine purpose for the inclusion of the clause above in its contract. The Council asserts that confidentiality is required to foster the working relationship between the contracted parties and allow resolutions to be reached quickly and at little cost, thereby protecting the economic interests of the Council and of Balfour Beatty.
24. On the basis of part 35(1)(c) of the Council's contract and in reliance of the assurances given by the Council, the Commissioner accepts that the minutes of the Network Board Meetings are subject to a duty of confidence and therefore this element of the exception is satisfied.

*Does the information have the necessary quality of confidence?*

25. The Commissioner considers that the information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
26. On the basis of his examination of the minutes, and in consideration of the Council's submissions, the Commissioner is satisfied that distribution of the minutes has been limited and that it is not otherwise accessible. He is further content that the information contained in the minutes is not of a trivial nature.

*Was the information provided in circumstances importing an obligation of confidence?*

27. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*<sup>1</sup>, Megarry J, suggested that the 'reasonable person' test may be a useful one. He explained:

*"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence."*

28. Accepting the 'reasonable person' test, together with the non-trivial nature of the withheld information and its very limited distribution and access leaves the Commissioner to conclude that the withheld information has the necessary quality of confidence and therefore this element of the exception is satisfied.

*Is the confidentiality provided to protect a legitimate economic interest?*

29. In order to satisfy this element of the exception, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
30. In the Commissioner's view it is not enough that some harm might be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, some harm *would* be caused by the disclosure.
31. 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"*.

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<sup>1</sup> *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

32. The Council has asserted that the economic interests of the Council and Balfour Beatty that would be damaged should the Network Board Meeting minutes be disclosed. The Council considers that the minutes of its meetings with Balfour Beatty record the free and frank discussions it has had which relate to strategic issues or matters of the moment. These would not usually be made available to the wider public and would result in damage to the Council's reputation and would negatively impact on its ability to make profits through its future contracts. This in turn would affect the Council's ability to receive best value for money.
33. The Council points out that the PFI contracts are funded by lenders who would not normally be involved in disputes or issue resolution. Here however, the release of the minutes would make public the discussions the Council had with Balfour Beatty regarding the performance of the services contract. Disclosure would show what have been raised, discussed and resolved and could deter future lenders from investing their funds, and possibly result in existing lenders withdrawing their support. Should this happen the Council could find itself in a long-term project where the funding is reduced or withdrawn.

*The Commissioner's conclusions*

34. The Commissioner acknowledges that the withheld information contains information which is of commercial value. He considers that disclosure of the withheld information would adversely affect the Council's legitimate economic interests.
35. The Commissioner considers that disclosure of the Network Board Meeting minutes would provide third parties with information which neither the Council nor Balfour Beatty had conceived would be made public and which is not normally made available in a competitive market. He finds that disclosure of this information would be of detriment to the commercial interest of both the Council and of Balfour Beatty.
36. The confidential nature of the information leads the Commissioner to conclude that the disclosure of the Network Board Meeting minutes would adversely affect the Council's and Balfour Beatty's legitimate economic interests and therefore finds that the exception provides by regulation 12(5)(e) is engaged.

*The public interest*

*Arguments which favour disclosure of the minutes*

37. Reliance on regulation 12(5)(e) is subject to consideration of the public interest.

38. The Commissioner will always give significant weight to the public interest where disclosure of information provides accountability and transparency for decisions taken by public authorities and where, as in this case, the decisions concern large amounts of public expenditure over a long period of time.
39. In this case disclosure of the Network Board Meeting minutes would promote transparency of Balfour Beatty's performance under contract and would allow the public to judge whether the Council's funding was achieving value for money.
40. The information, should it be disclosed could promote public debate and allow the Council's council tax payers to greater understand decisions which affect them.

*Arguments which favour withholding the minutes*

41. The Network Board Meetings provide a confidential forum in which matters concerning the street light contract can be discussed. Such discussions also include strategic issues which may affect the performance of the contract, including the level of service provided by Balfour Beatty. The confidential nature of the meetings allows for free and frank discussion of issues associated with the contract and allows the contracted parties to reach appropriate and timely resolutions.
42. Making the minutes public by virtue this request would likely damage the strong relationship of trust which the Council assures the Commissioner exists between itself and Balfour Beatty. This would potentially suppress the degree of frankness by which matters are discussed at the Network Board Meeting and could ultimately result in a failure to find speedy and informal resolutions to issues associated with the contract. Taken together, the Council argues that disclosure would result in greater expenditure of public funds.
43. It should also be noted that the contract to which the minutes refer is being run under the Private Finance Initiative and that it depends on funding from a variety of lenders. Discussions concerning the contract have included issues where disputes have arisen. That type of information is not normally shared with lenders or made public and if it was to be placed into the public domain there would be a real potential for current and future lenders to be put off from continuing with the current contract or from entering into future contracts. The project could lose funding and ultimately the Council would have to make up any shortfall – potentially by diverting funds from elsewhere.



*The Commissioner conclusions*

44. Weigh must always be given to the Council being transparent and accountable for its decisions. This is especially so where large amounts of money are concerned. He also recognises the inherent public interest in the effectiveness of Private Finance Initiative contracts.
45. The Commissioner considers that accountability is partially achieved through the publication of details of the Council's PFI contract in its annual statement of accounts which are available on the Council's website. Furthermore, the Council has responded to a number of information requests under the FOIA and the EIR about street lighting and its disclosures can be found on its website.
46. He also considers that accountability of the contract's performance is provided through the Council's – and Belfour Beatty's – observable responses to issues raised about the street lights by members of the public.
47. Where members of the public consider that the Council's services are failing to meet satisfactory standards, it is open to them to raise those issues with the appropriate department within the Council or with their elected representatives.
48. Crucially, the Council has advised the Commissioner that all of its procurement processes are undertaken in line with all relevant European and domestic legislation. The Council has also advised the Commissioner that it proactively publishes a large amount of information about its contracts on its annual statement of accounts, its contract register and where the monthly spend is greater than £500.
49. In relation to this specific contract, the Council published information concerning its benefits. This information was presented to the Council prior to the contract being entered into and it can be accessed at:  
  
<http://www2.cambridgeshire.gov.uk/CommitteeMinutes/Committees/Meeting.aspx?meetingID=67>
50. Ultimately the Commissioner has decided that the greatest weight has to be given to the confidential nature of the minutes sought by the complainant. He cannot dismiss the clear, unambiguous and contractual requirement that the minutes should remain confidential. It is for this reason that the Commissioner has decided that the Council is entitled to withhold the Network Board Meeting minutes in reliance of Regulation 12(5)(e).



51. In view of this conclusion, the Commissioner has not gone on to consider the Council's further reliance on Regulation 12(5)(d) – the confidentiality of proceedings.

## Right of appeal

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52. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

53. 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.
54. 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**