

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

**Date:** 26 July 2017

**Public Authority:** Cornwall Council  
**Address:** County Hall  
Truro  
TR1 3AY

**Decision (including any steps ordered)**

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1. The complainant has requested a copy of the Integrated Waste Management Contract for Cornwall Energy Recovery Centre at St Dennis, Cornwall. Cornwall Council disclosed information during the course of the Commissioner's investigation and withheld other information under the exception for adverse affect to commercial confidentiality – regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that Cornwall Council has correctly applied Regulation 12(5)(e) to some of the requested information and the public interest favours maintaining the exception in this case. She has, however decided that the council was not correct to apply Regulation 12(5)(e) in relation to the remaining withheld information. The council also failed to issue a refusal notice within the statutory time limit and breached regulation 14(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - Disclose the withheld information identified in the confidential annex.
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.

## Request and response

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5. On 25 September 2016, the complainant wrote to Cornwall Council (the "council") and requested information in the following terms:

*"....detailed copies of all redacted parts of the Integrated Waste Management Contract."*

6. The council responded on 25 October 2017. It confirmed that it was withholding the information under the exceptions for intellectual property rights (regulation 12(5)(c)) and the interests of the information provider (regulation 12(5)(f)). The council also withheld information under section 43(2) of the FOIA – the exemption for prejudice to commercial interests.
7. Following an internal review the council wrote to the complainant on 1 December 2016. It stated that it was maintaining its position.

## Scope of the case

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8. On 3 December 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. During the course of the Commissioner's investigation the council disclosed some information to the complainant. It also revised its position in relation to the exceptions it was relying upon, withholding the remaining information under the exceptions for commercial confidentiality (regulation 12(5)(e)) and personal data (regulation 13).
10. The complainant confirmed that they wished the Commissioner to investigate whether the council had correctly withheld information under regulation 12(5)(e).

## Reasons for decision

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### Regulation 12(5)(e) – commercial confidentiality

11. The council has applied regulation 12(5)(e) to withhold a number of elements of the Integrated Waste Management Contract (the "IWM Contract").
12. 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".
13. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He 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?*

14. The IWM Contract is an agreement between the council and SITA Cornwall Limited, now operating as Cornwall Energy Recovery Limited (the "contractor") for the operation of the Cornwall Energy Recovery Centre (CERC)<sup>1</sup>.
15. The contract is set to run for 30 years and, though it was completed in 2006, it was restated in 2013. Part of the contract has been published on the council's website<sup>2</sup>.

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<sup>1</sup> CERC is operating under the control of "Suez" on behalf of the contractor. For further background see: <http://www.cornwall.gov.uk/environment-and-planning/recycling-rubbish-and-waste/the-cornwall-energy-recovery-centre-cerc/>

<sup>2</sup> <https://www.cornwall.gov.uk/environment-and-planning/recycling-rubbish-and-waste/waste-management/waste-contract/>

16. It is in the public domain that the revenue value to the contractor for managing the CERC is some £1.1 billion and in 2013, the net present value of cost to the council was quoted at £433 million<sup>3</sup>.
17. Given that the contract relates to a service provided by the contractor to the council for a charge, the Commissioner is satisfied that the information in question is commercial in nature.

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

18. 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.
19. 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.
20. 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.
21. The council has stated that the contract contains a clause which directs that information designated as "commercially sensitive" should be treated as confidential information.
22. The council has confirmed that, at the time of the restatement of the contract in 2013, it agreed with the contractor that the withheld information should be defined as commercially sensitive and, hence, subject to a duty of confidence.
23. In addition to the explicit contractual directions regarding confidence the council has stated that there is also an implied obligation of confidence as disclosure of the information would have an impact on the commercial operations of the contractor.
24. The Commissioner accepts that, at the very least there is a clear implied obligation of confidence in the information shared between the parties.

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<sup>3</sup> Figures taken from: <https://waste-management-world.com/a/sita-to-build-waste-to-energy-plant-as-part-of-1-1bn-pfi-in-cornwall>

25. Furthermore, she notes that the agreement itself explicitly states 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 as it relates to a significant and substantial contract. The Commissioner is also satisfied that the information has not been placed in the public domain.
26. In contrast to the section 41 exemption under FOIA, there is no need for public authorities to have obtained the information from another. 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.
27. 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?*

28. 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.
29. In this case, the council has stated that disclosing the information would *"....detrimentally affect the Council and the contractor."*
30. 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. 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.
31. 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”.*

*Adverse affects to the legitimate economic interests of the contractor*

32. The council has provided specific arguments which relate to each element of the contract which has been withheld. In determining its position the council has liaised with the contractor and sought its views as to whether the information should be disclosed. The Commissioner has analysed the arguments provided by the council and the contractor and determined that the exception is engaged in respect of some elements of the withheld information and that, in these respects, the public interest favours maintaining the exception.
33. In accordance with the council's wishes, the Commissioner has redacted references to the specific withheld information, including document titles and submissions which identify elements of the withheld information and placed these in a confidential annex.

#### **Regulation 14 – refusal notice**

34. Regulation 14 states:

*“14.—(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.*

*(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.*

*(3) The refusal shall specify the reasons not to disclose the information requested, including—*

*(a) any exception relied on under regulations 12(4), 12(5) or 13;  
and*

*(b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).”*

In this case the council applied regulation 12(5)(e) to withhold some of the requested information during the Commissioner's investigation. The Commissioner finds that the council, therefore, failed to issue a refusal notice within 20 working days and breached regulation 14(2) of the EIR.

## Right of appeal

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35. 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)

36. 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.
37. 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**