

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 11 July 2018

Public Authority: Northamptonshire County Council
Address: 1 Angel Square
Northampton
NN1 1ED

Decision (including any steps ordered)

1. The complainant has requested information about the contracts between Northamptonshire County Council, Vinci UK and East Midlands Learning Consortium (EMLC) relating to the construction of Northampton International Academy, and the status of contractors on site. The Council refused to supply the contracts, citing the exemption under section 43(2) of the FOIA – commercial interests, but provided information about contractor status (i.e. demolition and build). The complainant subsequently asked for a redacted copy of the contract, which the Council then withheld citing section 12 of the FOIA on the basis that responding to the request would exceed the appropriate costs limit.
2. Following instruction from the Commissioner, the Council reconsidered its response to the request under the EIR. It supplied a redacted copy of the contract to the complainant, but withheld some information under regulation 12(5)(e) – confidentiality of commercial or industrial information, and 12(3) – third party personal data. Under the public interest test for 12(5)(e) it said it could not see a public interest in releasing the full contract.
3. The Commissioner's decision is that Northamptonshire County Council has failed to supply sufficient evidence to support its application of regulation 12(5)(e) and the exception is therefore not engaged. She also finds that the Council did not give full consideration to regulation 12(3), and the associated requirements in regulation 13. In her duty as a regulator she has herself considered this information under regulation 13 and determines that the whilst some of the withheld information is third party personal data, disclosure would not breach the principles in

the Data Protection Act 1998, with the exception of the signatures. By failing to respond to the request under the correct regime, the Commissioner also finds the Council has breached regulations 5(1) and (2) and 14(2).

4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose all withheld information within the contract, except for the signatures that the Council has redacted in the copy already provided to the complainant
5. 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

6. On 8 February 2017 the complainant wrote to Northamptonshire County Council (NCC) and requested information in the following terms:

'I am making a request for copies of the contracts between NCC and EMLC relating to the Northampton international academy. Also contracts relating to the construction of the building between NCC and the two contractors working on the building. I would also like to see any correspondence from NCC to the first contractor relating to their removal,' (sic)

7. The Council responded on 6 March 2017. It stated that the contracts were being withheld under section 43(2) of the FOIA as they contained commercially sensitive information. It went on to say that no contractor was removed from the site, and that there had been two contractors – one for demolition and one for main building works. There was a period without any contractor on site between these two stages. It confirmed that the demolition contractor was GBM and the building contractor was Vinci UK

8. On 8 March 2017 the complainant made a follow-up request:

'Thanks for your response - I can't say I am surprised in fact NCC have acted in exactly the way I expected. I don't see why you couldn't redact the parts you consider to be "commercially sensitive". I am going to consider my position with regard to this. I think the best course of action would be a view of the human

rights bill - its my view (not sure if there has been a test of this) that its my right to be able to view these contracts as they are for public works using public money. Can you tell me who regulates these contracts if you are not prepared to discuss their contents.

'I have checked the procedure so I am making a formal request for sight of the contracts with any "commercially sensitive" areas redacted - I understand its my right to see these documents - and you are not going to remove it form me. I would also like your definition of commercially sensitive - I don't see how anything could be commercially sensitive- I would have thought that NCC would be desperate to show what a wonderful and cost affective job they had made of this project.' (sic)

9. The Council replied on 21 April 2017. It said that the project manager assigned to the contracts regulates them, and that is was refusing to supply redacted copies citing section 12 of the FOIA – cost of compliance exceeds the appropriate fees limit.

Scope of the case

10. The complainant contacted the Commissioner on 8 November 2017 to complain about the way his request for information had been handled. The complainant has concerns about overspends on and delays to the project, as well as the procurement process and possible collusion / corruption. He believes that it is in the public interest to see what spending has been agreed on the project. The Commissioner clarified with the complainant that he sought a copy of the contract regarding the building of the new academy.
11. The Commissioner contacted the Council to ask that it review its response to the request under the EIR as she considered the request to be for environmental information. The Council responded, providing a redacted copy of the contract between NCC and Vinci. It applied regulation 12(5)(e) – commercial confidentiality, to the withheld information, and did not consider it would be in the public interest to release it. It also applied regulation 12(3) – third party personal data, to the information.
12. After consultation with the complainant, the Commissioner has taken into account the expansion of the original request to encompass the contract in its entirety and therefore considers the scope of the case to be whether the Council has:

- correctly applied regulation 12(5)(e) to the withheld information and if it has, where the balance of public interest lies; and
- correctly applied regulation 12(3) to any third party personal data and as a result given due consideration to the requirements within regulation 13.

Reasons for decision

Is the request for environmental information?

13. During the course of her investigation the Commissioner advised the Council that she considered the requested information to fall under the EIR.
14. Regulation 2(1) of the EIR defines 'environmental information'. The relevant parts of the definition are found in 2(1)(a) to (c) which state that it is as any information in any material form on:
 - '(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...'*
15. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
16. In this case the withheld information relates to a building contract for a large academy, and the Commissioner determines that the information, therefore falls within the category of information covered by regulation

2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment.

17. In view of this, the Commissioner has concluded that the Council wrongly handled the request under the FOIA and therefore breached regulations 5(1) and (2) of the EIR.
18. If a public authority is refusing a request for information under regulation 12 or 13 (and in this case the Council is doing both), then under regulation 14 it must issue a refusal notice within 20 working days. By virtue of failing to deal with the request under the correct regime, the Council has also breached regulation 14 of the EIR.
19. For future reference, the Commissioner draws the Council's attention to her general guidance on the Environmental Information Regulations¹ and more specifically 'What is environmental information?'²

Regulation 12(5)(e)

20. The exception under reg 12(5)(e) of the EIR provides that public authorities are entitled to refuse to disclose information where to do so would adversely affect the confidentiality of commercial or industrial information, where such confidentiality is provided by law. If the exception is engaged, it is then subject to the public interest test.
21. In assessing whether the exception is properly engaged, the Commissioner applies a four stage test, of which all must be met:
 - The information is commercial or industrial in nature
 - Confidentiality is provided by law
 - The confidentiality is protecting a legitimate economic interest
 - The confidentiality would be adversely affected by disclosure

Is the information commercial or industrial in nature?

22. The Council has withheld information on the grounds of commercial confidentiality and third party personal data. It has not specifically identified which exception it is applying to specific information.

¹ <https://ico.org.uk/media/for-organisations/guide-to-the-environmental-information-regulations-2-5.pdf>

² https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

Although it is apparent to the Commissioner which exception applies where, she reminds the Council that the use of specific EIR exceptions to information should be clearly identified in any future application.

23. The complainant has requested a copy of the contract between the Council and the contractor Vinci UK for the building of an academy. The commercial information withheld by the Council within the contract includes the company names of potential subcontractors, page numbers, bill of quantities, pricing information and schedules, profit and overhead calculations, a document entitled 'Northampton International Academy Contractors Proposals – dated 24th June 2016 – v4', and the contractor's bank details.
24. In the context of this specific contract, the Commissioner accepts that, with the exception of the page numbers, the information withheld under r12(5)(e) is commercial in nature as it relates specifically to the commercial activities of the contractor regarding the building of a new school academy.

Is the information confidential by law?

25. The Commissioner considers information deemed confidential by law to include common law confidence, a contractual obligation, or statute. The Commissioner notes that the withheld information is part of a legally binding contract, under which the contractor has stated:

'Our full bid document is considered confidential. There are commercially sensitive parts of it (for example OH&P figures) and work with our supply chain which gives us a commercial advantage over our competitors. We have also worked hard on aspects like the programme and methods that we consider proprietary information.'

26. As well as considering the contractual confidentiality of the withheld information, the Commissioner must also consider whether it has the necessary 'quality of confidence'. This requires confirming that the information is not trivial and not already in the public domain. The information relates primarily to costs and pricing schedules as part of a school building project funded by public money. They form part of a multi-million pound project and therefore the Commissioner does not consider the information to be trivial in nature. Information about the overall budget for the project is publicly available through Council Committee reports but this is not the same as the values contained within the contract.
27. In view of the above, the Commissioner accepts that the information is confidential as a result of contractual obligations combined with the

nature of the information which is not trivial nor already within the public domain.

Is the information protecting a legitimate economic interest?

28. To satisfy this element of the test, disclosure of the withheld information would have to adversely affect the legitimate economic interest of the Council, the contractor, or both. This means that the Council would need to consider the sensitivity of the information at the time of the request and whether the commercial information provided at the time the contract / commercial confidentiality was agreed still requires protecting.
29. It is not enough that disclosure might cause some harm to an economic interest, a public authority needs to establish that on the balance of probabilities, disclosure would cause some harm.
30. It is not clear from the contents of the contract exactly when each piece of withheld information was supplied by the contractor, but dates within the contract indicate a range from March – June 2016. The complainant's requests were made approximately 11 months after the start of this timeframe.
31. As part of its confidentiality statement, submitted during the tender process and forming part of the contract, the contractor states:

'If this information were to be made public, it could affect our relationships with subcontractors, our commercial competitiveness in the market place. It would also affect the competitiveness on this project which would be unfair. We are happy to discuss this in more detail but we would wish that the full content of this bid be kept confidential until the completion of the project'

32. In its representations to the Commissioner concerning the withheld information, the Council has asserted the following

'Making this information publically accessible would allow VCUK's competitors to assess their bidding strategy and gain an unfair competitive advantage for future construction tenders i.e. allow their competitors to undercut them on future bids which would risk serious harm to the success of their business. Furthermore, releasing commercial sensitive information provided by bidders on the understanding that the information will be treated as confidential would undermine the willingness of companies to tender for works and services in the future. The Council's ability to procure works and services could therefore be

adversely affected; when its core purpose is ensuring that value for money spent from public funds is centric and this could be compromised through disclosure' (sic)

33. The Commissioner notes that the arguments provided by the Council for engaging reg 12(5)(e) are generic. It has not identified specifically how the release of each piece of withheld information would adversely affect the legitimate economic interests of either the contractor or Council.

34. The Council also consulted with the contractor over the request and says:

I can confirm that NC have liaised directly with Vinci Construction UK (VCUK) on this matter; the outcome of which is an agreement that there is a legitimate interest with this party and also with NCC who as a wholly taxpayer funded organisation need to ensure that we are able to obtain best value when allocating and spending our residents monies' (sic)

35. The Commissioner notes that the requests were made well after the contract, including costs, had been agreed between NCC and Vinci UK. She therefore does not give any weight to the latter's assertion that disclosure of information would (at the time of the request) affect the competitiveness of the academy project. The EIR implement the provisions of the European Directive 2003/4/EC. Article 4 paragraph 2 of the Directive sets out a duty to interpret exceptions in a restrictive way. Taking into account this duty, the wording "where such confidentiality is provided by law to protect a legitimate economic interest" (as opposed to "where such confidentiality was provided...") indicates that the confidentiality of this information must be objectively required at the time of the request. By the time the Council had reviewed its response under the correct regime the entire build project was nearing completion and the Commissioner fails to see how the release of costs could at this stage could affect any negotiations.

36. Regarding the contractor's assertion that release of the information could affect relationships with subcontractors and competitiveness in the marketplace, the Commissioner draws attention to the First-tier Tribunal decision *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd (EA/2010/0106)*, where the request was for a viability report for a new development submitted as part of a planning application. The Tribunal found that the exception was not engaged, saying that "statements by interested parties that harm might or could be caused are insufficient [...] The use of words such as 'could' or 'may' do not in our view provide evidence of harm or prejudice to the required standard of proof". Additionally, the contract references subcontractors

who are 'likely' to undertake the work, and therefore considering how relationships could be affected borders on the imaginary.

37. The Commissioner acknowledges that bidders might prefer that information relating to their business interests remain confidential, including bidding strategies. However, the Commissioner emphasises that confidentiality clauses within contracts are not a bar from disclosure under the EIR, and indeed the Council itself makes this explicit within the contract with Vinci UK:

'Where a Bidder identifies information as commercially sensitive, the Council will endeavour to maintain confidentiality. Bidders should note, however, that...the Council may be required to disclose such information in accordance with the FOIA or EIR.... the Council cannot guarantee that any information marked confidential or commercially sensitive will not be disclosed'

38. The Commissioner is not persuaded that providing information relating to the finances and bidding strategy for one specific, almost complete project would, on the balance of probability (i.e. more likely than not), result in the company being undercut on future projects and thereby causing serious harm to the success of the business. No two projects are the same, costs and business models change rapidly and people move between companies taking their knowledge and expertise with them.
39. The Commissioner is also not persuaded by the Council's argument that releasing information provided under contract would deter companies from bidding for work in the future thereby undermining the Council's own position of achieving best value. As noted above the Council has already made the contractor aware of its own obligations under FOIA and EIR, and there are potentially highly lucrative benefits for third parties engaging in commercial partnerships with public authorities. It is simply not feasible to think that companies would be deterred from such partnerships on the possibility that information supplied as part of a business agreement may at some stage be released under an information rights regime designed to promote openness, engagement and participation in public decision-making. Followed to a logical conclusion, companies would potentially put themselves out of business by failing to bid for contracts, and that is a not a situation borne out in reality. Furthermore, despite the Council's own caveat to its confidentiality statement, Vinci UK continued to bid for the contract.
40. The Commissioner therefore concludes that the Council has failed to adequately demonstrate that disclosure of the withheld information under reg 12(5)(e) would adversely affect a legitimate economic interest of any party the confidentiality is designed to protect. It follows,

therefore, that the confidentiality would not be affected by disclosure. In view of this the Commissioner determines that the exception is not engaged, and so is not required to consider the public interest test.

Regulation 13 - personal data

41. Regulation 12(3) provides that third party personal data can only be disclosed in accordance with regulation 13, which sets out the detail of the exceptions. If disclosure of the information would breach any of the data protection principles, it must not be released. There is no additional public interest test.

42. In deciding whether regulation 13 is engaged the first issue to consider is whether the requested information is personal data. Personal data is defined in the Data Protection Act 1998 as:

"personal data" means data which relate to a living individual who can be identified—

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual'

43. The personal data redacted from the contract includes complete biographies for some project team members, all personal photographs, and a number of signatures. The signatures are written beside full names. The Commissioner accepts that this is personal data.

44. The second issue to consider is whether disclosure of the requested information would contravene the first data protection principle. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that disclosure would be fair will she go on to look at whether a Schedule 2 processing condition can be satisfied. In assessing whether disclosure would be unfair, and thus constitute a breach of the first data protection principle, the Commissioner takes into account a number of factors, including the following:

- What reasonable expectations does the individual have about what will happen to their personal data?
- What are the consequences of disclosure?

- Are there any legitimate interests in disclosure which would outweigh the rights and freedoms of the data subject?

45. The Council hasn't provided any details to justify its withholding of the personal data, and simply stated:

'For advice and assistance; information which is considered to be personal has also been redacted as this would contrary to the Data Protection Act 2000, EIR 12(3) and we believe is not subject to the public interest test' (sic)

46. The Commissioner is unclear about the purpose of *'For advice and assistance'*, and draws the Council's attention to her guidance on *'Personal Information (section 40 and regulation 13)'*³ where there are detailed explanations on the exemptions/exceptions and the requirements on public authorities to demonstrate full consideration of the relevant acts and their appropriate use.

47. In the absence of any arguments from the Council, the Commissioner in her role as regulator has a responsibility to ensure compliance with the Data Protection Act 1998 (applicable at the time of the request). Having considered the factors above, she can see no reason why release of the biographical information and associated photographs, would be a breach of the first data protection principle. This is partly because it has not been explained why some biographies are included and others are not, and therefore why the release of the withheld biographies would be unfair. The Commissioner can see no adverse consequences of disclosure, and considers that senior staff and managers in a large construction company would have a reasonable expectation that biographical information provided in this context may be made available, particularly as the biographical information relates solely to their professional skills and experience. It is also extremely likely that photographs could be found in the public domain, either through an internet search engine, websites such as 'Linked-In' or the company's website itself. The Commissioner therefore concludes that disclosure of the biographical information and photographs would not breach any of the data protection principles.

48. Turning to the signatures within the contract, the Commissioner considers that the individuals concerned would have a reasonable expectation that this information would not be disclosed in any of the

³ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

circumstances of the case. Arguments for this are strong: release of signatures presents a risk of fraud, with potentially very damaging and serious consequences. The Commissioner therefore concludes that disclosing these would not be fair and therefore in breach of the first data protection principle. On this matter, regulation 13 is engaged.

49. Having determined that disclosure of the biographical information and photographs does not breach the data protection principles, the Commissioner must consider which condition of processing under Schedule 2 of the DPA 1998 is satisfied.

50. Condition 6 under Schedule 2 states that:

'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

51. The Commissioner has already concluded that there is no evidence to suggest the disclosure of the purely professional biographical information and photographs would cause any unwarranted harm or distress to the individuals concerned, i.e. would not prejudice their rights, freedoms or legitimate interests. The legitimate interest in disclosure to the requester, and the public, via the EIR request lies in the wider objectives of the EIR, identified in Article 1 of the Aarhus Convention:

'In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each party shall guarantee the rights of access to information, public participation in decision-making, and access to justice on environmental matters in accordance with the provisions of this Convention.'

52. The complainant has expressed concerns about overrunning of the project and overspending, and believes that given it is wholly funded by public monies, there is a strong public interest in the contract details being made available.

53. The biographical information and photographs form part of the contract for which the request has been made. The Commissioner considers that, given the value of the contract and its wider social and environmental impact, and the overall presumption in favour of disclosure under the EIR, disclosure of this information is necessary to

meet the legitimate interest of the requester and public, and therefore regulation 13 of the EIR is not engaged.

Right of appeal

54. 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

55. 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.
56. 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
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