

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **11 February 2020**

Public Authority: **Central Bedfordshire Council**
Address: **Priory House**
Monks Walk
Chicksands
Shefford
SG17 5TQ

Decision (including any steps ordered)

1. The complainant has requested a highways pricing structure. Central Bedfordshire Council disclosed some information and withheld other information under the exception for commercial confidentiality – regulation 12(5)(e).
2. The Commissioner's decision is that Central Bedfordshire Council has correctly applied regulation 12(5)(e) to withhold the information and that the public interest favours maintaining the exception.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 26 July 2019, the complainant wrote to Central Bedfordshire Council (the "council") and requested information in the following terms:

"Please can you send me the Highways pricing structure as per the contract with Ringway Jacobs. To include current costs for any jobs they would conduct from potholes to major road changes."

5. The council responded on 15 August 2019. It stated that it was withholding the information under the exemption for information provided in confidence – section 41 of the FOIA.
6. Following an internal review the council wrote to the complainant on 9 October 2019. It stated that it had reconsidered the request under the EIR and that it was now withholding the information under the exception for commercial confidentiality – regulation 12(5)(e).

Scope of the case

7. On 17 August 2019 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the information under regulation 12(5)(e).

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

9. The withheld information held relates to the commercial service pricing structure contained within the Term Maintenance Contract Plus (TMC+) for the provision of the Highways Service, providing - transport planning, design and maintenance, drainage, streetlights, gulley's boundary asset to asset, awarded to Ringway Jacobs. The contract is based upon the standard form of contract from the Highways Maintenance Efficiency Programme (HMEP).

10. 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".
11. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She 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?

12. The requested information contains prices and cost breakdowns based on the entire expected cost of a core 7 years of the proposed contract, including; mobilisation, expected works costs for all areas of the service, and all fees and overheads.
13. The Commissioner is, therefore, satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

14. In relation to this element of the exception, the Commissioner has considered whether the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.
15. In relation to the common law duty of confidence, the Commissioner considers that the key issues to consider are whether the information has the necessary quality of confidence, which involves confirming that the information is not trivial and is not in the public domain, and whether the information was shared in circumstances creating an obligation of confidence.

16. The council has confirmed that confidentiality is imposed by contractual obligation. It is more than trivial as it involves detailed pricing submission for the highway's maintenance contract. As the local highway authority, the Council is responsible for the maintenance and improvement of the public highways within its administrative area under the Highways Act 1980.
17. The council has explained that Ringway Jacobs has a clear expectation of confidence, as a result of the explicit obligation on confidentiality being included in the commercial agreement.
18. The council has confirmed that the requested information is not in the public domain and has not been shared outside of this agreement. For these reasons, the council considers that a reasonable person who was provided with the withheld information would consider that the information had been provided to them in confidence.
19. Having taken all of the above into consideration, the Commissioner is satisfied that the information is subject to confidentiality provided by law. Therefore, this element of the exception is satisfied.

Is the confidentiality provided to protect a legitimate economic interest?

20. 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.
21. 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.
22. The council confirmed that, in determining its response to the request, it sought the views of the relevant third party (Ringway Jacobs). The Commissioner has had sight of relevant correspondence and is satisfied that the council's submissions accurately reflect the third party's concerns.
23. The council has argued that the withheld pricing structure information to be confidential because it could be used by competitors of Ringway Jacobs to gain a commercial advantage by exploiting this information in any current or future negotiations. It has explained that the HMEP standard contract template is in the public domain, the specification is

considered against the rate that is considered against the payment mechanism and contract – whether target costs or rates. Therefore, the council has submitted, providing any of the price elements would provide an advantage to a competitor and would adversely affect Ringway Jacobs' legitimate economic interests, as it would put them on an unlevel playing field with competitors in current and future tender opportunities. The council has stated that this would have a significant detrimental impact on Ringway Jacobs commercial position with tenders and their economic position in the market.

24. The council has further explained that Ringway Jacobs are using the current rates to tender for work and the contract is formulated in a manner that allows the council to market test openly, enabling them to go to market for a lot to demonstrate value for money is achieved. The council considers that publishing the current costs for any jobs they would conduct would adversely affect Ringway Jacobs economic interests' as it would enable businesses to tailor their tender to make theirs more attractive, thus providing businesses an extreme advantage over Ringway Jacobs.
25. The council has further explained that the agreement enables it the option to pay Ringway Jacobs by rates or by target rate, meaning if Ringway Jacobs tender rate comes below target, the council shares the benefit and if it comes out higher the cost is shared. The council has argued that, if the local supply cost chain has knowledge of the pricing structure and current costs for jobs, they could adjust their rate and price to ceiling, rather than the actual cost that they could deliver at, which may be a lesser value, adversely affecting the financial 'value for money' aim of the council, in addition to Ringway Jacobs' budget to fulfil the Service. Although the confidentiality is designed to protect the interests of Ringway Jacobs, the council considers that its own commercial interest would also be adversely affected if the information was to be released in respect of the cost-effective provision of the highway service. The confidentiality, it has submitted, protects the administration of the current contract and the management of an extensive supply chain.
26. In summary, the council has confirmed that the information is being withheld to protect a commercial bargaining position in the context of existing or future tenders. In the council's opinion it is more probable than not that disclosing the withheld information would cause harm to Ringway Jacobs' legitimate economic interests.
27. Having considered these submissions the Commissioner acknowledges that disclosing the costing and pricing information would have a direct impact on Ringway Jacobs' competitiveness in the commercial market as it would enable competitors to revise their strategy in a way which would

undermine Ringway Jacobs' position. On the basis of the arguments she has been provided with, the Commissioner is, therefore, satisfied that it is more likely than not that disclosure would harm Ringway Jacobs' legitimate economic interests.

28. In reaching her decision in this case the Commissioner has also had regard for previous decisions issued in relation to requests for comparable information and relies on the same rationale in this instance¹.

Would the confidentiality be adversely affected by disclosure?

29. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it is inevitable that this element will be satisfied. She acknowledges that 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 also harm the legitimate economic interests that have already been identified.
30. The Commissioner has therefore concluded that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest in disclosure

31. The Commissioner notes that regulation 12(2) of the EIR directs public authorities to apply a presumption in favour of disclosure. The council has acknowledged that there is general a public interest in disclosing information to ensure it is transparent and so can be held to account regarding decisions it makes and its use of public funds

¹ See, for example, the following notices on the ICO website:

<https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615334/fs50804402.pdf>
<https://ico.org.uk/media/action-weve-taken/decisionnotices/2018/2173211/fs50688840.pdf>
<https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616385/fs50848643.pdf>

Public interest in maintaining the exception

32. The council has argued that the requested information is contained in the sections deemed confidential within the contract and relate to ongoing commercial activities between Ringway Jacobs and its stakeholders. It considers that disclosing this information would adversely affect future negotiations should stakeholders know that details of their commercial interests could potentially be released. The council has argued that Ringway Jacobs' ongoing commercial services would be disadvantaged if competitors knew the commercial interests and obligations of the current service provider. The council considers that it is in the public interest that any tender regarding commercial contracts should be undertaken in an environment where no party has an unfair advantage over the other.
33. The council has further argued that it is not in the public interest for a private sector organisation not to be able to rely on a public sector organisation's confidentiality obligation being met. Breaching confidentiality in this manner, it has argued, would potentially result in the private organisation withholding information that would result in a worse outcome for the taxpayer/public sector.
34. The council has also submitted that it is also in the public interest to protect its own ability to achieve the best value for money from any third party it negotiates with. Disclosing the information, it has argued, would inhibit this.

Balance of the public interest

35. The Commissioner acknowledges that there is a general public interest in disclosure and, given that the contract involves public expenditure and involves impact on local amenities and wider environmental impacts there is a specific weighting in favour of disclosure in this case.
36. In acknowledging the importance of transparency and accountability and the ability of the public to hold it to account regarding decisions it makes and its use of public funds, the council explained that it publishes its contracts register and payments to suppliers expenditure. The council directed the Commissioner to specific publications on its website which contain information relating to its agreement with Ringway Jacobs. It confirmed that other information relating to this contract had also been published in its Executive and Scrutiny Committees².

² The council directed the Commissioner to the following sections of its website:

37. The Commissioner accepts that disclosing the information would result in prejudice to the commercial interests of Ringway Jacobs by providing competitors with insights into their pricing strategies which, in turn would harm their ability to competitively negotiate future contracts. The Commissioner considers that the fact that the information is relatively recent and would be relevant to other equivalent contracts intensifies the likelihood and scale of harm that disclosure would cause.
38. The Commissioner, therefore, finds that the exception in regulation 12(5)(e) is engaged and that the public interest favours maintaining the exception on this occasion.

https://www.centralbedfordshire.gov.uk/info/58/business/54/procurement_and_tender_opportunities/3
<https://centralbeds.moderngov.co.uk/documents/s58343/Term%20Highways%20Services%20Contract%20Award.pdf>

Right of appeal

39. 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

40. 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.

41. 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
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Cheshire
SK9 5AF