

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

Decision notice

Date: 18 October 2022

Public Authority: Newcastle City Council
Address: Civic Centre
Newcastle upon Tyne
NE1 8QH

Decision (including any steps ordered)

1. The complainant has requested information from Newcastle City Council regarding a selection process for a preferred partner for the development of the Stephenson Quarter.
2. The Commissioner determined that the request should have been considered under the EIR. Having considered the application of regulation 12(5)(e) – adverse effect on the confidentiality of commercial interests – which has similarities to section 43(2) FOIA, he is satisfied that the information was withheld correctly.
3. The Commissioner also considered the application of regulation 13 (personal data) rather than section 40 FOIA. He has decided the council is entitled to rely on regulation 13 in respect of the personal data of individuals who are not employed by the council. However the names of council officers should be disclosed due to their positions as senior decision makers.
4. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the withheld information in paragraph 3.2 of the Stage 2 Report, where it is indicated to be the names of the employees of Newcastle City Council.
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 12 March 2021 the complainant requested information from Newcastle City Council ("the council") in the following terms:

"I have been reading about the development of the Stephenson Quarter and the Council's Citylife (17/07/2020) heralded the next step as a Joint Venture. The article describes how a 2 stage selection process led to appointment of a preferred partner. Could I be supplied with the information around the Joint Venture process including the original advert for a partner, the approval process and the reports on each of the 2 stages. If any report contains any sensitive information then of course that might be omitted."
7. The council responded on 12 April 2021 with some information, but refused to provide the remainder:
 - Stephenson Quarter – Bid Document 16 May 2019 provided in full.
 - Stephenson Quarter – Stage 1 Bids Report. Some information was redacted on the basis of section 43(2) (commercial interest), and section 40 (personal information) of the FOIA.
 - Stephenson Quarter – Stage 2/Final Report. Some information was redacted on the basis of section 43(2). Names of individuals were redacted on the basis of section 40.
8. The complainant requested an internal review on 29 July 2021 disputing the basis for the redactions made to the Stephenson Quarter – Stage 2/Final Report ("the Stage 2 Report").
9. The council wrote to the complainant on 17 September 2021 with the outcome of the internal review stating that it upheld its position.
10. The council provided an updated response to the complainant on 12 September 2022. It disclosed some of the previously redacted information in the Stage 2 Report, however some information remained withheld on the basis of sections 43(2) and 40 of the FOIA.

Scope of the case

11. The complainant contacted the Commissioner on the 18 September 2021 to complain about the way his request for information had been handled. Specifically disputing the grounds for withholding information from the Stage 2 Report, and regarding the time taken to respond.
12. The Commissioner considers that, as the information requested in this case is related to the development of a site, it is highly likely to affect the elements of the environment as defined at regulations 2(1)(a) and 2(1)(b). He therefore has decided that that the information falls within the definition of environmental information at regulation 2(1)(c).
13. The Commissioner has substituted the FOIA exemptions cited by the council with their nearest equivalent EIR exceptions, being regulation 12(5)(e) (commercial confidentiality), and regulation 13 (personal data).
14. The scope of this case is to consider whether the council was correct to withhold information from the Stage 2 Report on the grounds of regulation 12(5)(e) and regulation 13; and whether the council made any procedural errors in its handling of the request.

Reasons for decision

Regulation 12(5)(e)

15. 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;”

16. The Commissioner’s published guidance on this exception explains that in order for this exception to be applicable, there are a number of conditions that need to be met. These are:
 - 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?

17. In his guidance on regulation 12(5)(e) the Commissioner considers that "for information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party.¹" 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 complainant has requested an unredacted copy of the Stage 2 Report. The redactions made are:
 - The names of the bidding companies.
 - The scores achieved by each company against the bid assessment criteria.
 - Specific commercial details and queries such as values, costs and proposal specifications.
19. The Stage 2 Report is a scoring assessment of bid tender submissions from a number of suppliers, for the selection of a partner for the redevelopment of a central site in Newcastle City. The overall scoring criteria, an evaluation summary for each supplier, and the process for final selection are provided with redactions made as stated above.
20. Tenders are part of a commercial procurement process which is a competitive process to provide services to another party. The council argues that disclosure of the information would impact both the suppliers' competitiveness in future tenders and the council's ability to run competitive tenders.
21. The Commissioner considers that the withheld information is commercial in nature being the details pertaining to, and the evaluations of suppliers' bids in a competitive procurement exercise. The first condition has therefore been met.

Is the information subject to confidentiality provided by law?

22. In the Commissioner's view, ascertaining whether or not the information has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
23. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the

¹ https://ico.org.uk/media/for-organisations/documents/2021/2619007/12-5-e-confidentiality-of-commercial-and-industrial-information_31122020-version-13.pdf

information was shared in circumstances creating an obligation of confidence.

24. 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.
25. The council states that the information is not trivial because:
 - The identity of suppliers, the details of their bids and the council's evaluation would provide valuable information to their competitors on their tender proposals.
 - It will provide information on what the council considers to be their strengths and weaknesses.
 - The redacted information relates to property values and construction rates. In a competitive market this information is sensitive because it gives insight how other companies are bidding for work which can be critical to winning tenders.
 - While some figures and assumptions change as time passes they are still relevant to Newcastle's market and may inform other bids that these developers are working on. Disclosure of the information would therefore put suppliers at a commercial disadvantage when submitting future bids for similar services.
 - The information is important to the selected supplier in relation to their ongoing developments at Stephenson Quarter for which the supplier is actively marketing sites. Disclosing this information could prejudice negotiations if potential occupiers and investors have an insight into the base figures which could undermine the values being quoted.
26. The council advised that it had not contacted the suppliers directly regarding the information request because it is an accepted informal rule that negotiations and appraisals are privileged information which is not shared. The information is therefore provided on a restricted basis for the use and benefit of the instructing parties.
27. The council confirmed that whilst the winning contractor is known, the details that have been redacted from the Stage 2 Report are not in the public domain.
28. Taking account of the withheld information, the Commissioner agrees that it is not trivial in nature. He acknowledges that the information was provided to the council with the expectation that it would be handled in

confidence, as would the council's resulting assessment. Furthermore he acknowledges that neither has been shared widely.

29. The Commissioner is therefore satisfied that the second condition has been met because the information is subject to the confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

30. In his guidance on regulation 12(5)(e), the Commissioner defines that legitimate economic interests "could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income."
31. The council states that disclosure would prejudice the commercial interests of the suppliers involved in the tendering process because of the reasons already stated above.
32. The council states that disclosure would prejudice the council's commercial interests for the following reasons:
- The presentation of bids, the way a supplier answers questions, and the assessment against an evaluation criteria set in a procurement exercise provides the council with an important means to distinguish between the merits of competing bids.
 - Disclosure of this information could reduce the competitiveness of the selection process for future bids. It would enable suppliers to see previous successful bids and understand the council's evaluation criteria. The council states "it is likely that the competitiveness of the selection process and the authority's ability to achieve best value would be hindered, thus harming the authority's commercial interest."
 - Potential future procurement processes for the council may be hindered because suppliers could be discouraged from engaging with the council if they fear that their commercially confidential information and market position may be disclosed.
33. The council states that disclosure of the information would prejudice both the contractors' commercial interests and the council's commercial interests in relation to maintaining a fair and transparent process where information has been freely provided on the understanding that confidentiality of the information is maintained.

34. The council advised that the withheld information, if made public, would be of interest to the unsuccessful bidders. It advised that there are commercial sensitivities that would be jeopardised in relation to the council's joint venture partner who is actively developing the scheme.
35. The Commissioner accepts the council's position that the redacted information would be of use to competitors on future bids and that this would be prejudicial to both the suppliers and the council. He also accepts that release of the information may negatively impact the selected supplier's marketing of sites that are related to the development of the contract. Furthermore that the council's reputation regarding the confidentiality of such information would be damaged and that this may have a negative impact on future procurement exercises, ultimately resulting in less value for money for publicly funded projects.
36. The Commissioner is satisfied that the release of the withheld information would adversely affect a legitimate economic interests of both the suppliers and the council, and that the third criteria is therefore met.

Would confidentiality be adversely affected by disclosure?

37. The Commissioner is satisfied that, as the first three conditions of the test have been met, disclosure of the relevant information into the public domain would adversely affect the confidential nature of the information. This would consequently harm the legitimate economic interests of the suppliers and the council.
38. The Commissioner is therefore satisfied that regulation 12(5)(e) is engaged in relation to the withheld information. As a result, he has gone on to consider the public interest test.

The Public interest test

39. Regulation 12(1)(b) requires that, where the exception under regulation 12(4)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.
40. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019), "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations" (paragraph 19).

Public interest in favour of disclosure

41. The complainant has expressed concerns regarding transparency of the bid assessment process. The complainant states that they are surprised that the company names and scores have been redacted. They propose that a much more open approach would be to list the bidders in alphabetical order and the scores against bidder, for example 1,2,3,4, so that nothing is revealed that might prejudice their business interests.

Public interest arguments in favour of maintaining the exemption

42. The council argues that the identity of the unsuccessful bidders is not known. They will not be a party to or involved in the project, nor in receipt of any public funding from the exercise. The public interest in disclosing this information is very much outweighed by the interests in withholding the commercially sensitive information for the reasons set out previously.
43. The council states that there is an inherent public interest in the maintenance of the exemption. The public interest is particularly strong in relation to private companies' participation in public authority bids. There is an important public interest in ensuring that potential bidders are not discouraged from bidding for public opportunities by a justified fear that their commercially confidential information, relating to their proposals, market positions, and commercial standing, will be released publicly and so released to their competitors
44. The council argues that the effect of publishing the withheld information would be likely to harm the commercial interests of both the bidders and the council. This would prejudice the council's ability to obtain a competitively procured price for the services and contracts in the future.

Balance of the public interest

45. The Commissioner considers that bidding suppliers would not expect details of their submissions into the bid process to be released. For the reasons already set out in relation to the exemption, release of the information could be detrimental to the commercial success of the joint venture, and the competitiveness of future bids for the suppliers involved. Ultimately this would harm the council's reputation on future bids, which may diminish competition and therefore would not be in the public interest.
46. The Commissioner has considered the complainants case that the names of the suppliers could be anonymised. However the Commissioner considers that the suppliers' commercially confidential information, and details of the council's appraisal would still be released in this scenario, which would be of use to competitors.

47. On balance the Commissioner finds that the transparency argument is outweighed by the need for the council to secure the best value for money with selected contractors and partners. This ability could be compromised if the withheld information were to be disclosed which would be counter to the public interest.
48. For these reasons, and despite the acknowledged public interest in disclosure of the information and presumption in favour of disclosure, the Commissioner has concluded that the public interest favours maintaining the exception. The council is not, therefore, obliged to disclose this information.

Regulation 13 personal data

49. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
50. In this case the relevant condition is contained in regulation 13(2A)(a)². This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
51. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
52. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

53. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

54. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

² As amended by Schedule 19 Paragraph 307(3) DPA 2018.

55. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
56. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
57. The withheld information comprises the names of officers of the council, external legal advisors and commercial property agents. The individuals are named as being involved in the assessment process. Both the person's name and their employer is given therefore the individuals would be easily identifiable.
58. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the individuals involved in the assessment process. He is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
59. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
60. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

61. Article 5(1)(a) of the GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

62. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
63. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

64. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to

the extent that at least one of the" lawful bases for processing listed in the Article applies.

65. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"³.

66. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

67. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

68. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
69. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
70. The complainant has expressed a legitimate interest in transparency stating that the assessment of the bidding process to determine if there were any conflicts of interest can only be achieved by knowledge of those involved in the assessment process. The complainant states that the individuals are senior officers in their organisations and it would be reasonable to expect their names to be publicly available.

Is disclosure necessary?

71. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
72. The complainant requests details of decision makers, no alternative means of meeting the legitimate interest has been put forward by the council or is obvious to the Commissioner.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

73. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
74. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;

- whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
75. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
76. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
77. The council has not provided the Commissioner with any information regarding the seniority of the council officers named in the withheld information, nor further arguments regarding their reasonable expectations.
78. The Commissioner assumes that the council officers responsible for the bid assessments are senior decision makers in the council as they are responsible for making decisions about a contract worth a significant sum of public money.
79. Given the need for accountability and transparency, the Commissioner considers that senior council officers should expect their posts to carry a greater level of accountability, since they are likely to be responsible for major policy decisions and the expenditure of public funds.
80. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest in the disclosure of the Newcastle City Council officers' names to outweigh the council officers' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.
81. The other redacted individuals are shown in the disclosed information to be employees of Womble Bond Dickinson and Knight Frank. These individuals do not carry out public functions, and whilst they may be senior advisors to the council, they are not the public authorities decision makers for public funds or policy. The Commissioner therefore considers that they would not expect their information to be disclosed.
82. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest in the disclosure of the employees of Womble Bond Dickinson and Knight Frank personal data to outweigh the individuals' fundamental rights and freedoms. The Commissioner

therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

Fairness and transparency

83. Even though it has been demonstrated that disclosure of the requested information under the EIR would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
84. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
85. The requirement for transparency is met because as a public authority, the council is subject to the EIR.

The Commissioner's view

86. The Commissioner has decided that the council was entitled to withhold the information relating to the names employees of Womble Bond Dickinson and Knight Frank under regulation 13(1), by way of regulation 13(2A)(a).
87. However regarding the names of the Newcastle City Council officers, the Commissioner has decided that the council failed to demonstrate that the exception at regulation 13(1) is engaged.
88. The Commissioner requires that the council disclose the names in paragraph 3.2 of the Stage 2 Report of the individuals who are shown to be employees of "Newcastle City Council".

Regulation 5 EIR – duty to make environmental information available

89. Regulation 5(1) states that, subject to certain provisions, a public authority that holds environmental information shall make it available on request.
90. Regulation 5(2) states that information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
91. In this case, the council provided its final response to the request outside this timeframe and has therefore breached regulation 5(2) of the EIR.
92. Since a response has now been provided, the Commissioner does not require the council to take any steps.

Right of appeal

93. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

94. 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.

95. 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

Janet Wilson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF