

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

Decision notice

Date: 6 February 2023

Public Authority: Oxford City Council
Address: Town Hall
St Aldate's
Oxford
OX1 1BX

Decision (including any steps ordered)

1. The complainant requested information relating to the construction of eco homes. Oxford City Council (the "council") disclosed some information and withheld other information under the exemption for commercial interests (section 43(2) of the FOIA. During the Commissioner's investigation the council disclosed additional information and reconsidered the request under the EIR, withholding information under the exception for commercial confidentiality (regulation 12(5)(e)).
2. The Commissioner's decision is that the council wrongly handled the request under the FOIA and breached regulation 5(1), 11(4) and 14(1) and that it failed to demonstrate that the exception in regulation 12(5)(e) was engaged.
3. The Commissioner requires the council to disclose the cost of contracts identified in part 4 of the request.
4. The council must take this step 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 19 March 2022, the complainant wrote to Oxford City Council (the "council") and requested the following information:

"Regarding the eco homes as detailed on the Oxford Direct Services website:

<https://www.odsgroup.co.uk/News/2020/05/...>

1. What date did construction of each of the eight homes begin?
 2. What was the original estimated completion date for each of the eight homes and what date were they finally completed?
 3. What was the initial cost estimate for constructing the eight homes and what was the final cost? Please provide individual details for each of the eight homes.
 4. Please provide the names of all the contractors who were involved in the project and the cost of contracts they were awarded.
 5. Please provide details of the monthly rent received by the Council for each of the eight homes."
6. The council's initial response disclosed information and withheld the costing information in part 4 of the request under the exemption for commercial interests (section 43(2) of the FOIA). During the Commissioner's investigation the council was directed to reconsider the request under the EIR.
7. The council's final position is that information relating to the cost of contracts is subject to the exception for commercial confidentiality (regulation 12(5)(e).

Reasons for decision

8. The reasoning below sets out the Commissioner's view on the council's application of regulation 12(5)(e) in this case and on other procedural matters.

Is it environmental information?

9. During the course of his investigation the Commissioner advised the council that he considered the requested information fell to be considered under the EIR.
10. In this case the requested information relates to decisions relating to the construction of eco homes. In keeping with regulation 2(1)(c), the Commissioner considers, therefore, that the information can be

considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").

11. In view of this, the Commissioner has concluded that the council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council subsequently corrected this the Commissioner does not require the council to take any steps in this regard.

Regulation 14 – refusal to disclose information

12. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore, where the procedural requirements of the two pieces of legislation differ, it is inevitable that the council will have failed to comply with the provisions of the EIR.
13. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued failed to cite any exception contained within the EIR as the council actually dealt with the request under FOIA.

Regulation 11 – internal review

14. Regulation 11(4) of the EIR requires authorities to carry out internal reviews within 40 working days of the date of their receipt.
15. In this case the complainant requested an internal review on 3 June 2022. The council did not provide its review response until 23 January 2023 and, therefore, breached regulation 11(4).

Regulation 12(5)(e) – commercial confidentiality

16. 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".
17. In its response to the complainant the council cited the following reasons for withholding the information under regulation 12(5)(e):

“With regards to disclosing the costs of individual sub-contractors’ contracts, I have considered the issues of commercial sensitivity under the EIR and taking note of your reference to the Local Government Transparency Code 2015, and a local authority’s duties thereunder. In this regard, however, you will note that the sub-contracts let to various contractors in the construction of the eco homes were let by ODS (not the Council) to private sector suppliers. These contracts were let under terms that gave ODS no express authority to disclose confidential/price sensitive information to enquirers, so it would be my view that the exemption set out in section 12 (5) (e) of the EIR would apply to this information, on the basis that a disclosure of the pricing of the work supplied by the individual sub-contractors would adversely affect the confidentiality of this commercial/industrial information. Although owned by a local authority, ODSL operates in a commercial environment, and must respect the commercial confidentiality of its private sector suppliers whenever possible. It is for this reason that, having undertaken the public interest test, we are applying EIR exception section 12(5)(e) to withhold the detailed individual pricing paid to each of its sub-contractors.”

18. The Commissioner recognises that disclosures under the EIR can result in information being placed in the public domain that would otherwise not be available. The exception in 12(5)(e) is designed to protect commercially confidential information where its disclosure would adversely affect the legitimate economic interests of a party or parties. In order for the exception to be engaged a public authority needs to demonstrate with evidence and arguments how, in a specific instance, withheld information falls into these categories.
19. Whilst the council has suggested that the withheld information falls into these categories it has provided no explanation of how they are applicable in this case.
20. In relation to confidentiality, it has suggested that contractors/sub-contractors would not expect this information to be disclosed. However, since the passing of the EIR, it is the duty of public authorities to advise all contractors that any information provided to the council can be subject to disclosure in response to a request. Where a request for such information is received, it is the public authority’s responsibility in each individual instance, to justify why information should be withheld.
21. In relation to the council’s explanation of the adverse effects which disclosure of the information would cause, the Commissioner considers that these are entirely generic in nature.
22. It is not enough that disclosure might cause some harm to an economic interest. An authority needs to establish that disclosure would cause harm, that is, that it is more probable than not. The Commissioner

considers that the level of detail in the council's arguments is not sufficient for it to conclude that disclosure would cause harm.

23. The Commissioner is left with the impression that the council has sought to apply the exception on a general basis, with a level of detail which fails to support its position.
24. The Commissioner accepts the possibility that a case might be made for withholding the information. However, in this case, he considers that the council has failed to do this and he does not consider it is his role to supply the deficiencies of public authorities or to otherwise create arguments on their behalf. He also notes that the council was provided with several opportunities to provide submissions in this case but that it failed to provide arguments of sufficient detail.
25. Having considered the council's submissions the Commissioner has concluded that the exception in regulation 12(5)(e) is not engaged in this case. As the exception is not engaged he has not gone on to consider the public interest test. The council should now disclose the information it withheld under regulation 12(5)(e) to the complainant.

Right of appeal

26. 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

27. 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.
28. 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

Christopher Williams
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Wycliffe House
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