

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 9 March 2023

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

#### **Decision (including any steps ordered)**

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1. The complainant requested from Cornwall Council, ('the council'), copies of contracts between the council and Citybus. He also requested copies of contracts with all of the relevant companies regarding a bus fares pilot. The council applied Regulation 12(5)(e) to withhold the information from disclosure.
2. The Commissioner's decision is that the council was not correct to apply the exception in Regulation 12(5)(e) to withhold some of the information requested.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To disclose a copy of the contracts to the complainant, subject to schedule 17 of each contract being redacted, the information highlighted in paragraph 29, and any personal data falling within the scope of Regulation 13 of the EIR.
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 FOIA and may be dealt with as a contempt of court.

## **Request and response**

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5. On 28 April 2022 the complainant wrote to the council and requested information in the following terms:

“I am going to make FOI requests for copies of the contracts with Citybus for the 8-year deal and also the contracts with all the companies for the bus fares pilot. I would like to understand exactly what the Council has let itself in for. If you would like to send me copies of the contracts, that will save the FOI team a bit of work.”
6. The council responded on 23 May 2022. It applied Regulation 12(5)(e) to withhold the information from disclosure (commercial confidentiality).
7. Following an internal review, the council wrote to the complainant on 25 July 2022. It upheld its initial decision.

## **Reasons for decision**

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8. The following decision notice analyses whether the council was the council was correct to rely upon Regulation 12(5)(e) to withhold the information from disclosure.
9. Regulation 12(5)(e) 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.
10. In his assessment of whether Regulation 12(5)(e) is engaged, the Commissioner will consider the following questions:
  - Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality required to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?

11. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive because if the information were disclosed under the EIR, it would cease to be confidential.

Is the information commercial in nature?

12. The withheld information relates to the council's contracts with bus companies for the provision of bus services within the county.
13. The Commissioner accepts that the information is commercial in nature as it relates to commercial contracts between the council and third parties to provide bus services.

Is the information subject to a duty of confidentiality?

14. The council argued that the information is held under an implied duty of confidence due to the nature of the information; it is commercially sensitive.
15. It further argued that the information is not otherwise public, and that it is not trivial information as it is commercially sensitive.
16. The Commissioner notes that paragraph 40 of the agreements between the parties confers a duty of confidentiality on both parties as regards the other parties confidential information.
17. Having seen the withheld information, the Commissioner is satisfied that the council's own employees would understand that the information held within the contracts should not be disclosed without due authorisation at the necessary level within the council.
18. The Commissioner therefore accepts, given the nature of the information in question, that the information is subject to a duty of confidence.

Is the confidentiality required to protect a legitimate economic interest?

19. The council argued that a disclosure of the information would prejudice its own, and the bus companies commercial interests. It clarified that the information contains pricing and fee documentation and specific details of how the businesses are run. It said that a disclosure of this information would be likely put both it, and the companies, at a competitive disadvantage in future tenders and negotiations.

*The legitimate economic interests of the bus companies*

20. The council said that competitors would be likely to use the commercial information relating to how the bus companies run their businesses and how they price their fees to outcompete the companies concerned. It argued, therefore, that a disclosure of these details would give competitors an unfair advantage over the companies, and would be likely to prejudice their commercial interests.
21. However, the council did not contact the bus companies for their view on the disclosure of the information, and the likelihood of commercial harm occurring should the information be disclosed. One, however, did identify commercially sensitive information within the relevant schedule of the contract to declare the information was commercially to it.
22. In the case of *Derry City Council v Information Commissioner EA/2006/0014*, (11 December 2006), the Tribunal considered that in order to justify applying section 43 where a third party's commercial interests are concerned, it is not enough for a public authority to speculate on the potential prejudice which would occur to their commercial interests should the information be disclosed.
23. The Commissioner's guidance on this issue<sup>1</sup>, highlights that he expects public authorities to consult with third parties for their exact views on any prejudice which would be likely to occur in all but the most exceptional circumstances. The Commissioner has not noted any exceptional circumstances in this case which would lead him to base his decision on the council's speculation as to the prejudice which might occur to the third-party companies should the information be disclosed.
24. As the council did not provide third-party submissions, this significantly weakens its arguments in respect of the application of section 43(2) in respect of the commercial interests of these companies.

*The council's own legitimate economic interests*

25. The council argued that disclosing the information would damage third-party companies trust and confidence in the council, because their confidential commercial information would be disclosed into the public domain. It argued that this would be likely to prevent some companies from choosing to contract with the council in future. A lack of competition for such contracts would be disadvantageous to the

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<sup>1</sup> <https://ico.org.uk/for-organisations/section-43-commercial-interests>

council's legitimate interests as it would potentially lessen the chance of obtaining contracts at best value.

26. The Commissioner, however, considers that this particular argument holds little strength. The companies can be reasonably assured that regular payments will be made, and they provide security of income to the company duration of the contract. The Commissioner recognises, therefore, that unless a disclosure of the information would be particularly damaging to other areas of the business, it is unlikely that they would refuse to contract with public authorities purely on the basis that pricing information or tender strategies would be disclosed.
27. The council also argued that a disclosure of the withheld information would provide details of prices, and the level of services which the council has agreed with the companies. It argues that any company bidding or negotiating with it to contract for similar contracts in the future could use this information to put the council at a disadvantage in future tendering exercises. Disclosing detailed information on prices, and the level of services agreed in these contracts for those prices, would be likely to affect future tendering bids it received. It argued that this would be prejudicial to its commercial interests.
28. The council said that there is a significant likelihood of it seeking to enter into other, similar contracts to these in the near future due to the ongoing work and projects in relation to its Public Transport Improvement Programme. It argues therefore that the prejudice it has described would be likely to happen were it to disclose the requested information.
29. The Commissioner notes that the majority of the contracts signed by between the council and each third-party are identical. The contracts differ significantly only in respect of one section; schedule 17; the 'operator tender submissions'. There is also pricing information within schedule 13 of the final park and ride contract, and pricing information provided prior to schedule 1, part 2 of the PCB contract.
30. In regard to the sections of the contracts which are the same, the Commissioner does not consider that the council is correct to withhold the entirety of the contracts from disclosure under Regulation 12(5)(e). The contracts appear to be a template contract between the parties, and the council's arguments are not persuasive as regards the potential for prejudice to occur through a disclosure of this information.
31. However, schedule 17 of each contract contains copies of the individual tendering documents for each company concerned. It is these documents which contain details such as pricing, and detailed descriptions of the levels of services which each company has contracted

to provide. The Commissioner accepts that a disclosure of these details would be likely to affect future tendering exercises. Similarly, the pricing information highlighted in paragraph 29 above.

32. A disclosure of the successful tenders would undermine the level playing field under which tendering companies are intended to submit tenders for similar contracts in the near future. If the council were to disclose this information, it would be likely to result in bids levelling off around the pricing and level of service offered in these contracts. This would prejudice the council's legitimate economic interests as it would undermine the competitive process under which tenders are meant to be bid. This would potentially prevent the council from receiving true 'market value' bids via the tendering process.
33. The Commissioner is also satisfied that the way in which the companies have addressed and submitted their tenders is a package of information which, in total, gives that company an advantage over their competitors where it has proved to be successful previously. A disclosure of the bids received in this case may narrow how companies approach similar tenders in the future to follow those types of bids which were successful previously – it may undermine the potential for innovative bids being submitted.
34. The Commissioner is therefore satisfied that a disclosure schedule 17 and the other information highlighted in paragraph 29 would be detrimental to the council's own legitimate economic interests.
35. The Commissioner has therefore decided that Regulation 12(5)(e) of the EIR is engaged by this information.
36. However, the Commissioner has decided that the council was not correct to apply Regulation 12(5)(e) to the remainder of the contracts. His decision is therefore that these sections should be disclosed by the council, subject to the redaction of appropriate personal data under Regulation 13 of the EIR (personal data), where relevant.
37. For schedule 17 of the contracts, and the other information highlighted in paragraph 29, he has therefore gone on to consider the associated public interest test.

#### The public interest test

38. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in the information being disclosed.

39. Regulation 12(2) also provides that a public authority shall apply a presumption in favour of disclosure.

*The public interest in the information being disclosed*

40. The Commissioner notes that there is a strong public interest in the public being made aware of the levels of service which they can expect from bus companies contracted to work within their area. Bus services provide a main form of transport for many people, and there is a strong public interest in the public being aware of the levels of service expected of the companies by the council as part of the agreed contracts. They can then question whether the levels agreed by the council meet the needs of the area concerned, and hold the council, or the company concerned, to account if they feel their requirements are not being met adequately.
41. The Commissioner also considers that there is a strong public interest in the public being made aware of the costs, in terms of public money, being spent to purchase the level of service being provided to them. This provides confidence in the council's financial management of the public money which is provided to it.

*The public interest in the exception being maintained.*

42. There is a strong public interest in protecting the pricing which the council has in place within its current contracts when moving forward to negotiate new, similar contracts. There is a public interest in allowing the market at the time to determine the prices and levels of services being bid by companies.
43. Disclosing information which allows companies to determine the prices and levels of service which the council has accepted in the recent past would be likely to undermine this, and affect the true market value of future such bids. This, in turn, could prevent the council from obtaining best value, and the best level of service at the time from the bids it receives.

*Conclusion of the public interest test*

44. There is a public interest in protecting market sensitive information relating to similar future procurements from disclosure. A disclosure of this information would ultimately make it harder for the council to obtain services at best value to tax payers in future negotiations for similar services. It may also affect the level of service being offered in such bids.

45. The Commissioner has therefore decided that the council was correct to apply Regulation 12(5)(e) to withhold the 'operator tender submissions' within the contracts.
46. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure, and the Commissioner has borne this in mind when reaching his decision. However, the above demonstrates that the Commissioner's view is that the public interest in the exception being maintained clearly outweighs that in the information being disclosed at the time that the request was initially responded to.
47. Therefore, the Commissioner's decision is that the presumption in favour of disclosure required by Regulation 12(2) does not change the outcome of his decision that the exception was correctly applied by the council in this case.

The Commissioner's conclusions

48. The Commissioner's decision is that the majority of each contract should be disclosed, subject to appropriate redactions under Regulation 13 of the EIR (personal data), and subject to the redactions below.
49. However, the council was correct to withhold schedule 17 of each contract: the 'operator tender submissions' under Regulation 12(5)(e), and the public interest rests in the exception being maintained for this information. The council is therefore able to redact these sections from the contracts before disclosing them.
50. Also, the pricing information held within schedule 13 of the final park and ride contract, and pricing information provided prior to schedule 1, part 2 of the PCB contract.



## Right of appeal

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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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

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.

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 .....**

**Ian Walley**  
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