

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

**Date:** 30 April 2024

**Public Authority:** UK Sport  
**Address:** 21 Bloomsbury Street  
London  
WC1B 3HF

**Decision (including any steps ordered)**

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1. The complainant has requested information on the bids related to a particular tender regarding environmental sustainability support for national governing bodies<sup>1</sup> ("NGBs"). UK Sport ("UKS") initially relied on FOIA section 43(2) – commercial interests, to refuse the request.
2. The Commissioner's decision is that the request should have been addressed under the EIR. He finds that the exception at regulation 12(5)(e) - confidentiality of commercial or industrial information, is engaged and that in the circumstances of this case the public interest favours maintaining the exception.
3. The Commissioner does not require further steps.

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<sup>1</sup> A National Governing Body is an organization that governs and administers a sport on a national basis.

## Background

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4. The request concerns UKS's Invitation to Tender ("ITT") for specific work which is set out as follows:

"UKS are due to publish their Environmental Sustainability Strategy, outlining the actions to be taken over the next two years to set a strong foundation, identify the greatest impacts across high-performance sport and drive progress in these areas.

A key component of this strategy will be providing support and guidance to the ~40 NGBs into which UKS invests to measure their environmental impact and to produce environmental sustainability action plans for their organisation by 31 March 2025, which align with the ambition set out in the UN's Sports for Climate Action Framework.

... The main objective is to accelerate action in this space, building the capacity, skills and confidence of NGBs to work on environmental sustainability and embed long term changes. Within the cohort of NGBs in which we invest there is a mix of paralympic sports, winter sports, newer sports and performance-only focused organisations."

5. The ITT sets out that interested parties should provide a submission covering:
- An outline of the proposed approach to delivering the project specification.
  - Details of the proposed personnel who would be involved, and their experience;
  - Information on why the collective experience and diversity of thought of the research provider and nominated Team are suitable for the contract;
  - A fixed fee quote for the work, which includes the day rate and number of hours/days worked by all individuals involved in the application.
  - A breakdown of the unit cost for delivery of one cluster and subsequent clusters demonstrating economies of scale.
  - Information on your organisation's commitment to creating Social Value, by improving environmental sustainability and driving the EDI agenda.

## Request and response

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6. On 26 June 2023, the complainant wrote to UKS and requested information in the following terms:

"UK Sport had a recent tender T23-004 - NGB Environmental Sustainability Support ITT

Our request is for all bids, and presentations related to this tender."

7. UKS responded on 24 July 2023. It stated that it held information in the scope of the request and explained that the information was withheld in reliance of FOIA section 43(2). It explained that disclosure of the tenders would unfairly prejudice the suppliers' commercial interests when competing for future public sector contracts.
8. Following an internal review UKS wrote to the complainant on 18 August 2023. It stated that it had considered the complainant's request to review and determine the commercial sensitivity each section of the 26 tender responses. It explained:

"... having reviewed a sample of the responses, it is clear that this is not feasible. The long-form style of many responses means that the commercially sensitive information is intertwined across the document, which must therefore be treated as a whole.

The timing of your request is also a relevant consideration, given the commercial sensitivity of the other tenderers is likely to be increased given the up-to-date nature of the information contained therein because the tender has only recently closed. Releases of current pricing, delivery/team structures and strategy plans is likely to harm their ability to win public sector tenders in the future in this field."

## **Scope of the case**

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9. The complainant contacted the Commissioner on 26 September 2023 to complain about the way their request for information had been handled. They explained:

"The tender was limited to 8 pages of A4, and so it was very difficult to put large amounts of commercially sensitive information into the tender, and our tender was not marked as commercially sensitive neither were the other tenders marked as commercially sensitive. UK Sport's tender said that responses may be released under the FOI act and that might have to release information that was marked as commercially sensitive.

Rather than releasing unmarked information, UK Sport have withheld all information on the basis that it might be commercially sensitive.

I believe that the correct response would be to release all unmarked information and to review any marketed information to see if it is correctly marked as commercially sensitive."

10. The complainant further explained:

"We want to understand how organisations bid for this work, and how it was presented so that we can improve future bids."

11. Further to his sight of the withheld information the Commissioner advised UKS to consider whether the request should have been considered under the EIR rather than FOIA. Following an exchange of correspondence UK Sport explained:

"UK Sport maintains our primary position that the EIR is not relevant in this matter for the reasons set out in our previous correspondence. However, we understand your view and we therefore also maintain that, if the EIR is relevant in the matter, the information is still exempt from publication under Reg. 12(5)(e) EIR."

12. The Commissioner considers that the request should be addressed under the EIR and therefore has considered UK Sport's application of regulation 12(5)(e) – the confidentiality of commercial or industrial information, to withhold the requested information.

13. Following consultation with the complainant the Commissioner considers that the scope of his investigation concerns the material contained in the specific bid documents which were limited to eight pages and not any attached appendices.

## Reasons for decision

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### Is the requested information environmental?

14. Regulation 2(1) of the EIR defines environmental information as being information 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)...as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
  - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
  - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
15. The Commissioner is satisfied that the requested information comprises information on activities likely to affect the state of the environment falling within regulation 2(1)(c). This is because the purpose for which the tenders were created was to create environmental sustainability plans including the measurement and monitoring of environmental impact with regard to emissions. As such the plans (whether implemented or not) form a plan and an activity which is created to likely affect elements of the environment, for example the air affected by greenhouse gas emissions. He has therefore assessed this case under the EIR.

### **Regulation 12(9) information on emissions**

16. Regulation 12(9) states:

“To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse that information under an exception referred to in paragraphs (5)(d) to (g).”

17. The Commissioner firstly considered whether any of the withheld information could be considered to relate to emissions. If the withheld information is information on emissions regulation 12(9) overrides the application of regulation 12(5)(e).
18. UKS submits that the relevant withheld information discusses how the bidder might help NGBs think about emissions analysis and reporting and/or discusses its own emissions position (as a private entity) as part of its social value package and/or details other experience it has assisting private bodies on thinking about their emissions profile. It submits that none of this is information on emissions.

19. The Commissioner's guidance on emissions<sup>2</sup> provides some examples of what amounts to "information on emissions", for example the level of existing or potential emissions is information on emissions, the assumptions and formulae used to calculate the emissions in question, and details of the consequences or effect of the emissions.

20. In this case no such information is included in the withheld information.

21. The Commissioner's guidance considers the phrase "relates to" in regulation 12(9):

"Regulation 12(9) of the EIR says that where the requested information 'relates to information on emissions', you cannot use certain exceptions. At first glance the term 'relates to' could be interpreted as extending the scope of the override to capture any information that can somehow be linked to the subject of emissions. However, the Commissioner considers a narrower approach is required and that, in line with the Upper Tribunal's decision<sup>3</sup>, regulation 12(9) will only be relevant if the information falls squarely within the definition of environmental information under 2(1)(b) because it is information on emissions"

22. The case referenced at footnote 3 relates to information which was environmental information by virtue of regulation 2(1)(c), namely legal advice to inform the public authority's decision on which of two pieces of legislation was most relevant to the control of emissions from domestic chimneys, finding that the disputed information did not "relate to information on emissions" within EIR reg. 12(9).

23. On this basis the Commissioner finds that the override for information on emissions provided by regulation 12(9) is not engaged. He has therefore considered the application of regulation 12(5)(e).

### **Regulation 12(5)(e) - confidentiality of commercial or industrial information**

24. 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

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-9-information-on-emissions/>

<sup>3</sup> <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=4159>  
[GW v the Information Commissioner, the Local Government Ombudsman and Sandwell Borough Council \[2014\] UKUT 130 \(AAC\) GIA/4279/2012, 11 March 2014](https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=4159)

information, where such confidentiality is provided by law to protect a legitimate economic interest.

25. As set out in the Commissioner's guidance<sup>4</sup>, the exception can be broken down into a four-stage test. All four elements are required in order for the exception to be engaged:
1. The information is commercial or industrial in nature.
  2. The confidentiality is provided by law.
  3. The confidentiality is protecting a legitimate economic interest.
  4. The confidentiality would be adversely affected by disclosure.

### **Is the information commercial or industrial in nature?**

26. For information to be commercial in nature, it needs to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade. A commercial activity generally involves the sale or purchase of goods or services, usually for profit.
27. The tenders provide the respondents' consideration of their approach to the work required, as set out above in paragraphs 4 and 5. The tenders contain information on commercial partnerships, approaches to the project, scoping exercises, project and workshop plans and phases, methodology, team information with regard to roles and relevant experience, costs, social value response and experience. The respondents are competing for the contract to provide a service for profit.
28. Having seen copies of all the withheld information the Commissioner notes that some of the tenders contain brief statements regarding the organisation's achievements which can be found in the public domain on company websites. However, he observes that such information is minimal and notes UKS's argument that all components of the tenders have commercial value. UKS also advised that the complainant had explained their interest in the information requested being to assist them in future bids not for generic company information.

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<sup>4</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-5-e-commercial-or-industrial-information/#:~:text=Practical%20points-,What%20does%20the%20EIR%20say%3F,protect%20a%20legitimate%20economic%20interest>

29. In view of the above, the Commissioner accepts that the withheld information is commercial in nature.

**Is the information subject to confidentiality provided by law?**

30. The Commissioner considers this to include confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself.
31. With regard to the common law of confidence, there are two issues that need to be considered:
- Does the information have the necessary quality of confidence? In the Commissioner's view if the information is not trivial nor in the public domain, it has the necessary quality of confidence.
  - Was the information shared in circumstances creating an obligation of confidence?
32. UKS submits that the information is subject to confidentiality by law because the tenderers provided the tender documents to UKS under an obligation of confidentiality as stated in the ITT. It also argues that there is an inherent duty of confidentiality in tendering exercises.
33. The Commissioner notes that section 10 of the ITT includes paragraphs on commercial sensitivity and confidentiality. Paragraph 10.2 advises:
- "The extent to which this information shall be held in confidence by UKS and for how long may be subject to discussion as part of the Tender process and during post-tender negotiations (if any)."
34. The Commissioner is satisfied that the tenders are covered by a common law duty of confidence. The tenders have the necessary quality of confidence, contain information which is not trivial and were provided on the understanding that they would be treated confidentially, as explained in ITT section 10.

**Is the confidentiality provided to protect a legitimate interest?**

35. The First-tier Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd*<sup>5</sup> that, to satisfy this

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5b2011%5dUKFTT\\_EA20100106\\_\(GRC\)\\_20110104.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5b2011%5dUKFTT_EA20100106_(GRC)_20110104.pdf)



element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. It is not enough that disclosure might cause some harm to an economic interest. The public authority needs to establish that, on the balance of probabilities, ie more probable than not, disclosure would cause some harm.

36. UKS argued that the legitimate economic interests being protected are those of the tenderers and UKS. In respect of the tenderers UKS stated that disclosure would enable competitors to:

"... copy their ideas and pitches, undercut their prices and gather commercial intelligence on their rivals which would be likely to lead to them losing future tenders with UK Sport or other potential customers."

37. UKS further explained that the sports sustainability consultancy sector is niche and specialised and any commercial disadvantage to competitors can result in substantial detriment. It explained that there were twenty six responses to the Invitation to Tender ("ITT") which comprise the withheld information and contain the competing tenderers' "commercial secrets".

38. UKS advised the Commissioner that the request was made immediately after the ITT had closed and a preferred supplier had been identified but before a contract had been concluded. Consequently the tenders contained the most current commercial information such as pricing, delivery/team structures and strategy plans.

39. UKS also advised that the complainant had acknowledged the commercial benefits of the disclosure of the requested information in explaining that they wanted to see what other tenderers had submitted so that they could gain a competitive, commercial advantage in order to win future tenders.

40. UKS explained in its internal review that it considers commercially sensitive information to be "intertwined across the documents". It explained to the Commissioner that the exception applied to all the information it holds because the entirety of each tender submission is commercially sensitive:

"...even the narrative sections have commercial value and are therefore commercially sensitive because they were designed by the relevant bidder to set them apart in the procurement. In the hands of a

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competitor, this valuable narrative information could be damaging as the competitor would have an insight into their work processes.”

41. The points raised by the complainant in paragraph 9 relate to the marking of particular parts of the information contained in the tenders as commercially sensitive. In its internal review UKS explained:

“In the experience of UK Sport, in practice it is exceptionally unusual for tender responses, or sections thereof, to be marked as commercially sensitive, even when it is clear that the information therein is commercially sensitive, and so the absence of any such marking in the documents would not be a reliable guide.”

42. The Commissioner has seen the ITT and notes that section 10 of the document concerns transparency and FOIA. Section 10.2 asks tenderers to mark the areas they consider to be commercially sensitive, giving reasons and evidence. Section 10.3 states that UK Sport reserves the right to withhold or disclose information whether or not it is identified as commercially sensitive. The Commissioner is satisfied that the ITT makes clear that the determination of commercially sensitive information will be made by UKS irrespective of any markings made by tenderers.

43. The Commissioner notes that UKS did not consult with the tenderers for their opinion on disclosure. UKS stated that:

“...it would take a disproportionate amount of time to seek out all 26 other tenderers and get their responses and would therefore be manifestly unreasonable. Secondly we do not need their opinion to adjudge whether their commercial interests would be harmed by disclosure. We have sought the advice of our Procurement Manager who has experience with other tenderers and has dealt with these sorts requests and he says that no tenderer would like their bids revealed to competitors as it would give up a competitive advantage.”

44. The Commissioner’s guidance<sup>6</sup> advises public authorities that if a third party’s interests are at stake it should consult with them, unless it has prior knowledge of their views. It is not sufficient to speculate about potential harm to a third party’s interests. However, the Commissioner is prepared to accept that UKS has sufficient knowledge in the circumstances of this case to determine the potential harm to the tenderers’ legitimate interests.

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<sup>6</sup> Ibid

45. UKS explained that it was protecting its own legitimate commercial interests regarding future tenders in the sector of environmental sustainability to prevent the market being "distorted" by the harm caused by disclosure of confidential information. It advised:

"This is of particular relevance to UK Sport because it has recently launched an Environmental Sustainability Strategy for the high-performance sport sector in this country with a specific focus for the period through to 2025, and so future tenders in the sector are foreseeable, either by UK Sport itself or by National Governing Bodies of sports to whom UK Sport grants funding and is encouraging to take steps as regards their environmental sustainability."

46. The Commissioner concluded that there is a common theme regarding the commercial risks to the parties which is that disclosure would impact their respective negotiating positions in respect of future transactions in the environmental sustainability market. The Commissioner accepts, as a general principle, that disclosure of information that would harm a party's commercial bargaining position in the context of a future or existing negotiation is a legitimate commercial interest. The Commissioner accepts that there is a real and genuine risk that disclosure of the withheld information would harm the commercial interests of parties in future negotiations in the sector.
47. The Commissioner is therefore satisfied that this limb of the test is met.

**Would the confidentiality be adversely affected by disclosure?**

48. 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. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information, and would also harm the legitimate economic interests that have already been identified.
49. The Commissioner accepts that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information, and would also harm the legitimate economic interests identified. For the reasons set out above the Commissioner accepts that regulation 12(5)(e) applies.

**Public interest test**

50. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions.
51. The Commissioner's guidance advises public authorities to consider both the specific harm that disclosure would cause to the relevant economic

interest at stake, and whether there is any wider public interest in preserving the principle of confidentiality.

52. UKS provided a brief consideration of the public interest test. It stated:

"UK Sport has recognised and given due consideration to the important principles of openness and transparency. However, in this instance, UK Sport's position is that the principles of fairness, competition and negotiating position outweigh those principles."

53. In making this determination UKS referenced a previous decision notice<sup>7</sup> which considered the application of section 43(2) with regard to tender bids and presentations. UKS quoted the Commissioner at paragraph 33:

"...if confidentiality is not upheld in the tendering process then organisations may be deterred in the future and this may prejudice the bidding process as a whole for the council resulting in less competition. However, conversely, the complainant's argument could also be the case, being that knowledge of the Supplier's method statement could give rise to challenge and scrutiny of their proposals and therefore more competitive bids."

54. Followed at paragraphs 49 and 50:

"[the Commissioner] is persuaded that revealing the business model of a supplier in this market would erode their competitive position and therefore impact the whole market to some degree. The result being that the public benefit of having an efficient market would be eroded to an extent. ... The Commissioner is also persuaded that the council may incur some reputational damage in regard to its procurement processes should the information relating to the Suppliers commercial proposition and business model be disclosed."

55. Having quoted from the decision notice, UKS concluded:

"It is in the public interest to protect the integrity of public procurement exercises, protect the reputation of UK Sport as a public body in this small market and allow for fair competition to best serve the protection of public funds."

56. The Commissioner's guidance explains that there is always some inherent public interest in maintaining commercial confidences. Third parties would be discouraged from confiding in public authorities if they

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<sup>7</sup> <https://icosearch.ico.org.uk/s/search.html?collection=ico-meta&profile=decisions&query&query=FS50867432>

did not have some assurances that confidences would be respected. However, arguments about undermining confidentiality and the relationship of trust have more weight when they relate to the specific circumstances of the case and identify how that particular relationship serves the public interest. UKS did not provide any arguments in this regard.

57. The Commissioner considers there to be a legitimate public interest in the transparency provided by disclosure of the tenders regarding the support and guidance to be provided to the NGBs with sustainability plans and environmental impact. He considers there to be a public interest in the accountability of UKS in its handling of this project. Currently he notes that UKS's website<sup>8</sup> briefly mentions NGBs and the support it is providing regarding environmental sustainability. He is aware of the complainant's personal reasons for requesting the tender information, however, these reasons cannot be a primary consideration in the public interest in disclosure.
58. The Commissioner has balanced the benefits of disclosure of the tenders considering the information contained there and its ability to inform the public, against the protection of the legitimate interests of the parties involved in the ITT .
59. The Commissioner recognises and gives weight to the importance of accountability for spending public money in implementing the Environmental Sustainability Strategy.
60. However, the Commissioner gives weight to preserving the principle of confidentiality and notes that UKS has explained its concerns regarding undermining its relationship with providers of service in a limited marketplace. He accepts that it serves the public interest for there to be a fruitful relationship between the parties. He notes that at the time of the request the information had been very recently submitted by the tenderers as the ITT was published in March 2023. Therefore the content of the bids contained current information on the tenderers' approaches. He agrees that there is an underlying public interest in ensuring the confidentiality of commercial information is protected. In the particular circumstances of this case he considers that harm caused to the legitimate economic interests of the tenderers would ultimately not serve the public interest.

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<file:///C:/Users/HughesSU/Downloads/20230615%20UKS%20Environmental%20Sustainability%20Strategy%20V1-2023.pdf>

61. Whilst the Commissioner has been informed by the presumption in favour of disclosure, he is satisfied that, for the reasons given above, the exception has been applied correctly. The Commissioner's decision is that the public interest in maintaining the exception outweighs that in disclosure, and therefore the public authority was entitled to rely on regulation 12(5)(e) of the EIR to refuse to provide the withheld information.

## **Other matters**

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62. In providing submissions to the Commissioner UKS advised:

"Notwithstanding previous attempts to explain UK Sport's position to [the complainant] and/or to provide him with further specific feedback in relation to his unsuccessful bid in response to the ITT, UK Sport is happy to engage further as the ICO would find helpful."

63. Any such engagement is for UKS and the complainant to arrange and not for further engagement by the Commissioner. The Commissioner considers this offer to be outside the scope of the request and therefore not applicable to regulation 9 – advice and assistance, however, he suggests that the complainant takes advantage of the offer to assist them in future applications.

## **Right of appeal**

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64. 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)

65. 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.
66. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Susan Hughes**  
**Senior Case Officer**  
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