

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

Date: 21 May 2024

Public Authority: Hampshire County Council
Address: The Castle
Winchester
Hampshire
SO23 8UJ

Decision (including any steps ordered)

1. The complainant requested information about a parking survey from Hampshire County Council ("the council"). The Council withheld information under Regulation 12(4)(e) (internal communications), Regulation 12(5)(e), (commercial confidentiality), and Regulation 13 (personal data).
2. The Commissioner's decision is that the council was correct to withhold some information under Regulation 12(5)(e) and Regulation 13, however it was not correct to withhold information under Regulation 12(4)(e) of the EIR.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - To disclose copies of all correspondence withheld under Regulation 12(4)(e), with appropriate redactions of personal data falling within the scope of Regulation 13.
 - To disclose all information which has been withheld under Regulation 12(5)(e) with the exception of:

- the breakdown of prices
 - the framework document, (with the exception of the completed the completed 'scope' section of the document, and the completed 'Brief summary of the service' on the 'Expression of interest' form)
 - appropriate redactions of personal data falling within the scope of Regulation 13.
4. The public authority must take these steps within 30 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

5. On 14 May 2023, the complainant wrote to the council and requested information in the following terms:
- “Please can I see all information recorded by Hampshire County Council (HCC) regarding a parking survey in Stockbridge. The survey is currently being conducted on behalf of HCC by Paul Castle Associates. I would like to see all recorded information in relation to the survey, including all correspondence and documents between HCC and Paul Castle Associates. This includes any reports, minutes and notes that might exist.”
6. The council responded on 13 June 2023. It said that no information was held as the survey was carried out by a third party. It argued that it does not hold any correspondence between Paul Castle Associates and the County Council as Paul Castle Associates are a sub-contractor working for Stantec. The council had commissioned Stantec to conduct the survey.
7. Following an internal review the council wrote to the complainant on 20 July 2023. It provided some correspondence between Stantec and the council regarding the survey, however it withheld other information under Regulation 12(4)(e), Regulation 12(5)(e), and Regulation 13.

Scope of the case

8. The complainant contacted the Commissioner on 9 October 2023 to complain about the way their request for information had been handled.
9. During the course of the Commissioner's investigation, the council carried out a further review of its position and disclosed additional information to the complainant. However, it retained its reliance upon the exceptions cited for other information.
10. The Commissioner therefore considers that the complaint is whether the council was correct to withhold information under Regulations 12(4)(e) and 12(5)(e). He will also consider the council's application of Regulation 13 to withhold personal data from disclosure.

Reasons for decision

Regulation 12(4)(e) – internal communications

11. Regulation 12(4)(e) provides that information is exempt from disclosure if it involves the disclosure of internal communications. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then the exception will be engaged.
12. The Commissioner has reviewed the withheld information and is satisfied that some of the documents consist of communications between officers at the council. As the information clearly comprises internal communications, the Commissioner considers that the exception at Regulation 12(4)(e) is engaged.
13. However, some documents include correspondence with Stantec employees. This information is clearly not purely internal communications within the council, and Regulation 12(4)(e) is therefore not applicable to these documents.
14. Additionally, some correspondence with the local parish council is included within the documents. Again, Regulation 12(4)(e) is not applicable to this information as it is not purely internal communications.
15. As the Commissioner has decided that Regulation 12(4)(e) is engaged for some of the information, he has gone on to carry out a public interest test on this information.

16. The test, set out in Regulation 12(1)(b), is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. If it does not then the information should be disclosed in spite of the exception being engaged.
17. When carrying out the public interest test, Regulation 12(2) of the EIR provides a presumption towards the disclosure of the information which must be taken into consideration.

Public interest test

The public interest in the exception being maintained

18. The council considered that a disclosure of the internal correspondence would diminish its officers' confidence in their communications and impact on the 'safe space' which is necessary to reach decisions away from external interference and distraction.
19. Furthermore, it argued that if information was disclosed, this would result in a chilling effect on discussions between officers which would consequently lead to poor decision making if the disclosure caused a loss of candour. Therefore, it argued that these concerns apply to the discussions between officers within the council when considering how best to procure a third-party organisation to carry out the survey.

The public interest in the information being disclosed

20. The complainant noted that the decisions necessary to procure the survey, and to provide an outline of the requirements of that survey had all been completed by the time that they submitted their request for information. The complainant argued that any safe space to achieve these aims had therefore passed by the time that they submitted their request for information. They argued that whilst they could see a potential argument towards maintaining a safe space insofar as phase two of the project (decisions as to what, if any, actions to implement), that was not the case for the information which they had requested.

The Commissioner's conclusions

21. The Commissioner considers that the underlying rationale for the exception at Regulation 12(4)(e) is to protect a public authority's need for a private thinking space. He considers that the extent to which disclosure would have a detrimental impact on internal processes will be influenced by the particular information in question and the specific circumstances of the request.

22. Arguments about protecting internal deliberation and decision-making often relate to preserving a safe space in which to debate issues away from external scrutiny, and preventing a 'chilling effect' on the exchange of free and frank views in future. Their weight will vary from case to case, depending on the timing of the request and the content and context of the particular information in question.
23. The Commissioner considers that the need for a safe space is strongest when the issue is still live. Once a decision has been made the argument will carry little weight. The timing of the request is therefore an important factor.
24. In previous decision notices the Commissioner has often provided his view that public officials are expected to be impartial and robust in meeting their responsibilities, and not easily deterred from expressing their views by the possibility of future disclosure.
25. Having considered the content of the withheld information, the Commissioner is not persuaded that disclosure of the material would result in necessary communication between officers being deterred or compromised. He considers that disclosure of the internal communications would further support the council's transparency and openness in its handling of the issues involved, without any likely effect on council processes. He also notes that complainant's arguments that they had only requested information in respect of procuring the survey, and that this period had passed by the time that the request was submitted.
26. The Commissioner considers that there is a broad public interest in the information being disclosed. Any introduction of parking restrictions and charges may affect the amount of people visiting the area. If this is reduced due to the implementation of parking charges this could affect the local economy. There therefore a strong public interest in the council being transparent about its reasons for deciding to carry out the survey.
27. Where legitimate concerns are raised and there is a public perception that transparency will assist the public interest in accountability and scrutiny of decisions, the Commissioner considers that these provide valid weight in favour of disclosure.
28. For the reasons set out above, the Commissioner does not consider that the council has provided compelling public interest arguments for withholding the information under Regulation 12(4)(e) of the EIR. There is also an inherent presumption in favour of disclosure under regulation 12(2).

29. The Commissioner therefore finds that, on balance, the public interest in favour of disclosure outweighs the public interest in favour of maintaining Regulation 12(4)(e) in this case.

Regulation 12(5)(e) – commercial confidentiality of environmental information.

30. This reasoning covers whether the council was correct to withhold the requested information under Regulation 12(5)(e) of the EIR.
31. Information can be withheld under Regulation 12(5)(e) if disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
32. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of Regulation 12(5)(e) of the EIR, the authority must demonstrate that:
- the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
33. Regulation 12(5)(e) is also subject to a public interest test if the exception is engaged.

Is the information commercial or industrial in nature?

34. Having considered the withheld information, the Commissioner is satisfied that the information is commercial in nature. It relates to the procurement of a service from a third party by the council in a competitive environment.

Is the information subject to confidentiality provided by law?

35. The council pointed out that the procurement/contractual documents contain a confidentiality clause. It further argued that the information is subject to an implied duty of confidentiality as it is not trivial and is not otherwise in the public domain. It also argued that, in relation to certain documents, these were provided to the council with the expectation of confidence following the council's usual practice on such documents.
36. The Commissioner accepts that information involved within a procurement exercise such as this is generally considered to be confidential to the point where a contract is awarded, at which point it

will be expected that some information will be disclosed to meet the transparency requirements on council spending. At the least the total value of the contract would need to be disclosed.

Is the confidentiality provided required to protect a legitimate economic interest?

37. The council argued that the withheld information contains proprietary information provided by Stantec as to how they and their subcontractor Paul Castle Associates approach such contracts, for example the breakdown of costs. It argues that disclosing this would be advantageous to their competitors and would have a negative impact on Stantec's ability to tender for other contracts in the future.
38. The council confirmed that it had sought Stantec's view, and that it had expressed concerns regarding the disclosure of the information. Stantec advised that all financial figures, with the exception of the total cost, should be exempt because of the ongoing contractual relationship with the council until 2026. Stantec argued that their pricing, with the exception of inflation, will remain the same until 2026. It also argued that financial quotations from potential/actual subcontractors should be exempt as this would give an unfair advantage to their competitors. In addition, it requested that information such as the draft questionnaire, all personal data, and bank details were redacted.
39. The council also argued that the withheld information contains the intellectual property of the council. It is used as part of a wider contract framework which the council licences to other public bodies across the UK in return for a management fee. It confirmed that this framework document has not been shared widely, and its disclosure would allow other authorities who have not paid to use it to copy or base their own framework documents along similar lines, thereby affecting the council's ability to compete for customers in this market.
40. The Commissioner is satisfied that, insofar as the information specifically cited is concerned, a disclosure of this information would adversely affect the commercial and economic interests of the parties concerned.
41. The Commissioner has also concluded that a disclosure of the withheld information would inevitably affect the confidentiality of the information.

Conclusions

42. In conclusion, the Commissioner is satisfied that the tests outlined above have all been met, and the exception in Regulation 12(5)(e) is therefore engaged by the information.

43. The Commissioner has therefore gone on to consider the public interest test required by Regulation 12 of the EIR. The test, set out in Regulation 12(1)(b), is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. If it does not then the information should be disclosed in spite of the exception being engaged.
44. When carrying out the public interest test, Regulation 12(2) of the EIR provides a presumption towards the disclosure of the information which must be taken into consideration.

Public interest test

The public interest in the information being disclosed

45. The Commissioner considers that there is a strong public interest in creating transparency over the survey concerned. Both the complainant, and the parish council have expressed concerns that the implementation of parking charges in the area would affect the local economy and the commercial interests of the businesses in the community.
46. The Commissioner considers that there is a strong public interest in the information being disclosed given the potential impact which parking charges could have on the local community. As the parish council, and therefore presumably local businesses, are unclear why the council decided to carry out the study, there is a strong public interest in the disclosure of information which could shed light on that.

The public interest in the exception being maintained

47. The Commissioner notes that a disclosure of the breakdown of prices would not shed any greater light on the reasons why the survey was procured by the council. Given that the council has already disclosed the price it paid for the survey, it would also provide little further information in regard to the cost which the council has paid.
48. On the counter side, a disclosure of the breakdown of the prices would provide valuable information to competitors of Stantec and Paul Castel Associates. The Commissioner accepts that such a disclosure would be likely to prejudice their commercial standing in the market as details of their pricing could clearly be used by competitors to reset their prices in future tendering exercises to better compete. It could also affect Stantec's ability to negotiate prices with its subcontractors.
49. As regards the council's argument that sections of its framework document should be withheld, the Commissioner notes that the document is a product which the council sells to other public authorities – it is a legal tool which the council has spent money and time drafting

which it sells to other authorities¹. A disclosure of this document would allow access to the wording and strategy employed in the council's framework, which would allow other authorities to copy or to use as a basis to develop their own procurement frameworks. This would therefore affect the council's ability to generate income via this product.

The Commissioner's conclusions on the public interest test

50. The Commissioner has decided that the public interest in the information being disclosed outweighs that in Regulation 12(5)(e) being maintained, other than for the following documents.

- In regard to the breakdown of prices the Commissioner has decided that the public interest rests with the exception being maintained. This includes details of Stantec subcontractors pricing.
- In regard to the framework document, the Commissioner has decided that the public interest rests with the exception being maintained other than for the following sections:
 - the completed 'scope' section of the document, and
 - the completed 'Brief summary of the service' on the 'Expression of interest' form

These sections of the framework document provide a clearer insight into the aims of the council when procuring the survey, and therefore the public interest rests in their disclosure.

51. The Commissioner has taken into account the presumption towards disclosure required by Regulation 12(2) when deciding that the breakdown of prices and the majority of the framework document should be withheld. However, his decision is that the public interest in maintaining the exception for these documents clearly outweighs that in the information being disclosed other than for the sections highlighted.

Regulation 13 – Personal data

52. In providing information in response to the request the council redacted some personal information of third parties under Regulation 13. The complainant has not raised this as a concern in making their complaint.

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<https://www.hants.gov.uk/business/hampshireengineeringservices/whatwedo/projectdeliveryservices/routestomarket>

Their concern focuses on the content of the withheld internal communications.

53. For clarity, it is the Commissioner's established position that unless there are any case specific circumstances, the names of junior officials are exempt from disclosure on the basis of Regulation 13(1) whilst senior officials should have the expectation that their names will be disclosed. This is in accordance with his guidance² and previous decision notices³.

Regulation 5(2) – Time for compliance

54. Regulation 5(2) of the EIR provides that requested information which is not subject to any exceptions should be disclosed as soon as possible and no later than 20 working days after the date of receipt of the request.
55. In this case, the council disclosed further information to the complainant during the course of the Commissioner's investigation, well beyond the 20 working days required by Regulation 5(2).
56. The Commissioner has therefore decided that the council did not comply with the requirements of Regulation 5(2) in its response to the complainant.

Other matters

57. The Commissioner first wrote to the council asking it to review its decision and to provide its arguments for relying upon the exceptions it had applied on 23 January 2024. It did not, however, provide its full and final response to the Commissioner until 2 May 2024 following the Commissioner issuing the council with an Information Notice on 2 April 2024.
58. Although the council did correspond with the Commissioner regarding the delays, and the reasons behind them, this delay has hindered the Commissioner's investigation and resulted in a delay in him reaching a decision and serving this Decision Notice.

² https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022447/ic-110922-t9r1.pdf>; <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022310/ic-114449-b7p7.pdf>

59. The Commissioner is disappointed with the delays he has encountered in this case and expects the council to take steps to address the causes of this in order to avoid a recurrence of these difficulties. He has therefore recorded a lack of proper engagement with the ICO for the purposes of his ongoing monitoring of public authorities' compliance with the requirements of the EIR.

Right of appeal

60. 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

61. 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.
62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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