

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

**Decision notice**

**Date:** 14 March 2016

**Public Authority:** Norfolk County Council  
**Address:** County Hall  
Martineau Lane  
Norwich  
Norfolk  
NR1 2DH

**Decision (including any steps ordered)**

---

1. The complainant requested a copy of a highway maintenance contract from Norfolk County Council ("the council"). The council provided information but withheld some information from Schedule 3 of the contract using the exemptions under section 41(1) and 43(2) of the Freedom of Information Act 2000 ("the FOIA"). In its internal review, the council also referred to the exception under regulation 12(5)(e) of the Environmental Information Regulations 2004 ("the EIR"). The council said that it could disclose a limited amount of additional information during the Commissioner's investigation. The Commissioner's decision is that the remaining information was excepted under regulation 12(5)(e) of the EIR and the public interest favoured maintaining the exception. He has found procedural breaches of regulations 5(1), 5(2), and 14(2).
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
  - Disclose to the complainant the redacted version of the withheld spreadsheet which the council has agreed to disclose, as provided to the Commissioner on 9 March 2016.
3. 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

---

4. On 28 January 2015, the complainant requested information from the council. The correspondence included other requests but only the following request is relevant to this complaint as follows:

*"A copy of the highway maintenance contract let in 2013."*

5. On 19 March 2015, the council disclosed some information but it said that it had withheld some information including 'Schedule 3 Fee Percentages' and 'Schedule 3 Price List (Parts A, B and C)' using the exemptions under section 43(2) and 41(1) of the FOIA.
6. The complainant requested an internal review on 1 April 2015, complaining about the decision to withhold the information from Schedule 3.
7. The council completed an internal review on 29 April 2015 and said that it wished to maintain its position that the information had been correctly withheld. The council referred to the exception under regulation 12(5)(e) of the EIR at this stage, which relates to commercial confidence, and said that this exception prevents the disclosure of the information.

## Scope of the case

---

8. The complainant contacted the Commissioner on 16 June 2015 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether the council had been correct to withhold the following information from the contract:
  - Schedule 3 Fee Percentages and Schedule 3 Price List (Parts A, B and C)
9. At the start of the Commissioner's investigation, the council stated that it wished to rely on regulation 12(5)(e) of the EIR and not any exemptions under the FOIA.
10. During the Commissioner's investigation, the council provided a spreadsheet to the Commissioner which it said comprised the withheld information. It said that it had had a longstanding dialogue with the

complainant and therefore understood that his interest relates to a narrow and marginal aspect of the highways contract and its pricing schedules, specifically section 278 agreements under the Highways Act 1980 (a commonly used arrangement which allows private developers to either fund or complete works to public highways outside or beyond a development site). Only some of the information in the spreadsheet relates to such works.

11. Given the extensiveness of the spreadsheet, the Commissioner asked the complainant to confirm whether there was any opportunity for narrowing the scope of the information required. The complainant confirmed that his interest was not, in this case, limited only to section 278 agreements and he explained that he was acting on behalf of "various developers", with an interest in receiving all the withheld information ideally, though that interest would also extend to a redacted version of the spreadsheet. He said that he would find benefit in receiving a version of the spreadsheet even if all the pricing information itself was redacted, just leaving for example the headings and the list of jobs which had been priced. The Commissioner asked the council whether it could disclose a limited amount of information from the spreadsheet which would not reveal financial details, and it agreed that it could. This information has therefore not been considered in the analysis of regulation 12(5)(e) below.
12. Lastly, the council referred to regulation 12(4)(b) of the EIR in correspondence to the Commissioner, an exception relating to manifestly unreasonable requests. This was not investigated any further by the Commissioner since it was not necessary in the circumstances.

## Reasons for decision

---

### Environmental information

13. Any information that is "environmental" must be considered under the terms of the EIR rather than the FOIA. Under regulation 2(1)(c) of the EIR, any information on activities affecting or likely to affect the elements or factors of the environment will be "environmental" for the purposes of the EIR. One of the elements listed in the EIR is land.
14. The council explained to the Commissioner that the contract concerned relates to a range of highway maintenance activities, including surfacing, surface dressing and patching, grass cutting, tree work and weed spraying, gully emptying, safety fence repairs, road lining and cats' eyes. The Commissioner considers based on the nature of the contract that it is appropriate to consider the request under the terms

of the EIR because it relates to activities which affect or which are likely to affect the elements of the environment.

### **Regulation 12(5)(e)**

15. This exception concerns the confidentiality of commercial or industrial information where such confidentiality is provided by law. When assessing whether this exception 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? (This would happen if the information was disclosed).

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

16. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
17. The withheld information relates to a highways maintenance contract that the council entered into with a third party company in 2013. This is an agreement relating to the purchase of services. It is clearly commercial in nature.

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

18. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
19. The Council presented an argument that the information was covered by a contractual obligation of confidence. The council said that it had defined in the contract what information should be kept confidential and this relates to the price amounts and fee percentages in schedule 3 along with "quality" related procurement submissions. It quoted the relevant contractual terms as below:

*"Z20.2 The parties agree that the provision of this contract are (subject to clause Z20.3 below) not treated as Confidential Information. The Employer publishes this contract, payments made under this contract and the Contractor's performance against the Key Performance Indicators.*

*Z20.3 Clause Z20.2 does not apply to the provisions of this contract or any of the contracts entered into pursuant to this contract which refer to the price amounts and fee percentages in Schedule 3 which will, subject to clause Z20.5, be kept confidential.*

*Z20.5. The Contractor does not (and ensures that its employees and Sub-Contractors do not) use any confidential or proprietary information provided to or acquired by it for any purpose other than to Provide the Services”.*

20. The Commissioner notes that the contractual terms above are very specific about the withheld information relevant to this case. The Commissioner accepts that confidentiality has been imposed upon the council by these contractual obligations.
21. The council also argued that the common law of confidence also applies. As the complainant expressed concerns that information withheld by the council was actually in the public domain, for completeness, the Commissioner also considered this argument. When considering whether the common law of confidence applies, the Commissioner's approach is similar in some respects to the test under section 41 of the FOIA. The key issues the Commissioner will consider when looking at common law confidences under this heading are:
  - Does the information have the necessary quality of confidence? This involves confirming that the information is not trivial and is not in the public domain.
  - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.
22. The Commissioner was satisfied that the information is not trivial and this is not contested by the parties. However, there was some dispute about whether any of the information was in the public domain. The complainant argued that some of the information had already been disclosed to his clients (the complainant is a solicitor acting on behalf of various developers). He said that the council had relied on the information by using it to “set bond sums for section 38 and section 278 agreements” and would not have been entitled to do so if the information been confidential.
23. For clarity, a section 278 under the Highways Act 1980 is a commonly used arrangement which allows private developers to either fund or complete works to public highways outside or beyond a development site, for example a housing estate, such as traffic calming improvements. The agreement ensures that the works are carried out to the council's satisfaction. There are specific rates within the contract price list that are used for these works. The council also explained that

a common way of creating new highways for eventual adoption by the highway authority is by an agreement between developers and the local highway authority (in this case the council) under section 38 of the Highways Act 1980. Bond sums are a payment made to the council by developers to protect the council's interest. The sum covers the costs of the works in the event of developer insolvency.

24. The council explained to the Commissioner that it considered what information is realistically accessible to a member of the general public at the time of the request. It said that the disclosure of information to which the complainant refers is to a limited audience, in a limited way. The council said that it should be noted that the disclosed pricing information does not relate to the how the price is built up, but the end total cost only. It is the council's view that the information is not in the public domain. It highlighted that the contract clause referred to above enables information to be used for the purpose of providing a service, which is the situation to which the complainant is referring. The council also added that the withheld prices in schedule 3 of the contract are not limited to works related to section 38 or 278 agreements but also contain prices relevant to highway maintenance activity, such as gully cleansing, grass cutting, weed spraying, sign cleaning etc. These form the majority of the price list.
25. The Commissioner agrees with the council's assessment that the information is disclosed to a limited audience for a specific purpose and should not be regarded as being accessible to the general public. He also accepts that the information was shared in circumstances importing an obligation of confidence. The common law of confidence therefore applies.
26. The council also argued that the withheld information contains the prices contractors have negotiated with their subcontractors. It said that disclosure of this information could also constitute an actionable breach of confidence between these parties. However, the council did not provide any supporting details and this argument has therefore not been considered any further by the Commissioner. In any event, it was not necessary to consider this additional aspect of the case.

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

27. The Commissioner considers that to satisfy this element of the test disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm

*would* be caused by the disclosure. In accordance with various decisions heard before the First-Tier Tribunal (Information Rights), ("the tribunal"), the Commissioner interprets "would" to mean "more probable than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests:

*"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".*

28. The Commissioner will not accept speculation about prejudice to the interests of third parties. He expects public authorities to provide evidence that the arguments being presented genuinely reflect the concerns of the relevant third parties. This is in line with the decision of the tribunal in the case of *Derry City Council v the Information Commissioner* (EA/2006/0014). In the latter case, the council tried to argue that disclosure of information would prejudice the commercial interests of Ryan Air but as the arguments expressed only represented the council's own thoughts on the matter, the tribunal rejected the arguments.
29. By way of background, the Commissioner understands that the request relates to the extensive pricing list of the council's current high profile maintenance and construction contract with Lafarage Tarmac, now known as Tarmac ("the contractor"). The contract became active at the beginning of April 2014 and is designed to run for a minimum of seven years with options to extend. The contract is worth up to £480 million if it runs for the full 12 years.
30. In this case, the council argued that disclosure of the withheld information would prejudice the commercial interests of the contractor. In its internal review, the council said that the disclosure would allow competitors to gain access to commercially valuable information, which would undermine the company's commercial bargaining position in the context of existing or future negotiations. The council confirmed that it had consulted the contractor and the contractor had confirmed its agreement that the disclosure would prejudice its commercial interests. It said:

*"...disclosure of all our current price information cannot be in the public interest. Commercial arguments would include:*

*1) This is a live contract and current pricing information is clearly highly sensitive information*

*2) Disclosure to actual potential competitors would undoubtedly lead to a restriction in competition*

*3) Disclosure would have detrimental effects on our business*

*4) Disclosure between competitors would also be in breach of Competition Laws. Sharing of pricing between competitors to fix prices.*

*While NCC may have a duty to publish payments under the contract our pricing information means that you owe a duty of confidence not to prejudice our commercial interests in these parts of our bid...*

*If disclosed, developers or anyone who had access to these rates, could use them as a baseline figure that competitors would need to beat to secure work; therefore if contractors were in competition with Tarmac (as could potentially be the case at this time for S278 works not on the Primary Highways network – or anywhere else for that matter) they would basically know what level to pitch their bids to secure works in undercutting Tarmac – meaning that whoever was successful, the chances are it would be unlikely to be Tarmac as everyone else would have an unfair advantage”.*

31. In its response to the Commissioner, the council expanded upon these arguments. It said that the prices negotiated in this contract were provided pursuant to a competitive tender as part of the Public Contract Regulations 2006 competitive dialogue process. It said that this relied on individual bidders being open in their dealings with the council, allowing them to see more information than it would normally be privy to. On this basis, the council argued that highly detailed and very extensive pricing details were disclosed in a confidential context. It said that this was markedly different to a more traditional commercial tendering process in which a simple price (or set of prices) is offered for acceptance or otherwise. It said that this contract involved a detailed dialogue between the parties on the commercial and operational detail of the business underpinning this information, with the parties seeking to understand how and where the prices and services could be optimised. Following this protracted procurement process, a contract was entered into, and a “target pricing” process could be applied using the information disclosed.

32. The council explained that under a target pricing contract (a method of pricing often used within this industry), a contractor is reimbursed for the cost of the works, including those of subcontractors. The contractor is contractually committed to meeting a stated target cost, which comprises the cost of the works described in the order plus a fixed percentage fee. At the end of each project, a “gain/pain” share mechanism is applied. Depending on the outcome, this will involve

- splitting the amount of money saved (the difference between the target cost and the actual expenditure) between the council, contractor and possibly some subcontractors. If the project's costs exceed the target cost, the "pain" option is exercised in the alternative. The council said that the target pricing model would make the contractor vulnerable to unfair competition if disclosed.
33. The council said that in the way described above, a real, dynamic pricing process underpins the withheld information. The number of pricing lines is extensive (5,000). The council said that these items will be at the heart of the contractor's business model and will form the basis of any attempt at winning new business. It said that to some extent they will be commodity prices and an industry analyst could model their movements in the industry as well as assessing pricing relationships with subcontractors. The council added that disclosure would allow the contractor's competitors to look at pricing to such a granular level of detail that competitors would be able to work out certain running costs of the business.
  34. On the specific subject of percentage fees, the council explained that each figure in one column of the spreadsheet is a percentage that the contractor would add to the composite rate when adding all the component parts, which allows for the recovery of local and head office business overheads and an element of profit. It argued that disclosure of these figures would give a clear indication to competitors of what the contractor's operating margin is, and what it could be in the future when bidding for other work. The council said that this would give a competitor an unfair advantage as adjusting the figure irrespective of the component costs can make a difference to winning the contract or not. It said that the level of this fee is very much a commercial decision dependant on how keen the bidders are to win the work.
  35. The Commissioner also invited the council to comment specifically on the contractor's concerns about price fixing and a breach of competition law. The council confirmed that it agreed with this argument and said that there had been recent examples of competitors colluding to tender for work after arranging prices between themselves, effectively taking it in turn to win tenders. Under the Competition Act 1998 and Article 81 of the EC Treaty bid-rigging is prohibited. It said that in September 2009, the Office for Fair Trading had imposed substantial fines on 103 construction firms in relation to bid rigging activities, and in particular "cover pricing". This describes a situation where one or more bidders collude with a competitor during a tender process to obtain a price or prices which are intended to be too high to win the contract. The tendering authority is left with a false impression of competition which may result in the payment of inflated prices. The

council argued that the disclosure of this level of information would make this problem more likely to occur.

36. The council also explained that the contractor had emphasised that the confidentiality of the information is for the life of the contract because of its "price escalation clause" whereby prices could be calculated to current levels. It said that allowances for overheads and restricted uplifts are directly transferable across all contracts. The council said that the contractor does also submit tenders of a similar nature on a regular basis.
37. In view of the above, the Commissioner was satisfied that the council had persuasively argued that if the information was disclosed, it is more probable than not that the commercial interests of the contractor would be prejudiced. The Commissioner accepts that the withheld information is very extensive, and would be likely to reveal a great deal of commercially sensitive information about the contractor's pricing and business model, which would place them at a competitive disadvantage in the future. This could result in undercutting of prices and increase the likelihood of bid-rigging. The fact that these prices have been arrived at as part of a competitive dialogue process between the contractor and the council as part of a "target pricing" model means that the information is even more revealing of the contractor's particular approach to this contract, which increases the likelihood of commercial disadvantage in future negotiations.
38. The council also argued that the disclosure would prejudice the council's ability to enter into future negotiations as potential bidders would be concerned that information regarding their pricing and contracts could be disclosed. This would affect the council's ability to negotiate savings in the future through the competitive dialogue process it had described. The council said that procurement in this way is used in particularly complex projects whereby a contracting authority cannot adequately specify its requirements and is one of the procedures through which a contracting authority may award a contract. By such means, the council will gather a large amount of information during the procurement process and will be privy to complex and detailed information about the bids and the tendering companies in an environment of confidence. The council said that this process had been crucial in securing the best value and had enabled the council to save approximately 4.4 million against the price list items (representing an average year's works orders) compared to the previous contract.
39. The council added that the market was not flooded with those wanting to work with the council, although the wider market itself is highly competitive. The council expressed concern that a withdrawal of even a

small number of bidders due to concerns over commercial confidentiality would result in the council being unlikely to meet its statutory obligation under procurement law to have sufficient levels of competition within the procurement process.

40. It is worth bearing in mind that any contractor entering into a contract with the council must note the possibility of disclosure under the FOIA or the EIR, as there is no guarantee of non-disclosure. Furthermore, the possibility of greater disclosure is for some contractors balanced out by the lucrativeness of public sector contracts. However, the Commissioner accepts that there is always the question of degree and the Commissioner appreciates that in the case of very extensive and disproportionate disclosure, this would result in contractors being less willing to share information with the council in future negotiations. It is clear that the competitive dialogue process described is a highly valuable mechanism and that any future reluctance on the part of contractors to share detailed pricing information in this way would prejudice the council's commercial interests by making it more difficult for them to negotiate savings, and encourage the most competitive environment for future procurement.
41. In view of the above, the Commissioner accepts that regulation 12(5)(e) was engaged.

### **Public interest in disclosing the information**

42. The general scheme of the EIR itself envisages that there is always some public interest in the disclosure of information. This is because it promotes the general aims of transparency and accountability, and understanding of the decisions taken by public authorities.
43. In this particular case, the complainant has argued that, *"...There is a clear public interest in knowing the costs and liability incurred by the authority for which public money has been and is being defrayed"*. The complainant has also informed the Commissioner that he is a solicitor acting for "various developers". He suggests that at the heart of his complaint is a background dispute about the appropriate use of the prices in the contract, though the precise details of that allegation were not clear to the Commissioner. The Commissioner understands from the background provided by the council that this is a reference to private developer funded works under section 278 and 38 agreements, where developers are provided with limited pricing information in order to support and justify the cost of works.
44. The Commissioner accepts that disclosure of this information would allow for a much greater level of public scrutiny about the council's decision to award this high value contract to this particular contractor.

Disclosure would enable the public to understand more about the specific negotiations conducted between the council and the contractor, and to assess its work to achieve the best value contract in this area. Transparency regarding contracts can also help to encourage competition and reduce costs in the future, enabling other potential bidders to understand more about the award of this contract, as well as helping those who lost out on the contract to understand more about that outcome. There is particular value in understanding more about the costs of a contract where the financial commitment is very large. As already noted above, this information relates to high profile maintenance and construction contract which is worth up to £480 million if it runs for the full 12 years.

### **Public interest in maintaining the exception**

45. The Commissioner has accepted that disclosure of this information would prejudice the commercial interests of the contractor. He accepts that disclosure would provide competitors of the contractor with information that would allow them to gain a significant commercial advantage over the contractor in existing or future negotiations, allowing them to undercut the contractor, understand details of the contractor's overall business model and increase the risk of bid-rigging. The way the prices have been arrived at, as part of a "target pricing" model negotiated with the council means the information would reveal even more about the contractor's specific approach to securing this contract, making them more vulnerable to unfair competition.
46. Furthermore, the EIR recognises that there is a public interest in ensuring that undue harm is not done to the commercial interests of public authorities through the disclosure of information. It is clear that in this case, the competitive dialogue process described by the council has played and will play an integral role in ensuring that the council contracts with the best possible provider at the best price. There is a public interest in ensuring that this occurs in terms of quality of service and value for money. Disclosure would harm the contractors' confidence in the space that currently exists for this important dialogue to take place, which involves the disclosure of very detailed and commercially sensitive information between the parties. Reluctance to engage in such a process in the future would harm the council's ability to achieve savings and ensure that sufficient competition is maintained amongst the limited amount of providers who may show interest in a contract of this nature in the future. Making savings where possible is a particularly important issue given the current wider climate of financial restraint.

## **Balance of the public interest**

47. As mentioned above, the complainant has argued that there is a public interest in accountability and transparency in general, and in particular, he has expressed concerns that the council may not be acting appropriately with regard to pricing.
48. This is a very valuable contract, and there is in general a commensurate need for transparency and accountability to reflect the very large amount of public money being expended, potentially over a 12 year period. However, the council explained to the Commissioner that the disclosure of the information would not in fact show how much money had actually been expended. The council explained that this contract involves a "target pricing" methodology (see paragraph 32 of this notice), and this means that the withheld information would not inform the public of precise expenditure. The list prices only form the starting point in the actual pricing process under target pricing. The council added that in relation to section 278 and 38 agreements (which it believes is the focus of the complainant's underlying concerns and which relate to a limited amount of the withheld information), the release of the information would not hold the council to account for its expenditure since these works relate to private developer expenditure (see paragraph 23 for fuller explanation). The council does not spend money on these works.
49. The Commissioner can however see that that there remains a public interest in providing reassurance about the council's integrity and ensuring that the council is treating developers fairly and setting appropriate prices. Nonetheless, this must be balanced against the harm to be caused by the level of disclosure being sought by the complainant. The council has explained that in order to justify the prices, it does provide a limited amount of information to the developers. This is the total price rather than showing how it is built up. No evidence has been provided to the Commissioner to demonstrate that developers are being treated unfairly by the council. The Commissioner also considers that there will be other ways for the complainant's clients to pursue complaints of this nature other than through the disclosure of the full pricing list, such as through the council's complaints procedure. Overall, the Commissioner was not satisfied that the complainant had made a convincing case that disclosure of the information was a proportionate response to the concerns that the developers have.
50. Moreover, the council has explained to the Commissioner that it does recognise the need for significant transparency and accountability about this contract. It said that it produces a large amount of

information regarding the contract costs. It listed the following sources of transparency:

- Media statements relating to the overall costs of projects the council is undertaking
  - Monthly spend data relating to invoices for this contract over £500 are published online
  - Highway Capital reports (from page 127 onwards) which are published online
  - The Transport Asset Management Plan, published online, which details the capital allocations and routine maintenance allocation
  - A number of formal information requests relating to the costs of the contract, which the council has responded to
51. The council also recognised the need for appropriate transparency to help to encourage competition in the future. The council said that individual feedback is provided to bidders and those who have participated in the competitive dialogue with the council in considerable detail. The council said that during the tender process, feedback and dialogue was maintained with contractors throughout, particularly during the competitive dialogue process. For example, an exercise was undertaken with the 3 shortlisted contractors to provide information on prices for 20% of the price list which reflected 80% of the work undertaken. Once these were received, discussions were undertaken with the contractor to look at variances of greater than 10% in order to fully consider affordability issues. This was followed up by a similar exercise when the whole price list was assessed. In addition, information relating to this contract, the successful bidder and award criteria is publicly available on the Official Journal of the European Union ("OJEU") website. There is also a process for challenging the procurement process in accordance with the provisions of European procurement law.
52. The Commissioner has accepted that if the information was disclosed, it would prejudice the commercial interests of the contractor because it would allow competitors to gain a significant commercial advantage over the contractor in existing or future negotiations allowing them to undercut the contractor, understand detail of the overall business model and it could increase the risk of bid-rigging. The Commissioner considers that in view of the level of disclosure being sought and the specific circumstances of this case, the level of commercial prejudice that would be faced by the contractor would be particularly severe. It is clear that the dialogue undertaken to form this contract involved a very detailed level of disclosure, and specific negotiations that would be very revealing of the approach this particular contractor has taken. As the council has said, the information sought provides a very granular

level of extensive detail about pricing, and would make the contractor very vulnerable.

53. In this case, the council said that it is the case that the contractor submits tenders of a similar nature on a regular basis. Although the Commissioner would suggest that the scale, requirements and negotiations for other work may vary considerably, it is clear that the pricing information is still considered relevant and up to date, which the council says will be the case for the price of the contract in view of the contractor's price escalation clause, and that this information would be of substantial use to competitors of the company for similar work in the future given how much it would reveal about the company's prices and business over a potentially lengthy period of time.
54. The Commissioner has also accepted that disclosure would be likely to prejudice the council's own commercial interests as well because it would affect contractors' confidence in the procurement process, which would affect the council's ability to negotiate and encourage the most competitive environment in the future. Again, the Commissioner accepts that in view of the level of disclosure being sought and the circumstances, the prejudice to the council would be particularly severe. It is clear to the Commissioner that the council places a very high value on its ability to thoroughly assess bids and make savings through the dialogue process and that there is a strong public interest in preserving this. As noted, conducting this process in this way saved the council the substantial sum of 4.4 million compared to the previous contract. Given the severity of commercial harm to the contract, this would hamper the council's efforts to negotiate in this level of detail with contractors in the future, and it may actually discourage some from even approaching the council about a future contact. As the council has pointed out, given the market conditions and the current climate, this would severely impact its ability to procure services in a suitably competitive environment.
55. The complainant has argued that pricing information is likely to be less sensitive once a contract has been awarded and that information revealing how a contractor is able to offer the particular prices is likely to be more sensitive. He points out this is recognised in the Commissioner's guidance. The Commissioner would like to make clear that guidance inevitably strives to set out some *general* principles that may be useful in the consideration of a particular case. The circumstances of each case and the information requested can vary considerably and individual consideration must be given on a case by case basis. While the price of a contract may be less sensitive than it was before the contract award, it does not follow that the sensitivity falls away significantly or completely. Likewise, while details of how a

contractor can commit to particular prices may be more sensitive than the actual prices, this does not mean that the pricing information itself cannot still cause severe prejudice depending on the nature of the information and other relevant circumstances.

56. In view of all the above, the Commissioner accepts that the level of commercial harm would be sufficiently extensive, frequent and severe to outweigh the benefits that would arise from the disclosure on this occasion. The council has set out a comprehensive and persuasive case for its position that disclosure of this extensive pricing list, providing granular detail about the approach taken to this contract and the company's wider business model, would clearly not strike a fair balance between the legitimate public interest in transparency and accountability and protecting the commercial interests of the contractor and the council. There are more proportionate disclosures that may be made or have already been made regarding the actual costs of the contract. As highlighted by the council, the withheld information does in any event only represent a starting point price, and is not actually revealing of the council's precise expenditure. Disputes over the council's prices may also be resolved in less harmful ways. Overall, the public interest in maintaining the exceptions outweighs the public interest in disclosing it in all the circumstances of the case.

### **Procedural issues**

57. As there was a limited amount of information that could have been disclosed to the complainant, the Commissioner has found breaches of section 5(1) and 5(2) of the EIR. These regulations provide that environmental information which is not exempt must be made available within 20 working days.
58. The Commissioner has also found a procedural breach of regulation 14(2) of the EIR because the council did not rely on regulation 12(5)(e) in its initial response. This regulation provides that a public authority must specify the reasons not to disclose the information requested, including the exception relied upon, within 20 working days.

## Right of appeal

---

59. 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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

60. 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.
61. 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** .....

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**