

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

### **Decision notice**

**Date:** 5 August 2024

**Public Authority:** Torpoint Town Council  
**Address:** 1-3 Buller Road  
Torpoint  
PL11 2LG

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

---

1. The complainant has requested information relating to a public procurement tender. Torpoint Town Council ("the Council") refused to provide the information, citing section 43(2) (commercial interests) of the FOIA.
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.

#### **Request and response**

---

4. On 17 November 2023, the complainant wrote to the Council and requested information related to the recent outcome of a public procurement tender:  

"Could you please forward the detailed breakdown of the scoring so that we can better understand how the scores were allocated?"
5. The Council responded on 21 December 2023. It stated that it considered the requested information commercially sensitive and

confidential, although it did not cite an exemption as a basis for doing so.

6. The Council maintained this position at internal review.

## **Reasons for decision**

---

### **Is the requested information environmental?**

7. 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);
8. 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 tender was for a proposed new public building. As such, the information is likely to affect

elements of the environment, for example, the overall look of the town. He has therefore assessed this case under the EIR.

9. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information, where such confidentiality is provided by law to protect a legitimate economic interest.
10. As set out in the Commissioner's guidance, the exception can be broken down into a four-stage test. All four elements are required in order for the exception to be engaged:
  - The information is commercial or industrial in nature.
  - The confidentiality is provided by law.
  - The confidentiality is protecting a legitimate economic interest.
  - The confidentiality would be adversely affected by disclosure

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

11. 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.
12. 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.
13. 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?**

14. 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.



15. 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?
16. It has been determined that this information is not trivial. In this case it includes methodologies, technologies and processes that are unique to the tenderers' submissions and disclosure of which could give other businesses advantages on future submissions. The Council also asserted it considered the information confidential in their first response to the complainant's request and it has not been disclosed previously.
17. The Commissioner is therefore satisfied the information meets the definition of confidential.

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

18. The Council and tenderers have argued the duty of confidence identified arises for the protection of both their economic interests. The Council argued that most of the tenderers have assessed the information to be commercially sensitive and it agrees with that assessment on the basis that the withheld information is not in the public domain and would harm their legitimate economic interests if disclosure was to the world at large.

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

19. The economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of information. If the requested information was disclosed, this would be available to competitors in the market and the Council and tenderers' clients.
20. The disclosure of details about the services provided, and the price, may affect the Council's ability to contract services at a competitive rate in the future. This would negatively impact its stretched budget and therefore the wider public. This may impact the quality and range of services that are delivered and increase the costs of those services.
21. In respect of the tenderers, disclosure would enable competitors to copy bidding strategies and technologies, undercut their prices and gather commercial intelligence on their rivals which would be likely to lead to them losing future tenders with the Council or other potential customers.

22. The Commissioner is satisfied that the confidentiality would be adversely affected if the Council disclosed this information.
23. Since the four tests have been satisfied the Commissioner finds that regulation 12(5)(e) of the EIR is engaged as disclosing the requested information would adversely affect the Council's and the tenderers' commercial interests. He has therefore gone on to consider the public interest test required by Regulation 12(1) of the EIR. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest the information being disclosed.

### **Public interest test**

24. The EIR feature a presumption in favour of disclosing information, under regulation 12(2).
25. The Commissioner considers there is a public interest in Councils being open and transparent in how they deliver public services. Disclosing the information would help assure the public that the Council undertakes commercial transactions on a competitive, commercial basis. Disclosure would enable the public to better scrutinise how the Council spends public money, such as when it purchases goods and services or awards contracts to private sector companies.
26. Regarding the public interest in maintaining the exemption, the Council considers that it would not be in the public interest for it to lose its ability to enter competitive dialogue within a varied and competitive market because of the disclosure. This would eventually result in a financial loss to the Council because it would mean that the Council could not attract future suppliers and it would not then be able to achieve the best value for money for its residents. Additionally, it is not in the public interest to provide detrimental information about a third party if to do so would weaken the third party's position in the market.
27. As disclosure would have a knock-on adverse effect on future redevelopment tenders, ultimately affecting the Council's residents, the Commissioner considers that this outweighs the public interest in disclosure. The Commissioner's decision is therefore that at the time of the request, the public interest favoured maintaining the regulation 12(5)(e) exception to protect the Council's commercial interests and those of the tenderers.



## Right of appeal

---

28. 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)

29. 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.
30. 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 .....**

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