

Strategy and Challenge

Mr Tim Davies
What Do They Know? Website

The Information Management Service
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Email xxxxxxxxxxxxxxxx@xxxxxxxxxxxxxxxx.xxx.xx

Our ref: 5367968

Your ref:

Date: 30 August 2017

Dear Mr Davies

Request ref 5367968

The council has now concluded an internal review of your case and come to the decision that some further information can be disclosed. Please find attached an updated copy of the Value for Money and Affordability Analysis Report prepared by Ernst and Young LLP.

You will note that a small amount of information remains withheld from release. On page 2 a very small amount of information has been withheld as being personal data and is excepted from release under EIR regulation 13(2)(a)(ii).

The remainder is financial detail that the council has concluded is commercially sensitive and therefore remains withheld under regulation 12(5)(e) of the EIRs.

The relevant part of EIR regulation 12 reads:

“(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if-
(a) an exception to disclosure applies under paragraphs (4) or (5); and
(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(3) ...

(4) ...

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect

—

(a) ...

...

(e)the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”

To satisfy the exception we have considered the following:

(i)The information has to be commercial or industrial in nature

The information relates to financial performance and viability. That information remains live: it is relatively recent and relates to current and future financial data and commercially sensitive timescales and assumptions.

The report relates to the council’s commercial activity, i.e. the purchase of services for a large public sector infrastructure project. The information in this case relates to the EfW contract and therefore the council has concluded that the information is commercial in nature.

(ii) The information has to be subject to a duty of confidence provided by law

We consider the information has the necessary quality of confidence, as it is not trivial information nor would this type of information usually be placed into the public domain, although the council has published the majority of the contract in an aid to provide relevant information to the community.

Information in question was produced and provided to the council under terms of a contract, which included specific terms on confidentiality. Those terms are also referred to within the report.

Information was shared within the council under the common law of confidence. Confidentiality of information is included in the council’s code of conduct which all employees are required to comply with.

Although the information was discussed with councillors, this was done under the provisions of paragraph 3 of Part 1 to schedule 12A of the Local Government Act 1972.

(iii) The confidentiality has to be required to protect an economic interest

The Council owes a duty of confidence to UBB Waste (Gloucestershire) Limited (UBB) in respect of this information. That information is not trivial or publicly available. It was imparted in circumstances giving rise to duties of confidence. Its disclosure would harm the interests of the council and UBB.

(iv) That economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of information”

Please find the adverse affect for each part of the withheld information in the following table:

Information reference/location	Outcome	Reasoning
Letter dated 5 November	Withhold	Personal data, which has been removed under

2015 – Page 2		EIR regulation 13(2)(a)(ii). As you are not the data subject, release of this information would constitute a breach of principle 1 of the Data Protection Act. Principle 1 states that personal data shall be processed (used) fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met; in this case none of the conditions in Schedule 2 have been met.
EY 1 – Table 1 Data listed under column headings of Nominal All in costs and NPV	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. The information provides detail of unique bidding and pricing. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
EY4 EPC price	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. The information provides detail of unique bidding and pricing. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
EY4 RRP issued	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. The information provides detail of unique bidding and pricing. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
EY6 RRP and EPC	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. The information provides detail of unique bidding and pricing. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
EY12 Table 8 Nominal UC Net Electricity – Figures	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction.

		The data relates to possible future prices/income that could be obtained for electricity. These negotiations have not been completed and damage could be caused to the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to purchasers/competitors.
EY13 Table 9 Base case and Base Case with Capital Cont	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. The information provides detail of unique bidding and pricing. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
EY14 Summary of NPV position	Withhold	The information provides detail of unique bidding and pricing. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
EY15 Table 10 Waste flow sensitivities	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. The information provides detail of unique bidding and pricing. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
EY15 Table 11 Electricity Price Sensitivities	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. The information provides detail of unique bidding and pricing. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
EY18 Table 14 Affordability Sensitivities	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. The data relates to possible future prices/income that could be obtained for electricity. These negotiations have not been completed and damage could be caused to

		the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to purchasers/competitors.
EY19 Table 15 Key changes in the UBB proposal since Financial Close 1 CAPEX Figures under Column 1, 2 and 3	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
Figures under Column 1 and 2 SPC and bid costs	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. The information provides detail of unique bidding and pricing. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
Operating Costs Figures under Column 1 and 2	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
Nominal Tonnage Figures under Column 2 and 3	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
Contract Tonnage Figures under Column 2 and 3	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. The data relates to possible future prices/income that could be obtained. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.

<p>Base Price per tonne Band 1 Figures under Column 2 and 3</p>	<p>Withhold</p>	<p>The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction.</p> <p>The data relates to possible future prices/income that could be obtained. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.</p>
<p>Base Price per tonne Band 2 Figures under Column 2 and 3</p>	<p>Withhold</p>	<p>The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction.</p> <p>The data relates to possible future prices/income that could be obtained. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.</p>
<p>Third Party Gatefee 3a Figures under Column 2 and 3</p>	<p>Withhold</p>	<p>The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction.</p> <p>The data relates to possible future prices/income that could be obtained. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.</p>
<p>Third Party Gatefee 3b Figures under Column 2 and 3</p>	<p>Withhold</p>	<p>The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction.</p> <p>The data relates to possible future prices/income that could be obtained. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.</p>
<p>Third Party Gatefee 3c Figures under Column 2 and 3</p>	<p>Withhold</p>	<p>The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction.</p> <p>The data relates to possible future prices/income that could be obtained. Disclosure of the information would have an adverse affect on the parties' commercial</p>

		interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
Senior Debt Capital Figures under Column 1, 2 and 3	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
Senior Debt interest Figures under Column 1, 2 and 3	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
Gearing Figures under Column 1 and 2	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
Libor Figures under Column 1 and 2	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. The figures relate to individually negotiated rates with the financial providers. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.
EY19 Capital expenditure increase	Withhold	The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction. The information provides detail of unique bidding and pricing. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.

EY21 Figures detailed at paragraph 6.1 third party revenue potential	Withhold	<p>The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction.</p> <p>The data relates to possible future prices/income that could be obtained. These negotiations have not been completed. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.</p>
EY22 Table	Withhold	<p>The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction.</p> <p>The data relates to possible future prices/income that could be obtained for electricity. These negotiations have not been completed. Disclosure of the information would have an adverse affect on the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to competitors.</p>
EY26 Figures relating to Third Party Gate fees	Withhold	<p>The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction.</p> <p>The data relates to possible future prices/income that could be obtained for electricity. These negotiations have not been completed and damage could be caused to the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to purchasers/competitors. Disclosure of the information would therefore have an adverse affect on parties.</p>
EY26 Figures relating to sale of electricity to other public bodies	Withhold	<p>The figures fall under regulation 12(5)(e). The public interest test falls in favour of redaction.</p> <p>The data relates to possible future prices/income that could be obtained for electricity. These negotiations have not been completed and damage could be caused to the parties' commercial interests and there is particular commercial sensitivity attached to the figures and potential use to purchasers/competitors. Disclosure of the information would therefore have an adverse affect on parties.</p>

Public Interest Test

Regulation 12(1)(b) provides in effect that an exception in regulation 12(5) can only be relied on if the public interest in maintaining the exception outweighs that in disclosure of the information in question.

Arguments in favour of disclosure

- There is a public interest in the disclosure in the interests both of transparency and accountability.
- The information relates to a very large public sector infrastructure project which will have consequences over many years. The contract itself is a PFI contract involving the expenditure of a great deal of public money over many years.
- Public concerns have been expressed about value for money and the EfW technology chosen by the council, which those against it say may involve harmful emissions and toxic waste left over from the scrubbing process.

Arguments in favour of withholding

- The substantial harm identified carries significant weight in favour of maintaining the exception.
- There is a public interest in preventing other companies in the waste management business from having access to the figures. Not only would this be contrary to the general public interest in maintaining commercial confidences, it would provide competitors with an unfair commercial advantage and would discourage commercial organisations from sharing information with public authorities in the future.
- Disclosure of the particular information under consideration in this case would not make any significant contribution to public knowledge on those issues, particularly in light of the information that had already been put into the public domain; the incremental contribution to public knowledge represented by the redacted information is negligible.
- Release would not inform the public of anything relevant to the reasons why the EfW facility was selected (matters that have, in any event, already been aired).
- Public authorities need legitimate space to negotiate and to thoroughly discuss various options in relation to financially and environmentally significant proposals such as those outlined in this case.
- To protect the duty of confidentiality owed by the council to UBB and separately to E&Y.
- There is a significant amount of information in respect of the EfW facility, including the vast majority of the contract (and associated documents including information relating to the financial implications of the facility and data relating to emissions) which have already been published within the public domain, therefore this additional granular detail will add nothing further to the public debate.
- In providing a copy of the Report, the council notes that the financial mechanism for termination, for which the council understands has attracted significant public interest and has therefore released this information to you. Releasing the limited amount of granular financial information that remains redacted would be likely to cause significant commercial and financial harm to the council and to UBB.

It is considered that the greater public interest therefore lies in not providing the information at this time. In coming to that conclusion, the public interest in providing the information has been carefully weighed against any prejudice to the public interest that might arise from withholding the information; in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

This response therefore acts as a refusal notice under regulation 14 of the EIR.

Right of Appeal

If you remain dissatisfied with the outcome of the investigation into your complaint, and this response, please contact the Information Commissioner, whose contact details are:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Tel: 0303 123 1113 (or 01625 545745 if you would prefer not to call an '03' number, or +44 1625 545745 if calling from overseas)

To assist the Information Commissioner in dealing with your complaint, you can complete their online form, which is available at: <https://ico.org.uk/concerns/>

I will now close your request as of this date.

Yours sincerely

Nigel Riglar
Commissioning Director: Communities and Infrastructure