



To: Mr Ian Walley

**Nigel Riglar**  
Shire Hall  
Westgate Street  
Gloucester  
GL1 2TG

**Phone:** 01452 328470

**Our Ref:** NR/ls

**Your Ref:** n/a

**Date:** 5 March 2018

Dear Mr Walley

**Case Reference Number: FER0682654**  
**Environmental Information Regulations 2004 ("EIR")**

We write further to your e-mail dated 14 December 2017 in respect of case reference number FER0682654. Gloucestershire County Council ("GCC") working together with its contractor Urbaser Balfour Beatty (Gloucestershire) Limited ("UBB") have undertaken a thorough and detailed review of the responses provided to Mr Timothy Davies ("the Requestor") and the information that has, through other means, been shared within the public domain.

***Background to the Request***

On 21 March 2017 the Requestor made the following request for information under the Freedom of Information Act 2000 ("FOIA") for:

*"Please provide:*

- (1) A list of all payments to Ernst and Young for consultancy work in relation to waste procurement, or the Javelin Park Incinerator contract;*
- (2) A list of reports produced by Ernst and Young for the council in relation to the Javelin Park Incinerator contract;*
- (3) A copy of the report produced by Ernst and Young for Cabinet on 11th November 2015, as referenced in the recent ruling of the Information Tribunal (Appeal number EA/2015/0254-6; paragraph 27).*

*Please also consider this request in the context of the Environment Information Regulations (EIR), and the recent ruling of the Information Tribunal which considered the Javelin Park Contract and Annexes as a whole, and ruled there was a substantial*



*public interest in understanding the financial arrangements around the contract. The ruling, and recent responses to the council questions, indicate that the Ernst and Young calculations play a significant role in judging both the truthfulness of information presented to the council and the public, and in evaluating the justifications for the UBB contract. As such, this document appears to form a part of the same whole as the contract, and to be of overwhelming public interest."*

(together "the Request").

The Request was made following the results of the Information Tribunal Hearing (EA/2015/0254, 0255 and 0256) to which you refer to in your request and which, resulted in a vast amount of information on this topic being disclosed. As a result of this and a number of additional disclosures (both pre and post the Information Tribunal hearing), there is a great deal of information already within the public domain.

We can confirm that items (1) and (2) have been provided therefore this letter relates to item (3) only.

In responding to the Request, GCC working together with UBB and Ernst and Young ("EY") have disclosed the vast majority of the EY Value for Money and Affordability Analysis ("the Report"). Retaining only information that was strongly considered and to date that we still consider we are legally entitled to withhold under the relevant exceptions detailed within the EIR.

### ***Further disclosures***

Enclosed with this letter is "Annex 1 Detail Request Ref 5367968 final 1<sup>st</sup> March A.doc" ("Annex 1") to further the ICO's understanding of GCC's position with regards to the Report. Within Annex 1 GCC has set out the information it is now happy to release and also the information it still considers we are legally entitled to withhold under the relevant exceptions detailed within the EIR. Following a careful review of the information forming the Request, GCC considers that some of the information it sought to withhold could be calculated by figures that had already been released within the public domain. We refer here to the information highlighted in green in Annex 1. We therefore consider that this information can be disclosed.

We can confirm that GCC are releasing the same information to the requester on 5 March 2018 (a copy of the redacted report along with the annex and cover letter) as we are providing to you. Please note we are sending to you on a confidential closed basis strictly for your review a copy of the un-redacted report to aid your understanding as per your request.

### ***EIR Exceptions***

In this letter we set out, as requested, each EIR exception and our reasoning why we are legally entitled to withhold some of the information forming part of the Request.

We understand that the topic of energy from waste ("EfW") facilities is emotive and that there is public interest in disclosure of information relating to such facilities.

However, GCC has disclosed vast amounts of information through the decision in the Information Tribunal and through other FOIA/EIR requests and through its own public consultation.

In terms of the information we wish to withhold, we note that any granular financial information was withheld and agreed to be withheld by the ICO in the Worcestershire County Council case (Case ref: FER0557463 ) ("WCC Case") in which UBB were also a party. It is of course concerning that two decisions were so vastly far apart in their application to such granular and live financial data. GCC considers (as in the WCC case) that, this granular financial detail will not add to the public debate and has been correctly withheld from disclosure.

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

GCC consider that Regulation 12(5)(e) is engaged in respect of the information that has been redacted from the body of the Report. We consider that this exception is relevant as disclosure would or would be likely to prejudice the commercial interests of any person. Here, we consider the commercial interests of UBB would be prejudiced. Whilst as a contractor, UBB acknowledge that some information will end up within the public domain, it also considers that EIR exceptions are there to protect it.

On application of the criteria set out in your letter:

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

It is clear here that this part of the test has been passed. The information is commercial and industrial in nature, it relates to granular inner financial (both projected and current) workings, timescales and assumptions of an EfW facility linking to the contractual obligations placed upon UBB by GCC and vice versa. It discloses the appetite for risk of both parties and inhibits best value in future contracts.

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

Much of the information that remains redacted within the Report was provided by UBB in confidence to GCC. The information is not within the public domain, nor is it trivial in nature. Not only was the information provided within confidential negotiations, the information was formed as a result of UBB disclosing confidential formula and GCC working closely with UBB. UBB were not contractually obliged to provide GCC with some of this information, it was shared in confidence and in good faith through a strong working relationship.

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

UBB operate in an extremely competitive waste market globally and are currently in the process for tendering new opportunities within the UK. Disclosure of this granular financial information, its working assumptions and the timescales it has agreed to perform/deliver certain aspects of the project within, will have a significant adverse

financial impact should this information be disclosed. It will also have an adverse impact on competition between contractors for new projects as to put it simply, competitors will know the appetite for risk and outbid UBB within these opportunities. Disclosing what may seem to be granular harmless financial data to a member of the public could be the crux of a deal to UBB, effectively disclosing their inner playbook to a competitor.

GCC also operate in a competitive market and must, as a public authority, seek to obtain best value for its projects. GCC has a legitimate economic interest, with its "commercial" hat on. It has to date been transparent, but it must protect itself commercially. Disclosure of its risk appetite and strategy will significantly limit its future negotiations on this project and on future projects and procurements. It must not be fettered from obtaining best value in significant financial transactions in the future, just for granular financial information that will not add to what is already within the public domain but would cause adverse financial impact if disclosed.

- (iv) The economic interest, and thereby its confidentiality, has to be adversely effected by disclosure;

It is likely as a result of the disclosure that UBB would be impacted in respect of future work with the risk of being subject to financial losses. For example, the EPC (Engineering and Procurement Contractor) is made up of a significant number of sub-contractors who are individually providing solutions to the EfW facility (i.e. works, services and major equipment). Should this granular detail be disclosed, the element of how much risk to build into the procurement and what could be negotiated with suppliers would enable a competitor to bid at a similar price to UBB and win the contract going forward where as if this information was not available they could not use it as a sense check of their own pricing and/or use it to undercut UBB. This therefore has a clearly negative impact on UBB's negotiating and costing positions.

GCC's economic interests would be adversely affected by disclosure of the information. For example, GCC are in the process of starting the procurement ready to sell the electricity generated from the EfW facility in the interest of obtaining best value for public funds. Disclosing the financial data will allow those to whom GCC may be able to sell the electricity to see the possible income/rates that GCC are seeking. Negotiations in respect of the electricity sale are ongoing and will be for some time. If these figures were made public, it will significantly limit what GCC can obtain as its stance will be out in the open.

Further, we are concerned that there will be reduced interest from companies to bid for other GCC procurements. Ultimately bidding/procurement depends on the confidence that a suppliers bid will remain confidential (i.e. not opened up to competitors) so as not to unfairly disadvantage them both in the procurement in question and in other procurements they are bidding for. If the specifics of their deals become public knowledge this increases the likelihood that competitors can estimate their pricing in a bid and tailor their solution to beat that and the focus then switches away from providing the best value bid but to a bid they would expect to beat the known position of their competition. This would reduce market confidence in GCC

and would be likely to result in a reduced number of bidders in GCC tenders and ultimately affect the value for money that GCC is able to achieve.

As you will see, we have made redactions to information which relates to financial performance and viability. This information relates to current and projected financial information. The information is still "active" within the project. The information also relates to commercially sensitive timescales and assumptions. This is information that was negotiated during a competitive process. UBB have projects of a similar nature that they are currently bidding on within the UK and worldwide. Disclosure of this information would provide a competitive advantage to UBB's competitors and inhibit UBB to obtain a relative price in the future. It reveals their appetite to commercial risk and would be likely to prejudice their current and future negotiating position.

#### *Regulation 12(1)(b) The Public Interest Test*

We looked at arguments for disclosure:

1. The obligation on GCC as a public authority to be open and transparent;
2. The public interest in waste facilities in general and particularly the emotive nature of those who are living near the facility;
3. The public interests in the value for money elements of the EfW facility; and
4. The previous Information Tribunal decisions and the disclosures ordered there and whether or not this information would add anything or could be calculated from what has already been disclosed.

As we have said repeatedly throughout this letter, there is a significant amount of information that has been disclosed within the public domain on this topic and we took that into consideration when applying the public interest test. We have also disclosed the vast majority of the Report as requested and almost all of the related contractual documentation. This granular detail will not add to the public debate or to what is already out there.

In order to assist you with our application of the public interest test, we set out below our further reasoning for strongly considering that the public interest is within maintaining the exception:

1. We understand that there is public interest in whether or not GCC obtained value for money. To confirm, none of the information that has been redacted within the Report will prevent the public from understanding how EY concluded that the EfW project will achieve value for money and that it is affordable. (In fact an external auditors report on this has been in the public domain for some years.) For example, information on the calculation of the termination figure referred to in the Report has been disclosed. In light of the information already available, GCC's assessment is that the additional public interest in the disclosure of the granular information which has been redacted from the Report is very substantially reduced.

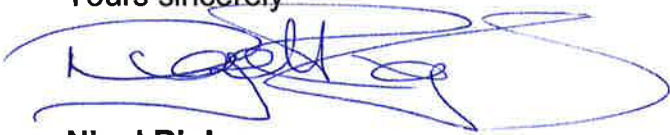
2. Throughout the report we have made references to UBB's competitors this is because there is an ongoing market for the construction and operation of EfW facilities within the UK, Europe and globally that UBB and its competitors will have the opportunity to bid in. Whilst we note your comments in respect of limited future developments for projects of this kind, we are aware that Buckinghamshire are looking at expanding their facility and Northamptonshire are considering a solution in the near future and that Aberdeen are presently in the procurement stage. This does not include the current projects in the market with alternative technical solutions which are failing to operate within the required specifications that may need to adopt this solution. There is significant evidence here that the information would likely be used in an adverse way and provide UBB's competitors with a competitive advantage. This is clearly not within the public interest.
3. Disclosure of this information will influence the pricing approach of bidders and other contractors. If we disclose everything in the Report then other companies in the industry will know the costs of the capital and the operating costs. They will also be able to calculate the mark up on third party waste and use this information to undercut UBB thus prejudicing their commercial interests.
4. We note the arguments that the information is "out of date" and therefore, there is public interest in disclosing the information. With the use of indexation competitors of UBB will still be in a good position to calculate the equivalent rates at today's date, and some of the data (for example, third party gate fees and electricity margins) has been calculated at nominal value meaning the rate at the time of the EfW facility being operational so would still be valid for competitive advantage. We would also point out that the EfW facility is still in construction and has not yet started to treat waste hence the information contained is of commercial value to both competitors and potential customers.
5. There will be a reduced willingness of commercial contractors to share commercial information with GCC (and other public authorities going through procurements). This will of course make it difficult for GCC to understand how the costs have been made up and the opportunity to challenge those costs to ensure that value for money is received. We are concerned that we could receive lower bids on a wider scale. For example, an abnormally low bid or undercutting could lead to not understanding the construction and operating costs and therefore lead to the provider failing to deliver the required quality of build potentially having a knock on consequences such as a failure to consider fully the health and safety aspects of the design. If a provider failed to deliver a solution within specification it would leave the authority in a position to have to re-procure which would be costly and take a number of years for the plant to be operational whilst continuing to pay for the failed solution and the landfill charges.

Therefore, GCC considers that Regulation 12(5)(e) is engaged and the information should be withheld and it would not be within the public interest to disclose this information. To assist you with your assessment of our arguments, we have provided in Annex 1 a detailed table of each redaction setting out our thinking

(together with UBB) as to why the exemptions apply. Please find a copy of this enclosed.

Should you require any further information, please let us know we will be happy to assist.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Nigel Riglar', with a large, sweeping flourish underneath.

**Nigel Riglar**  
**Commissioning Director: Communities and Infrastructure**

