

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

**Date:** 11 January 2024

**Public Authority:** South Hams District Council  
**Address:** Follaton House  
Plymouth Road  
Totnes  
TQ9 5NE

**Decision (including any steps ordered)**

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1. The complainant has requested from South Hams District Council ('the Council') information about financial penalties relating to the performance of a waste management contract. The Council refused to disclose the information, citing regulation 12(5)(e) (Confidentiality of commercial or industrial information) of the EIR.
2. The Commissioner's decision is that the Council was not entitled to rely on regulation 12(5)(e) of the EIR to refuse the request. He also finds that it did not comply with regulation 11(4) of the EIR when asked to conduct an internal review.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - Disclose the total value of compensation paid to the Council by the waste management contractor (the figure to include any monies "clawed back" by the Council by way of deductions it made from its contractual payments and any payments made by the contractor).
4. The Council 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.

## Background

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5. The request in this case follows on from two, related requests, made by the complainant and dealt with by the Commissioner under references IC-153809-Z1Q4<sup>1</sup> and IC-169490-Y4H5<sup>2</sup>. The requests asked about the Council's waste services contract with FCC Environment Services (UK) Ltd ("the contractor").
6. On 12 July 2022, citing "extremely challenging circumstances" that were causing ongoing issues for the Council's waste and recycling services, the Council and the contractor terminated the contract by mutual agreement<sup>3</sup>.
7. In the request dealt with under IC-169490-Y4H5, the complainant had asked to know how much compensation the contractor had paid the Council, in light of its acknowledged difficulties fulfilling some aspects of the contract. The Commissioner decided that, at the time of that request, the Council did not hold this information.

## Request and response

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8. Following his earlier requests, on 16 May 2023, the complainant wrote again to the Council and requested information in the following terms:

"I refer to the now terminated waste management contract between the Council and FCC Ltd.

It has been decided by the Information Commissioner that the Council was entitled to withhold the answer to my query concerning the payment of compensation by FCC for its failure to deliver services under the contract on the grounds that this information was not known at the time of my request. I therefore ask:

1. Does the Council now have this information?

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4023495/ic-153809-z1q4.pdf>

<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025175/ic-169490-y4h5.pdf>

<sup>3</sup> <https://content.govdelivery.com/accounts/UKSWDEVON/bulletins/31f0915>

2. If so, what is the total value of compensation paid by FCC Ltd to South Hams Council for its (FCC Ltd) failures to deliver the services as required under the contract?"
9. The Council responded on 6 June 2023. It confirmed that it held the requested information, but cited regulation 12(5)(e) of the EIR to withhold it. It referred the complainant to the explanation of this exception set out in the Commissioner's decision notice issued under IC-169490-Y4H5.
10. The complainant requested an internal review on 27 July 2023. The Council responded on 9 August 2023, saying that it was "comfortable" with its decision to refuse the request under regulation 12(5)(e) and that it did not consider that an internal review was appropriate.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 31 August 2023, to complain about the way his request for information had been handled. He disagreed with the application of regulation 12(5)(e) of the EIR to refuse the request.
12. The analysis below considers whether the Council was entitled to rely on regulation 12(5)(e) to refuse the request. The Commissioner has also considered its handling of the internal review request.
13. The Commissioner has viewed the withheld information.

### **Reasons for decision**

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

14. If information falls within the definition of "environmental information" at regulation 2(1) of the EIR, any request for it must be considered under the EIR.
15. As the requested information relates to waste collection, recycling and associated services, the Commissioner considers that it is information on 'factors' (regulation 2(1)(b) of the EIR) and 'measures' (regulation 2(1)(c) of the EIR) likely to affect the elements of the environment. He has therefore assessed this case under the EIR.

**Regulation 12(5)(e) - Confidentiality of commercial or industrial information**

16. The Council relied on regulation 12(5)(e) of the EIR to refuse the complainant's request for the total amount of compensation paid by the contractor.
17. In the complaint considered by the Commissioner under IC-169490-Y4H5, the complainant argued, and the Commissioner accepted, that his request to know the amount of compensation included monies "clawed back" by the Council by way of deductions it made from its contractual payments to the contractor. The Commissioner has carried forward the same interpretation of the phrase "payment of compensation by FCC" to this case; this interpretation is not disputed by the Council.
18. 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.
19. The Commissioner considers four tests when deciding whether regulation 12(5)(e) is engaged. All four elements are necessary for the exception to be engaged:
  1. The information is commercial or industrial in nature.
  2. The confidentiality is provided by law.
  3. The confidentiality is protecting a legitimate economic interest.
  4. The confidentiality would be adversely affected by disclosure.

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

20. The Council told the Commissioner:

"The information is commercial in nature as it relates to a settlement entered into between the Council and FCC with respect to the commercial activity of delivering a contract for Waste Collection and Recycling, Street Cleansing, Toilet Cleaning Service in the South Hams district of Devon (Contract). The Contract is for the provision of goods and services for 140,000 residents and is a contract with a significant value...The information sought by the complainant, [name redacted] relates to the financial settlement entered into with FCC and the negotiation and settlement of disputes regarding commercial information and FCC's provision of its obligations under the Contract."

21. The Commissioner is satisfied that information about the settlement, including any monies paid or forfeited, by the contractor, is commercial in nature. It relates to the performance of an individual contract, which is a commercial matter.

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

22. 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.
23. The Council argues that the withheld information is subject to confidentiality by contractual obligations, under both the terms of the original contract and the settlement reached on termination of the contract.
24. As regards the relevant information in the original contract, the Council referred the Commissioner to his decision notice under IC-169490-Y4H5, where he had accepted that information on, "The pricing of a specific element of the contract and agreed contractual deductions within the contract" was subject to a duty of confidence on the part of the Council and its employees.
25. The Commissioner is unaware of any change in circumstance which would materially affect his decision regarding the duty of confidence attached to that information. Therefore, his decision on that point (ie that information on the pricing of a specific element of the contract and agreed contractual deductions within the contract, being subject to confidentiality provided by law) still stands.
26. As regards the settlement, the Council said that it had agreed provisions around confidentiality with the contractor in a signed agreement setting out the terms of the settlement. It said:

"Whilst the parties are entitled to disclose information in the Settlement Agreement pursuant to an EIR or FOIA request, the agreement provides that such disclosure shall not be made if the information is exempt or excepted from disclosure under the Environmental Information Regulations or the Freedom of Information Act. Further, the parties are not to disclose the terms of the Settlement Agreement nor any substance from the negotiations to third parties without the written consent from the other parties to the agreement."
27. For the avoidance of doubt, the Council said that the contractor has not provided such consent and that it objected to the disclosure of the withheld information.

28. As regards the settlement agreement, the Commissioner can confirm that it contains confidentiality clauses which require each party to safeguard confidential information belonging to the other parties and to gain prior written consent of the relevant party in order to disclose confidential information. The Commissioner is therefore satisfied that it is subject to confidentiality provided by law.

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

29. For this test, it is necessary to consider how sensitive the information is at the date of the request and the nature of harm that would be caused by disclosure. The timing of the request, and whether any commercial information is still current, are likely to be key factors. Broader arguments that the confidentiality provision was originally intended to protect legitimate economic interests at the time it was imposed will not be sufficient if disclosure would not actually impact on those interests at the time of the request.
30. It is not enough that disclosure **might** cause some harm to an economic interest. It needs to be established that disclosure **would** cause harm (on the balance of probabilities – ie more probable than not).
31. Ensuring competitors do not gain access to commercially valuable information is one example of a legitimate economic interest, and it is the main argument put forward by the Council, following consultation with the contractor. The Council has also argued that its own ability to maintain a competitive negotiating position with suppliers would be damaged by disclosure in this case.
32. Firstly, the Commissioner notes that some of the Council's arguments to him on this point are concerned with the impact of the disclosure of the wider contents of the settlement agreement and the contract. However, all that has been requested in this case is the **total** figure of compensation paid to/deducted by, the Council. The Commissioner has therefore disregarded the Council's arguments about the impact of revealing wider information about the agreements contained in the contract and the settlement as such information falls outside the wording of the request.
33. The Commissioner understands that the contractor has expressed objection to the disclosure of the information. He notes that whilst it is no longer undertaking the contract for this council, it is still a service provider in this field and has similar contracts with many other councils. The question is therefore whether the overall compensation figure is "commercially valuable" to the extent that its disclosure, at the time of the request (ie May 2023) would harm the contractor's, or the Council's, legitimate economic interests.

34. The compensation figure relates to the contractor's performance against a contract which was agreed in 2018, five years prior to the request in this case being made. It was negotiated prior to the pandemic, and the commercial landscape was different then. On that point, the complainant says:

"...should the Council seek again to outsource its waste management services, it will be in a very different commercial environment from the one that pertained when the contract was first negotiated. The price and compensation structure that was proposed in 2018, which was pre-Covid and when interest rates were very low, would have no relevance and therefore no commercial value, especially as the contract could not be successfully delivered using that structure."

35. The Commissioner agrees with the complainant that, in the intervening five years, the changes in working practices and costs brought about by the pandemic, mean that any pricing structures and terms agreed in May 2023 would be considerably different from those agreed in 2018. On that basis, he does not see how disclosure of the total compensation figure would reveal commercially valuable information about the contractor, capable of placing it at a disadvantage against its competitors, when negotiating new contracts in 2023. This single figure does not give any insight into its pricing structure or operational set up which might enable a competitor to emulate its business model.

36. The Commissioner recognises that, for reputational reasons, the contractor might prefer that the information is not disclosed. However, that is not sufficient basis for engaging regulation 12(5)(e) of the EIR. In any case, information about the operational difficulties it had encountered in fulfilling some aspects of the contract was already in the public domain at the time of the request (including a video acknowledging problems with the recycling service, by the contractor's Head of Collections<sup>4</sup>), and the Council had publicly addressed them in comments in its annual statement of accounts for 2021/2022<sup>5</sup>.

37. The Council told the Commissioner that the overall figure for the Sustainable Waste Management reserve, declared in those accounts, included the total compensation figure. The Council has argued to the Commissioner that this demonstrates that the Council has been "...transparent as to sums recovered by the Council under the Contract",

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<sup>4</sup> <https://www.letsrecycle.com/news/fcc-environment-makes-south-hams-video-apology/>

<sup>5</sup> <https://www.southhams.gov.uk/sites/default/files/2023-06/Audited%20Statement%20of%20Accounts%202021-22.pdf>

and that disclosure of the exact figure was not necessary. However, as the published figure included money from other sources, the Commissioner does not consider that it is a satisfactory answer to the complainant's request to know the total amount of compensation regarding the performance of the contract.

38. As to the impact on its own commercial position, the Council argued that councils have:

"...a duty to their constituents to provide good value commercial deals. Disclosure of the compensation figure arrived at with FCC would jeopardise the Council's ability to secure best value, competitive contracts in the future and create a weak negotiating position. The contracting party is not bound by the same duty of transparency to the public as an authority and by forcing confidential negotiations into the public domain there is a risk that private commercial companies will be driven away from entering contracts with authorities out of fear of deals being exposed. In addition, we consider there is a risk that competitors, or contractors bidding on any future tender exercise would use this information to attempt to negotiate more favourable terms for themselves, rather than provide best value for money for the Council as a public authority and for council taxpayers as the end user of the services contracted for."

39. As above, the Commissioner does not see how disclosure of the total compensation figure would negatively affect the Council's ability to maintain a competitive negotiating position in a commercial environment. The figure relates to a contract that was negotiated in significantly different commercial circumstances to those of the present day. Furthermore, he notes that the complainant has not asked for any breakdown of the figure (ie how much was "clawed back" by the Council and/or how much was a penalty payment made by the contractor) which further limits any insight that might be gained into the Council's contractual position. It is not clear how, going forward, potential contractors could use this information to obtain more favourable terms for themselves.
40. As regards the Council's argument that it would be commercially disadvantaged because contractors would be deterred from bidding for contracts by the threat of disclosure under the EIR, the Commissioner's experience is that, in general, public sector contracts tend to be viewed as lucrative business opportunities for private sector contractors. As the EIR have now been in effect for nearly 20 years, private sector contractors are accustomed to the possibility of additional external scrutiny when doing business with the public sector; they are not generally deterred by the prospect of disclosure under the EIR/FOIA, when bidding for contracts. The Commissioner therefore does not accept that disclosure in this case would, in future, negatively affect the



Council's ability to do similar business with contractors, to the extent that regulation 12(5)(e) is engaged.

41. Having taken all the above into account, the Commissioner is not satisfied that confidentiality is required to protect a legitimate economic interest; the Council has not adequately demonstrated how disclosure of the total compensation figure would cause harm to its own economic interests, or those of the contractor, in any meaningful way.
42. As all four parts of the test set out at paragraph 19 are not met, the exception provided by regulation 12(5)(e) of the EIR is not engaged.
43. That being the case, the Commissioner's decision is, therefore, that the Council was not entitled to rely on regulation 12(5)(e) of the EIR to refuse the request.
44. The Council must now take the action specified in paragraph 3, above.

### **Regulation 11 – Representations and reconsiderations**

45. The complainant requested an internal review on 27 July 2023 and the Council responded on 9 August 2023, stating the following:

"My understanding is that you are unhappy as you feel we have incorrectly withheld the information you have requested under Regulation 12(5)(e) Commercial or industrial information.

#### **My final view**

The Council is comfortable with the response it gave you and the application of the exemption from disclosure under Regulation 12(5)(e) to the information you have requested. The Council does not therefore consider that an internal review is appropriate but will cooperate with the ICO as required if you deem it necessary to ask them to also consider your request."

46. The Commissioner put it to the Council that it had failed to comply with the requirements of regulation 11(3) of the EIR, which requires a public authority to conduct an internal review when asked to do so.
47. The Council told the Commissioner that it did, in fact, conduct a thorough reconsideration of the request, at senior level, on receipt of the complainant's internal review request. It said its reconsideration resulted in it reaching the same decision, that regulation 12(5)(e) was correctly applied. However, it conceded that:

"...the fact that this internal review of the complainant's request and the application of Regulation 12(5)(e) took place was not adequately communicated to the complainant."

48. As the Council did not provide the complainant with any information confirming that it had reconsidered the request (rather it told him that an internal review was "not appropriate") the Commissioner has no choice but to find that it did not act in compliance with regulation 11(4) of the EIR, which requires a public authority to communicate the outcome of its internal review.
49. The Commissioner has made a separate record of this for monitoring purposes.

## Right of appeal

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50. 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)

51. 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.

52. 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 .....**

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**