

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

Decision Notice

Date: 27 May 2010

Public Authority: Cornwall Airport Limited
Address: County Solicitors Office
Cornwall Council
County Hall
Treyew Road
Truro
Cornwall
TR1 3AY

Summary

The complainant requested information about a tender exercise carried out for the provision of wildlife and habitat management at Newquay Cornwall Airport. The public authority dealt with the request under the provisions of the Act but, following the Commissioner's intervention, subsequently considered the provisions of the EIR. The public authority disclosed some information but stated that other information was exempt from disclosure under regulation 12(5)(e). The Commissioner's decision is that some information was correctly withheld but that other information should have been disclosed. The Commissioner has therefore ordered disclosure of all information falling within the scope of the request except that which the Commissioner has concluded is exempt on the basis of regulation 12(5)(e). The Commissioner has also identified a number of procedural shortcomings in the way the public authority handled the complainant's request

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

2. The Environmental Information Regulations ('the EIR') were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner (the "Commissioner"). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the "Act") are imported into the EIR.

Background

3. As part of its Civil Aviation Authority License Application, an airport is required to provide a robust bird hazard management plan in conjunction with a grass management plan as directed by CAP772¹ and CAP642². This case relates to a request for information concerning a tender exercise carried out by Newquay Cornwall Airport ('the Airport') for the provision of bird and hazard management at the Airport. The tender was advertised through the Official Journal of the European Union on 5 June 2008 and following completion of the tender exercise, a contract was awarded to the successful company, North West Bird Control ('NWBC') on 1 December 2008.
4. The Commissioner understands that the Airport received three tenders (one of which was from the complainant's company) and all three companies met with representatives of the Airport to discuss the tender.
5. The Airport is owned by Cornwall Council ('the Council') and operated by Cornwall Airport Ltd which is a company wholly owned by the Council. The initial information request on 27 October 2008 was made to the Airport and the Airport holds the requested information. However, as Cornwall Council handle information requests under the Act and the EIR on behalf of the Airport, all responses regarding this case were issued by the Council on behalf of the Airport. Therefore, throughout the remainder of this Notice any reference to the Council, in terms of responding to the request, refers to it acting on behalf of the Airport.

The Request

6. On 27 October 2008 the complainant requested the following information from the Airport:

¹ <http://www.caa.co.uk/docs/33/CAP772.pdf>

² <http://www.caa.co.uk/docs/33/Cap642.pdf>

- "...copies of all North West Bird Control's tender, the pricing information and your evaluation reasoning and scores for North West Bird Control and Safeskys".
7. The Council responded to the request on 12 January 2009 stating that the information requested was exempt from disclosure by virtue of section 43(2) of the Act as it would prejudice the commercial interests of NWBC and the public interest favoured non-disclosure of the information at that time.
 8. On 12 January 2009 the complainant wrote to the Council concerning its refusal to disclose the information requested. The Council considered this communication to be a request for an internal review.
 9. On 13 February 2009 the complainant wrote to the Information Commissioner to complain about the Council's refusal to disclose the information requested.
 10. On 27 February 2009, the Commissioner wrote to the Council advising that, in his view, the information requested constituted environmental information and, as such, the request should have been handled under the EIR.
 11. The Council provided the outcome of its internal review under the Act on 4 March 2009. The Council disclosed some information relevant to the request but upheld its decision not to release the remaining information by virtue of section 43(2) of the Act. The Council also stated it considered some of the remaining withheld information relating to NWBC employees to be personal data that was exempt from disclosure under section 40(2) because disclosure would be unfair and breach the first data protection principle.

The Investigation

Scope of the case

12. On 5 March, 7 April and 25 June 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information he requested should have been disclosed.
13. As the complainant had written to the Council on a number of occasions regarding this matter, on 13 August 2009 the Commissioner

contacted the complainant to discuss his information request and the scope of the case. The complainant confirmed that he wanted any recorded information held in respect of the Airport's evaluation of NWBC's tender and a copy of NWBC's tender submission. It was agreed with the complainant that the Commissioner's investigation would focus on the information requested on 27 October 2008, as detailed in paragraph 6 above.

14. During the course of the Commissioner's investigation, the following matters were resolved informally and are not addressed in this Notice:
 - the Council agreed to disclose some of the requested information to the complainant. The Commissioner has therefore not considered this information further.

15. The remaining disputed information, to which this Notice relates, is as follows:
 - Information contained within NWBC's tender submission, to include:
 - Financial evaluation and cost savings information,
 - Details of how NWBC proposed to meet the terms of the contract and its risk assessment (referred to throughout the remainder of this Notice as the 'methodology',
 - Information relating to services NWBC provide at other airports (referred to throughout the remainder of this Notice as 'other airport information')."
 - A tender evaluation report prepared for the Cornwall Airport Ltd Board on 24 October 2008. This report is the only remaining withheld information which refers to the evaluation reasoning and scores of all tenders and contains the following information:
 - background information relating to the tender process, including details of the number of tender returns;
 - a high level breakdown of the criteria used to evaluate the tenders;
 - a summary of the tender evaluation for each of the three shortlisted companies and the overall scores awarded to each company by the evaluation panel members;
 - the overall tender price for the three shortlisted companies; and
 - the recommendation for the successful tender.

Chronology

16. On 17 August 2009 the Commissioner wrote to the Council advising that, in his opinion, the information requested fell within the definition of environmental information as set out in regulation 2(1)(c) of the

- EIR. The Commissioner requested a copy of the withheld information and further clarification of any exceptions which the Council was seeking to rely on and the reasoning behind its application of any such exceptions.
17. The Council responded to the Commissioner on 16 September 2009 and advised that it was prepared to disclose some additional information relevant to the request, but that it considered the remaining information to be exempt under regulations 12(5)(e) and 12(3).
 18. The Commissioner wrote a further letter to the Council on 27 October 2009 advising that his preliminary view was that the information which it had withheld under regulation 12(5)(e) was not exempt from disclosure and invited the Council to consider informal resolution. The Commissioner also requested further representations in respect of the Council's application of regulation 12(3), explaining that this exception provided that third party data can only be disclosed in accordance with regulation 13.
 19. The Council responded to the Commissioner on 13 November 2009 providing further arguments and supporting evidence in relation to its application of regulation 12(5)(e). The Council also withdrew its reliance on regulation 13 and agreed to disclose the information it had previously withheld under this exception. The Council also confirmed that it had provided the Commissioner with all the information held in relation to this request.

Analysis

Substantive Procedural Matters

Correct Access Regime

20. The Council originally processed the complainant's request for information under the Act and considered the information to be exempt under sections 43 and 40. However, the Commissioner considers that the information requested constitutes environmental information and that the correct access-regime is therefore the EIR.
21. In coming to this view, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term "any information ...on" in the definition of

environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment.

22. The Commissioner has determined that the requested data would fall within the definition of environmental information set out at regulation 2(1)(c) of the EIR. This provides that:

“environmental information’ has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material on—

(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) and (b) as well as measures or activities designed to protect those elements.”

The full text of regulation 2(1) is included in the legal annex to this notice.

23. The information requested in this case relates to a tender exercise carried out in respect of wildlife and habitat management at an airport, and includes information on activities in relation to managing the numbers of wildlife and the condition of the grass and soil in and around the airport. The Commissioner considers that this information falls within the definition of environmental information as set out in regulation 2(1)(c), in that it is information on a measure which is likely to affect the elements of the environment as set out in regulation 2(1)(a); in particular biological diversity, land and landscape.
24. Given that the Commissioner considers the request to be for environmental information, the refusal notice issued by the council breached the requirements of Regulation 14(3), which requires that a public authority that refuses a request to provide environmental information must specify the exception it is relying upon. In addition, by failing to provide a response and the requested information within twenty working days of receipt of the request, the Council breached regulations 5(1) and 5(2) of the EIR.

Exceptions

Regulation 12(5)(e)

25. Regulation 12(5)(e) allows commercial or industrial information which is held by a public authority under either a statutory or a common law

duty of confidentiality to remain confidential if that duty is required in order to protect the legitimate economic interest of any party.

26. The Commissioner considers that this exception can be broken down into four elements, all of which are required in order for the exception to be engaged:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate interest?
- Would confidentiality be adversely affected by disclosure?

Secondly, and once the above four elements are met, any public authority applying this exception needs to apply the public interest test and demonstrate that the public interest in maintaining the exception outweighs the public interest in disclosure.

Is the information commercial or industrial in nature?

27. The Commissioner considers that for information to be commercial or industrial in nature it is required to relate to a commercial activity, either of the public authority concerned or a third party.

28. The Commissioner considers that all of the withheld information in this case constitutes commercial information as it refers to a business activity for commercial gain. He therefore considers that this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

29. The Commissioner considers that “provided by law” will include confidentiality imposed on any person under the common law duty of confidence, contractual obligation or statute.

30. The Commissioner does not accept that all information is held in confidence merely because the parties decide together that that will be the case. Allowing this would essentially allow parties to contract their way out of obligations under the Act and the EIR. The Commissioner has therefore considered whether the information meets the necessary criteria for a duty of confidence to apply.

31. In order for the exception to be engaged it must be shown that the information:

- (i) Was imparted in circumstances creating an obligation of confidence; and
- (ii) has the necessary quality of confidence.

(i) The necessary obligation of confidence

32. The Council has provided the Commissioner with evidence from NWBC that it had indicated at the time it submitted its tender that the information was to be treated as confidential.
33. The Commissioner is satisfied that information provided as part of a tender should be considered to be held in confidence by the parties, at least until such time as the tender is concluded. After that point the parties would understand however that some details of the successful tender are likely to be disclosed, particularly in the case of public authorities with a duty to be accountable to the public and to act transparently.
34. The Commissioner's view is that as there is no requirement under regulation 12(5)(e) for information to have been obtained from a third party, this exception could also cover information created by a public authority and provided to or shared with a third party, or information jointly created or agreed between a public authority and a third party, where such information is subject to a duty of confidentiality which is provided by law.
35. In respect of the tender evaluation report, this is an internal document created by the Airport to put to its Board for consideration. The Council has not provided specific arguments as to why this information has the necessary quality of confidence. However, the Commissioner is aware that some of the information contained within the report has been shared with tenderers as a result of the tender debriefing process, but he has been unable to establish exactly which parts of the report have been shared with any third parties.
36. Having regard for the specific content of the tender evaluation report, as detailed in paragraph 19 above, it appears to the Commissioner that the background sections and general information relating to the tender exercise parts of the report have not been shared with a third party and is therefore not subject to an obligation of confidence. Included within the tender evaluation report are high level evaluation comments, overall scores and the overall tender price of the three tenders. With regard to this information, the Commissioner has taken into account feedback which was given to each individual tenderer on their tender as part of the tender de-briefing process. The Commissioner does not consider that information provided as part of this feedback process was imparted in circumstances creating a duty of confidentiality as there would be no obligation on the tenderer to keep such information confidential. The Commissioner is also aware that some information relating to the successful tender (NWBC) has also

been shared with unsuccessful tenderers. However, given the high level, generic nature of the information which has been shared with third parties in relation to the winning bid, the Commissioner is not convinced that this information was imparted in circumstances which give rise to an obligation of confidence. However, some of the evaluation comments contained within the report refer to information submitted by the tenderers and the Commissioner considers that these parts of the report would be subject to a duty to confidence provided by law.

37. In summary, whilst the Commissioner is not convinced that the whole tender evaluation report is subject to confidentiality provided by law, for completeness, he has considered the whole report to be subject to an obligation of confidence.
38. The Commissioner is therefore satisfied that all of the withheld information in this case was imparted in circumstances which created an obligation of confidence.

(ii) The necessary quality of confidence

39. The Commissioner has considered whether the information has the necessary quality of confidence in order for a duty of confidence to apply. This question takes into account such factors as whether the information is trivial or whether it is already in the public domain or available from other sources.
40. In this case, the withheld information includes tender information which it was stated could be used by competitors to their own advantage, and to the disadvantage of those who were tendering. The Council has provided the Commissioner with representations from NWBC in particular that it considers the methodology information provided in the tender submission to be its own intellectual property rights and the Council has confirmed that the methodology was the chief reason that the contract was awarded to NWBC. Both the Council and NWBC believe that disclosure of the remaining withheld tender information would have severe repercussions for NWBC by giving its competitors an unfair advantage in such a specialised market.
41. The Commissioner has considered the withheld information and the submissions made by the Council. He notes that, the withheld information is not trivial, and is not widely known or in the public domain. Accordingly the Commissioner is satisfied that all of the withheld information is subject to confidentiality provided by law.
42. Having established that the requested information is subject to confidentiality provided by law, the Commissioner had gone on to

consider whether that confidence was necessary to protect a legitimate economic interest.

Is confidentiality necessary to protect a legitimate economic interest?

43. The Commissioner considers that, to satisfy this element of the test, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. The Commissioner has therefore considered the submissions made by the Council and NWBC in relation to the sensitivity of the information and the nature of any harm which would be caused by disclosure.
44. In the Commissioner's opinion any tenderer should at least have an awareness that details about their bid, including details of their pricing may be disclosed if they were awarded the contract. The Council has provided the Commissioner with a copy of the tender pack. Clause 2.16 of the terms and conditions of the tender makes reference to the confidentiality and states that "Tenderers should understand that information they supply to the Company may be disclosable under the Freedom of Information Act 2000 and Environmental Information Regulations 2004". Included within the tender pack was a form which prospective tenderers were advised to complete in respect of any information which they considered to be commercially sensitive. NWBC provided a schedule with its tender pack indicating that it considered the information provided in respect of services it provides at other airports to be confidential and should not be released to third parties. Further, the Commissioner has had regard to clause 2.18 of the tender terms and conditions which refers to the Act and the EIR and states that:

"The Company [the Airport] works in strict accordance with any legislation that requires information held by the Company to be released to the public, As such the Company will only keep confidential information that is properly confidential in its nature, paying due regard to any relevant legislation, and then only for a reasonable amount of time.

*As part of the Company's duties under access to information legislation, it may be required to disclose information concerning the procurement process of the Contract to anyone who makes a reasonable request. Applicants should provide a schedule if they consider that any of the information provided in their response to this ITT [Invitation to Tender] is commercially sensitive (meaning it could reasonably cause prejudice to the applicant if disclose to a third party). The schedule should list the information, clearly marked as "**Not for disclosure to third parties**" together with valid reasons in support of*

the information as being exempt from disclosure under the relevant legislation. Please see the sample schedule at Schedule F.

The Company will endeavour to consult with Tenderers and have regard to comments and any objections before it releases any information to a third party under the legislation. However, the Company shall be entitled to determine its absolute discretion whether any information is exempt under the legislation, or is to be disclosed in accordance with the provisions of the legislation and can only withhold information if it is covered by an exemption from disclosure under the legislation”.

45. The Commissioner considers that the timing of the request in this case is a key factor in relation to any harm caused by disclosure. The request was made on 27 October 2008 and the contract awarded to NWBC on 1 December 2008. The request was also made within the 10 day mandatory standstill period between award decision and contract conclusion required under the Utilities Contracts Regulations 2006. This standstill period allows unsuccessful tenderers the opportunity to request further information on the evaluation of their tender and challenge the award decision before the contract is concluded. Therefore the Commissioner considers that some of the withheld information relating to the request, particularly information contained within the successful company's tender submission would have been commercially sensitive at the time the request was made.
46. Whilst the Commissioner considers that all of the withheld information is commercial in nature and the information is subject to confidentiality provided by law, he does not feel that confidentiality is provided to protect a legitimate economic interest in respect of all the information. He has set out his reasoning in paragraphs 51 to 67, below by addressing each category of withheld information separately.
- (i) The tender evaluation report
47. The Council has not put forward any specific arguments in respect of the nature of any harm which would be caused by disclosure of this particular report. The Council's arguments are of a more general nature in that it believes disclosure would prejudice, in particular, NWBC's commercial interests and adversely effect NWBC's competitive advantage in this specialised field.
48. As well as some general background information about the tender and evaluation process, the evaluation report contains details of the total price of each of the three tender bids, the total scores awarded by the evaluation panels and general comments about the content and quality of each company's tender submission.

49. Taking into account the high level information contained within this report in respect of the individual tenders, as detailed in paragraph 19, the Commissioner is not persuaded that disclosure would adversely either the Council's own, NWBC's or the other tenderers' commercial interests. Whilst the report contains details of each company's overall bid, the Commissioner does not consider that this would prejudice any of the party's commercial interests as price is only one factor that was taken into account when evaluating the tenders in this case, and only represented 30% of the overall tender evaluation.

(ii) Financial evaluation and cost savings information (NWBC)

50. In its submissions to the Commissioner the Council advised that disclosure of the financial information provided by NWBC in its tender submission would prejudice its commercial interests and ability to negotiate with the Council and other parties in the future as it would allow NWBC's competitors to match or better the price for such services in any future tendering process. The Council also believes that disclosure would hinder future tender processes as it would discourage companies from making detailed bids in the future, which would seriously prejudice the Council and NWBC's positions in commercial negotiations in any subsequent procurement exercises.

51. The Council has provided the Commissioner with a statement from NWBC outlining how disclosure would adversely affect its commercial interests. NWBC has advised that at no time had it given consent for any of the information contained within its tender submission to be disclosed. NWBC's view is that disclosing the financial information would give its competitors an advantage in any future tenders, could in turn lead to job losses and other financial repercussions.

52. The Commissioner notes the schedule which NWBC submitted with its tender pack indicating what information it considered to be confidential, as detailed at paragraph 46. The Commissioner also notes that NWBC subsequently indicated to the Airport that it considered all of the information it provided during the tender exercise to be commercially confidential and should not be disclosed to third parties.

53. The Commissioner is of the view that as price is only one factor that is taken into account by a company when evaluating tender submissions, disclosure of pricing information alone would not necessarily have an adverse effect on the competitive advantage of a contractor. However, the Commissioner has taken into account the timing of the request in this case. The request was made prior to the contract being formally awarded to the successful company and as such the Commissioner accepts that disclosure of the financial and cost savings information

contained in the tender submission would prejudice NWBC's commercial interests.

(iii) Methodology (NWBC)

54. As stated at paragraph 55 above, the Council has provided the Commissioner with a statement from NWBC outlining how disclosure would adversely affect its commercial interests. NWBC has indicated whilst its methodology is structured specifically for each individual airport, it considers the information to be its intellectual property rights. NWBC has also stated that it provided more detail in the methodology part of the tender submission for this particular contract than it would normally due to the fact that the evaluation was so heavily weighted towards methodology.
55. NWBC's view is that as the bird and habitat management industry is so small and specialised, disclosure of the detailed methodology would provide its competitors with an advantage because they would be able to adopt the same methodology for any future tenders. NWBC states that this would have severe repercussions for its business and could lead to job losses and, ultimately, its closure. NWBC has stated that at no time had it given permission for any of the information contained in the tender submission to be disclosed to a third party. NWBC has indicated in its statement that it would pursue the Council through the Courts for any losses which result from disclosure of its tender submission.
56. NWBC has made the Council aware of a forthcoming wildlife and habitat management contract at another airport, which it would be tendering for in the near future. NWBC was aware of this forthcoming contract at the time of tendering for the contract at Newquay Cornwall airport. NWBC believed that disclosure of its tender documents would compromise its competitive position in this and any future tender as it would allow its competitors to adopt its methodology.
57. The Council has supported NWBC's argument that wildlife and habitat management at airports is a specialised field, which it believes is further substantiated by the fact that although 15 companies initially expressed an interest in the contract, only three of these companies were able to meet the tender specification.
58. The Council has confirmed that the evaluation was weighted 70% towards the technical aspects of the tender bid and 30% towards financial appraisal. The Council has also stated that the methodology outlined by NWBC in its tender bid was the chief reason the company was awarded the contract. The Council has argued that disclosure of the methodology would have an adverse affect on future tenders of

this kind as companies would be less inclined to submit such detailed tenders in the future and would undermine the Council's ability in the future to negotiate with other companies.

59. The Commissioner is not persuaded by the arguments put forward by both the Council and NWBC that disclosure would lead to less detailed tender bids being submitted in the future. In the Commissioner's opinion potential tenderers clearly have an inherent interest in being frank and open and submitting full and detailed tender bids in order that they are in the best position to be awarded the tender contract. If a company does not provide sufficiently detailed proposals during a tender exercise they risk not being awarded the contract by undermining the strength of their tender proposal. Further, the Council has not provided any evidence to demonstrate exactly how receipt of less detailed tender proposals would affect its ability to procure goods and services efficiently.
60. However, the Commissioner considers that the methodology lies at the heart of the commercial information which the exception at regulation 12(5)(e) is trying to protect. This information is a detailed description of the systems and processes which gives the contractor its ability to submit a competitive tender. Disclosure of this information could weaken NWBC's competitive edge by allowing competitors to copy or adopt some or all of the methodology. The Commissioner is therefore satisfied that disclosure of the methodology at the time of the request would adversely affect NWBC's commercial interests.

(iv) Other Airport Information (NWBC)

61. The withheld information relating to "other airport information" includes a list of the other airports at which NWBC has carried out work, brief details of some of these contracts, and the results achieved and method statements for launching bird scaring rockets and grass spraying escorts at another airport.
62. The Council has advised that NWBC provided this information in confidence as part of its tender submission in order to illustrate and demonstrate its capability in the field of expertise. The Council believes it owes a duty of confidentiality to NWBC in respect of this information in order to protect NWBC's legitimate economic interests. The Council considers that disclosure would adversely affect NWBC's economic interests and it would lead to NWBC taking a less open approach when tendering for future contracts, which would in turn impact on the Council as it would hinder any future tender processes.
63. Having regard to the content of information which has been withheld under this category the Commissioner is unable to see how disclosure

would adversely NWBC's interests. Brief details of NWBC's involvement at other airports is contained in NWBC's "Statement of Capability" which the Council agreed to disclose during the Commissioner's investigation. The method statements appear to the Commissioner to be of a generic nature and provide basic instructions and guidelines for staff in relation to launching bird scaring rockets and grass spraying.

Would confidentiality be adversely affected by disclosure?

64. The Commissioner considers that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available and would also inevitably harm the legitimate economic interests which had been identified.
65. For the reasons set out in paragraphs 51 to 53 and 65 to 67 above, the Commissioner has concluded that the exception is not engaged in respect of the tender evaluation report and information relating to NWBC's contracts at other airports (contained within the tender submissions). This is because the Council failed to demonstrate that there are legitimate economic interests which require the protection of confidentiality. In the absence of any evidence on this point the Commissioner is unable to conclude that the exception at regulation 12(5)(e) is engaged. Because the exception is not engaged in respect of this information he is not required to consider the public interest test in relation to its disclosure.
66. In relation to the financial evaluation and cost savings information and the methodology information contained within NWBC's tender submission, the Commissioner considers that the first three elements of the test cited at paragraph 30 of this notice have already been established. The Commissioner therefore considers that, disclosure of this information into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests which have been identified. He therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of this information.

Public interest test

67. Because the exception is engaged in relation to the financial evaluation and cost savings information and the methodology information contained within NWBC's tender submission the Commissioner has gone on to consider whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of this information. In doing so he has given consideration to the detriment that disclosure would cause to the

economic interests of the parties involved and the extent to which there is a wider public interest in preserving the principle of confidentiality. Whilst there is an inherent public interest in preserving confidentiality the Commissioner is cautious about placing significant weight on the generic argument. In the context of the exception at 12(5)(e) he considers that arguments concerning the undermining of confidentiality will carry more weight when related to the specific circumstances of the case.

68. As stated in paragraph 30 above, even if regulation 12(5)(e) is engaged, regulation 12(1)(b) provides that the information must still be disclosed unless "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information".
69. The Council is of the view that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

70. The Council has stated that the public interest factors in favour of disclosure are:
- Disclosure would further the understanding of, and participation in, the public debate of issues relating to the Airport.
 - Disclosure would facilitate accountability and transparency in relation to decision making at a publicly owned company and the spending of public money.
71. The Commissioner also identified the following factors in favour of disclosure, which he put to the Council in his letter of 27 October 2009.
- Bird hazard management has potential health & safety implications as there is a potential for bird strikes to result in aircraft engine failures, and catastrophic air accidents. Disclosure will allow the public to see what processes the Council intends to implement to minimise and manage the risk of bird strikes at the Airport. There is a strong public interest in the general public being aware of how the successful contractor (NWBC) will manage bird hazard at the Airport, particularly given the potential safety and environmental implications of such a scheme.
 - There is a public interest in the public knowing that the Council has taken into consideration the needs and concerns of the community, both in terms of health and safety and any environmental concerns associated with bird hazard management.

- Successful bird hazard management should decrease the number of birds and possibly the number of species in an area. There is a public interest in access to information that affects wildlife in a particular area.
 - Bird hazard management could result in birds being culled. There is a public interest in information that could result in such culling to be made available, in order to allow the public to scrutinise decisions regarding culling,
 - Allowing access to such information could result in more competitive and transparent tenders being submitted by companies in future procurement exercises.
72. In response to the Commissioner's letter of 27 October 2009 the Council accepted the factors in favour of disclosure he had identified, as listed in paragraph 73. However, the Council maintain the view that there is no public benefit in releasing the remaining withheld information contained within NWBC's tender submission. It stated that the public interest in respect of how wildlife and habitat will be managed at the Airport is satisfied by the information contained in CAP772 and knowing that the Airport is audited for compliance with CAP772 on an annual basis by the Civil Aviation Authority.

Public interest arguments in favour of maintaining the exemption

73. The Council has argued that disclosure of the withheld tender information, particularly the methodology, would prejudice NWBC's commercial interests because it would disadvantage NWBC in any future tender exercise. The Council has stated that airport wildlife and habitat management is a specialised and limited market and this is demonstrated by the fact that out of the 15 companies that expressed an interest in the contract, only 3 of the companies were able to meet the tender specification.
74. The Council does not believe it is in the public interest to cause prejudice to a company's commercial interest that could have the effect of reducing competition in the future, should that company find itself uncompetitive. The Council has provided the Commissioner with a statement from NWBC indicating that if any losses resulted from disclosure of the tender information, it would pursue the Council through the Courts for compensation.
75. The Council's view is that disclosure of information which tenderers submit in confidence would discourage companies from making detailed bids in the future. The Council believes that this would

seriously prejudice its own and NWBC positions in commercial negotiations with other companies in the future.

76. Both the Council and NWBC believe that the public interest lies in knowing that the airport is working to the standards laid down in CAP772. The airport was audited by the Civil Aviation Authority prior to its licence being granted in December 2008 and procedures for bird hazard management were included in the criteria considered prior to the granting of its licence.

Balance of the public interest arguments

77. The Commissioner is not persuaded by the argument that disclosure of the remaining withheld information in NWBC's tender submission would discourage companies from submitting such detailed bids in the future. It is in a company's interest to submit a full and detailed tender in any procurement exercise and he considers it is unlikely that disclosure would discourage companies from submitted such detailed bids in the future.
78. In this particular case the Commissioner considers that the withheld information relating to financial evaluation and cost savings contained within NWBC's tender submissions is not detailed enough to enable a competitor, or any other party, to determine how NWBC calculates its profit margins. However, the Commissioner considers that disclosure would allow NWBC's competitors access to commercially sensitive information, which would adversely affect its ability to compete for other contracts in the open market. There is a strong public interest in maintaining a fair and competitive business environment. However, the Commissioner considers it fair to assume that commercial organisations competing in the same industry would, in order that they could remain competitive, have some indication of the rates that would be charged for a particular task.
79. The Commissioner has taken into account the fact that NWBC is likely to tender for similar work with other public and private organisations at other airports. Further, the Commissioner has been advised by the Council that at the time of this tender exercise, NWBC was aware of a forthcoming contract at another airport for similar services. He is also mindful of the comments from the Council that the detailed methodology information provided by NWBC was the chief reason that the company was awarded the contract.
80. The Commissioner is mindful of the fact that there will always be some inherent public interest in preserving confidentiality, but the Commissioner will be cautious about placing significant weight on this generic argument. The Commissioner has taken into account the

presumption in favour of disclosure as provided in regulation 12(2) of the EIR.

81. The Commissioner is of the view that that there is generally a strong public interest in public authorities being accountable for the decisions they make and the money they spend. The Commissioner also acknowledges that the public interest has been satisfied to a certain degree in knowing that the Airport is working to the standards set out in CAP 772, and following the recent audit by the Civil Aviation Authority, it was found to be fully compliant with CAP 772. Further, the Commissioner notes that there is a significant amount of information relating to wildlife and habitat management techniques contained within CAP 772.
82. The Commissioner notes that the request for information was made on 27 October 2008 and the contract was not formally awarded to NWBC until 1 December 2008. Although the Commissioner would normally expect the sensitivity of some of the information would be likely to diminish with the passage of time, he considers that the tender information submitted by NWBC would have been highly sensitive at the time of the complainant's request, as the tender had not been formally awarded at that stage. In addition, if one tender submission (out of all those received by the Council) was to be made public then that tenderer would be put at a significant disadvantage in future similar tender exercises due to the limited and specialised nature of the market.
83. In reaching a decision in respect of where the public interest in this case lies, the Commissioner considers that the following factors are of particular significance:
 - The timing of the complainant's request,
 - The nature of the commercial and financial information contained in the withheld information, and
 - The specialised and limited market to which the tender relates.
84. For the reasons set out above, the Commissioner is of the view that the public interest in maintaining the exception outweighs the public interest in disclosing the financial and cost savings information and the methodology information. Therefore the Commissioner is satisfied that the Council correctly withheld this information in reliance on the exception under regulation 12(5)(e) of the EIR.

Procedural Requirements

Regulation 5

85. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
86. The Commissioner has concluded that the Council breached regulation 5(1) in relation to information which was originally withheld from the complainant which was subsequently disclosed following the Commissioner's investigation, and regulation 5(2) for failing to make this information available no later than 20 working days after the date of receipt of the original request.
87. As the Commissioner has concluded that some of the information requested was not exempt by virtue of regulation 12(5)(e), he considers that the Council breached regulation 5(1) in failing to make this information available on request, and regulation 5(2) for failing to make it available within 20 working days following receipt of the request.

Regulation 14

88. Regulation 14 of the EIR requires a public authority to inform a complainant in writing as soon as possible and no later than 20 working days from the date of the requests if it is refusing to supply the information requested. It is also obliged to specify the reasons for not disclosing the information, state the regulation that applies and the matters that it considered in reaching its decision with respect to the public interest test. The authority must also tell the applicant that they can make representations (and appeal the decision) to the authority and that they ultimately have a right to complain to the Commissioner.
89. The Council initially failed to consider the request under the EIR. As such, the Commissioner concludes that the Council breached regulations 14(1), 14(2) and 14(3) of the EIR for failing to issue a refusal notice no later than 20 working days after receipt of the request stating the exception being relied on and the matters considered in reaching its decision with respect to the public interest under regulation 12(1)(b).

The Decision

90. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The Council was entitled to rely on the exception at regulation 12(5)(e) in relation to the financial evaluation and cost savings and methodology information contained within NWBC's tender submission and the public interest in maintaining the exception outweighs the public interest in disclosing the information.
91. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The Council incorrectly relied on the exception at regulation 12(5)(e) in relation to all other withheld information contained in NWBC's tender submission.
 - The Council incorrectly relied on the exception at regulation 12(5)(e) in relation to the tender evaluation report.
 - The Council breached regulation 5(1) and 5(2) in relation to:
 - i. The information which was disclosed following the initial internal review on 4 March 2009, and
 - ii. The information which was disclosed following the Commissioner's intervention.
 - The Council breached regulation 14(1), 14(2) and 14(3) for failing to issue a proper refusal notice under the EIR within 20 working days.

Steps Required

92. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- To disclose the tender evaluation report and all the remaining withheld information contained within NWBC's tender submission with the exception of the information relating to financial evaluation and cost savings and methodology
93. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

94. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

95. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 27th day of May 2010

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

The Environmental Information Regulations 2004

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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) and (b) 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 elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;
“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

Regulation 5 - Duty to make available environmental information on request

Regulation 5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

Regulation 5(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 5(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

Regulation 5(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be

up to date, accurate and comparable, so far as the public authority reasonably believes.

Regulation 5(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 11 - Representation and reconsideration

Regulation 11(1) Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.

Regulation 11(2) Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.

Regulation 11(3) The public authority shall on receipt of the representations and free of charge –

- (a) consider them and any supporting evidence produced by the applicant; and
- (b) decide if it has complied with the requirement.

Regulation 11(4) A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.

Regulation 11(5) Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of –

- (a) the failure to comply;
- (b) the action the authority has decided to take to comply with the requirement; and
- (c) the period within which that action is to be taken.

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 12(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.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

Regulation 12(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) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

- (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Regulation 13 - Personal data

Regulation 13(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

Regulation 13(2) The first condition is –

- (a) in a case where the information falls within any paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –
 - (i) any of the data protection principles; or
 - (ii) section 10 of the Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(a) (which relates to manual data held by public authorities) were disregarded.

Regulation 13(3) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of the Act and, in all circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

Regulation 13(4) In determining whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

Regulation 13(5) For the purposes of this regulation a public authority may respond to a request by neither confirming nor denying whether such

information exists and is held by the public authority, whether or not it holds such information, to the extent that –

- (a) the giving to a member of the public of the confirmation or denial would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded; or
- (b) by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(a) of the Act.

Regulation 14 - Refusal to disclose information

Regulation 14(1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

Regulation 14(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

Regulation 14(3) The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13; and
- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).

Regulation 14(4) If the exception in regulation 12(4)(d) is specified in the refusal, the authority shall also specify, if known to the public authority, the name of any other public authority preparing the information and the estimated time in which the information will be finished or completed.

Regulation 14(5) The refusal shall inform the applicant –

- (a) that he may make representations to the public authority under regulation 11; and
- (b) of the enforcement and appeal provisions of the Act applied by regulation 18.