

# Decision Notice

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## Decision 027/2019: Mr M and Scottish Borders Council

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### Recycling contract and framework prices

Reference No: 201801560

Decision Date: 4 March 2019



Scottish Information  
Commissioner

## Summary

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The Council was asked for a range of information about a recycling contract.

The Council disclosed some information and withheld the remaining information, arguing that disclosure would cause substantial harm to commercial confidentiality.

The Commissioner investigated and found that the Council had partially failed to comply with the EIRs in responding to the request. He concluded that the Council did not hold information for some parts of the request, and the remaining information was excepted from disclosure.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (paragraphs (a), (b) and (c) of definition of “environmental information”); 5(1) and (2) (Duty to make environmental information available on request); 10(1), (2) and (5)(e) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 15 August 2018, Mr M made a request for information to Scottish Borders Council (the Council). The request read as follows:
  - (i) *J&B Recycling (J&B) was first awarded the DMR (Dry Mixed Recycling) contract by the Council/New Earth Solutions, I believe sometime around 2009/10. Why was the J&B contract not the subject of a fresh procurement exercise in 2015 when the over-arching deal between [the Council] and [New Earth Solutions] collapsed and was abandoned in February 2015? Please supply any reports/documents/ correspondence showing steps taken by [the Council] at that time (2015) to ensure best value would be achieved by continuing the J&B Recycling deal.*
  - (ii) *Please provide copies of all correspondence relevant to the awarding of the J&B contract on occasions subsequent to 2015, including briefing notes. The DMR briefing note provided to me in June was very heavily redacted making it impossible to interpret. I would request that as many of those [redactions] as possible are removed, particularly the price rise asked for by J&B during negotiations.*
  - (iii) *I was sent a copy of “Scotland Excel Framework Price” as part of [the Council’s] response to its own original FOI. When did this document date from and why was every single price redacted? Were any of the haulage prices in that document lower than J&B’s price?*
2. A fourth part of Mr M’s request is not considered in this decision notice.
3. On 13 September 2018, Mr M emailed the Council requesting a review of its failure to respond to his request.

4. The Council notified Mr M of the outcome of its review on 14 September 2018. It provided explanatory responses, disclosed some information and withheld the remainder under regulation 10(5)(e) of the EIRs (substantial prejudice to the confidentiality of commercial or industrial information).
5. On 18 September 2018, Mr M applied to the Commissioner for a decision in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications. Mr M considered that the Council held further information than it had disclosed. He considered that:
  - (i) the Council should hold information relating to its decision to continue with J&B despite the main contract being abandoned
  - (ii) the Council should also hold documentation relating to its decision to invoke the step-in clause with J&B; and
  - (iii) the briefing note and other documents disclosed to him in a redacted form were “worthless and incapable of interpretation.”

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr M made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 25 September 2018, the Council was notified in writing that Mr M had made a valid application. The Council was asked to send the Commissioner the information withheld from Mr M. The Council provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and answer specific questions, and to provide submissions on its reliance on the provisions of the EIRs it considered applicable to the information requested.
9. The Council provided its submissions on 1 November 2018. It confirmed that it was relying on regulation 10(5)(e) of the EIRs to withhold the remaining information.
10. The Council discussed with the Investigating Officer the background to the recycling contract, when certain actions were completed and what information was held at the date of the request. The Council confirmed that it did not hold any information falling within part (i) of the request, as the “best value analysis” it had undertaken was carried out after 2015.
11. The Council was asked to provide Mr M with further explanation of the contractual arrangements and further information which could help explain its response to him. On 29 November 2018, the Council provided Mr M with this information.

## Commissioner's analysis and findings

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12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both Mr M and the Council. He is satisfied that no matter of relevance has been overlooked.

### Application of the EIRs

13. The Commissioner is satisfied that the information covered by this request is environmental information, as defined in regulation 2(1) of the EIRs (paragraphs (a), (b) and (c) of the definition of "environmental information"). The information relates to a recycling contract.
14. Mr M has not disputed the Council's decision to handle the request under the EIRs and so the Commissioner will consider the information solely in terms of the EIRs in what follows.

### Information falling in scope

#### *The Council's submissions*

15. The Council explained that, after a procurement exercise for the Waste Management Services contract (including residual waste, garden waste and DMR), New Earth Solutions (NES) were awarded the contract on 15 April 2011. The contract included a clause which permitted NES to subcontract part or all of its obligations under the contract to a third party. NES decided to invoke this option and subcontracted the haulage and treatment element relating to DMR to J&B. When the overarching contract with NES was terminated, the Council decided to invoke its "step in" rights and took over the subcontract with J&B directly. At this time, the Council provided J&B with a formal notice and a novation agreement in respect of invoking its step in rights. No new procurement exercise was carried out: it was not necessary at this time, because the Council had exercised its step in rights.
16. The Council went on to explain that the subcontract with J&B was due to expire in March 2017. Before the end of the contract, the Council employed a consultant to carry out an options appraisal to determine the best method for going forward in respect of DMR. The consultants found that a short term extension of the contract with J&B provided best value for the Council. As a result of this recommendation, the Council published a Voluntary Ex Ante Transparency notice (VEAT notice) on 13 April 2017 on the public contract website to inform the market of its intention to extend the existing contract with J&B for a period of three years. Feedback from the publication of the VEAT notice identified other suppliers who could potentially provide the DMR service to the Council. As a result, the Council decided to extend the contract with J&B until the end of June 2018 only.
17. The Council submitted that, during the period of extension with J&B, it was in negotiations with another local authority as to whether it could be added to its DMR contract. These negotiations had not concluded when the contract extension with J&B expired at the end of June 2018. Therefore, the Council has continually extended its contract with J&B on a month to month basis.
18. The Council stated that no new procurement exercise took place at the time it invoked its right to "step in" in 2015, or when it thereafter extended the contract in 2017, and consequently it holds no information regarding a new procurement exercise.
19. The Council provided this explanation to Mr M on 29 November 2018.

*Part (i) of the request – the Commissioner’s findings*

20. In the first part of his request, Mr M asked for information about the steps taken by the Council in 2015 (“at that time”) to ensure best value would be achieved by continuing with J&B. The Council has explained that it did not conduct any such best value assessment in 2015. It conducted a best value assessment in 2017, which concluded that it would be preferable to continue with the contract with J&B.
21. The Council disclosed a redacted version of the 2017 best value assessment to Mr M in its review response.
22. Having taken all of the above into account, the Commissioner accepts that the Council did not hold any information falling within scope of part (i) of the request when it responded to Mr M’s request for review. He finds that the Council was incorrect to inform Mr M that information was withheld under regulation 10(5)(e) of the EIRs: this information related to the 2017 best value assessment, not to any assessment carried out in 2015.
23. The Commissioner concludes that the Council should have responded to the first part of Mr M’s request in terms of regulation 10(4)(a) of the EIRs.

*Part (ii) of the request – the Commissioner’s findings*

24. In part (ii) of his request, Mr M requested all correspondence relevant to the awarding of the J&B contract on occasions subsequent to 2015, including briefing notes.
25. As detailed above, the Council explained that, when it terminated the contract with NES in 2011, it invoked its step in rights and took over the subcontract with J&B directly. At this time, the Council provided J&B with a formal notice and a novation agreement in respect of invoking its step in rights. After considering options before the contract ended in 2017, the Council decided to extend the contract with J&B until the end of June 2018, following which it has extended the contract on a month by month basis.
26. Mr M’s request was for information regarding the “awarding” of the contract. However, the Commissioner considers that the awarding of a contract is different from extending a contract. The Commissioner is satisfied from the submissions and documents provided by the Council that it has not awarded another contract to J&B. As Mr M requested information about the awarding of the contract as opposed to its extension, the Commissioner has concluded that the Council does not hold any relevant information.
27. The Commissioner notes that, during the investigation of this application, the Council disclosed a range of documents to Mr M to support its explanation of the contractual process relating to the DMR. Although the Commissioner has concluded that the Council does not hold information covered by the request, he is satisfied that Mr M has received information which will allow insight into the Council’s contractual process relating to the DMR.
28. The Council informed Mr M in its review response that it was withholding information under regulation 10(5)(e) of the EIRs. As the Commissioner has found that the Council does not hold any information falling within scope of part (ii) of the request, he concludes that the Council incorrectly informed Mr M that it held the requested information. The Council should have responded in terms of regulation 10(4)(a) of the EIRs.

## **Regulation 10(5)(e): confidentiality of commercial or industrial information**

29. Regulation 10(5)(e) of the EIRs provides that a Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
30. In part (iii) of his request, Mr M asked for copy of the "Scotland Excel Framework Price". This comprised a small table showing pricing for DMR from five companies. The Council disclosed information including the company names and locations, and withheld the remainder, including prices, under regulation 10(5)(e).
31. As with all exceptions under regulation 10, a Scottish public authority applying this exception must interpret it in a restrictive way and apply a presumption in favour of disclosure (regulation 10(2)). Even where the exception applies, the information must be disclosed unless, in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception (regulation 10(1)(b)).
32. The Aarhus Convention: An Implementation Guide<sup>1</sup>, which offers guidance on the interpretation of the Convention from which the EIRs are derived, notes (at page 88) that the first test for considering this exception is whether national law expressly protects the confidentiality of the withheld information. The law must explicitly protect the type of information in question as commercial or industrial secrets. Secondly, the confidentiality must protect a "legitimate economic interest": this term is not defined in the Convention, but its meaning is considered further below.
33. Having taken this guidance into consideration, the Commissioner's view is that before regulation 10(5)(e) can be engaged, authorities must consider the following matters:
  - (i) Is the information commercial or industrial in nature?
  - (ii) Does a legally binding duty of confidence exist in relation to the information?
  - (iii) Is the information publicly available?
  - (iv) Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?

*Is the information commercial or industrial in nature?*

34. The Council submitted that the information withheld from the Scotland Excel Framework is commercially sensitive information.
35. The Commissioner notes that the Scotland Excel Framework pricing is used by Scottish councils when procuring services to recycle food waste on its own; to recycle garden waste on its own; and to recycle both food and garden waste together<sup>2</sup>. Scotland Excel describes itself as the centre of procurement expertise for the local government sector and is a non-profit shared service funded by Scotland's 32 local authorities<sup>3</sup>.

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<sup>1</sup> [http://www.unece.org/env/pp/implementation\\_guide.html](http://www.unece.org/env/pp/implementation_guide.html)

<sup>2</sup> [http://www.scotland-excel.org.uk/home/Resources/News-pages/News\\_84236.aspx](http://www.scotland-excel.org.uk/home/Resources/News-pages/News_84236.aspx)

<sup>3</sup> <http://www.scotland-excel.org.uk/home/Aboutus/About-us.aspx>

36. Having considered the withheld information, which relates to the pricing framework for DMR services from various suppliers, the Commissioner is satisfied that the withheld information is commercial in nature for the purposes of regulation 10(5)(e) of the EIRs.

*Does a legally binding duty of confidence exist?*

37. In terms of regulation 10(5)(e), confidentiality "provided by law" will include confidentiality imposed on any person under the common law duty of confidence, under a contractual obligation or by statute.
38. The Council explained that the information belongs to Scotland Excel and not the Council and it was not in a position to disclose this information. The Council explained that it has access to Scotland Excel's information by way of an arrangement with Scotland Excel and has an obligation under that arrangement to retain the confidentiality of such information.
39. The Council provided copies of documents to support its position that the information was confidential and should not be shared outwith the organisations which are members of Scotland Excel.
40. As in *Decision 033/2009: Mr Paul Drury and East Renfrewshire Council*<sup>4</sup>, the Commissioner does not accept that the existence of a confidentiality clause, in itself, mean that all information captured by such a clause should be, or will be, automatically considered confidential. To accept such a proposition would essentially give public authorities the ability to withhold such information under the EIRs, regardless of whether the information in question is actually confidential. The Commissioner is required to look behind the confidentiality clause and focus on the nature of any withheld information to determine whether the duty of confidence should stand.
41. In this case, having viewed the withheld information, and the circumstances in which the Council obtained it, the Commissioner is satisfied that there is no reasonable basis for treating it as other than confidential. In the circumstances, he is satisfied that a legally binding duty of confidence exists in respect of the withheld information.

*Would disclosure of the information cause, or be likely to cause, substantial harm to a legitimate economic interest?*

42. The term "legitimate economic interest" is not defined in the EIRs. In the Commissioner's view, the interest in question should be financial, commercial or otherwise "economic" in nature. The prejudice to that interest must be substantial: in other words, it must be of real and demonstrable significance.

#### The Council's submissions

43. The Council submitted that disclosure of the Scotland Excel Framework prices would be detrimental to the contractors listed there, as all DMR contractors would then be aware of the prices charged by those companies. As a result, those contractors may not bid when the Framework is up for renewal if they have concerns that their prices may be made public in the future, resulting in a loss of business and financial opportunities for those contractors. (The Council understands that the Scotland Excel Framework has recently expired and that a new procurement exercise is being carried out by Scotland Excel with a new Framework to be put in place in the near future.)

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<sup>4</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2009/200800429.aspx>

44. The pricing information from Scotland Excel was shared with the Council on the basis that the information would be kept confidential and not be released into the public domain. The withheld financial information was not publicly available at the time of Mr M's request for information, and is to date still not publicly available. The Council is required to comply with the confidentiality statement on Scotland Excel's website. It submitted that the financial information shared by Scotland Excel is not the type of financial information that DMR contractors would share with their competitors as it would allow competitors to undercut prices and disrupt fair tendering.
45. The Council noted that the Scotland Excel Framework is a live framework, actively used by over 32 local authorities. The Council considered that the time frame which is necessary to safeguard the commercial interests of both the local authorities and the contractors on the Framework will be for the period of (i) the Framework; (ii) the procurement exercise relating to any future Framework; and (iii) the subsequent Framework.

#### The Commissioner's view

46. The submissions received from both the Council and Mr M reflect the original position taken in this case, i.e. that a range of information was withheld under regulation 10(5)(e) of the EIRs. It is now clear that the only withheld information is the pricing information redacted from the Scotland Excel table. The Commissioner has taken the wider submissions into account in reaching his decision, but has focussed most closely on points which relate most directly to the withholding of the Scotland Excel pricing, which is the matter under consideration in this case.
47. In the Commissioner's view, disclosing the withheld information in response to Mr M's request would, or would be likely to, cause substantial harm to a legitimate economic interest (in this case, the economic interests of Scotland Excel and the contractors whose prices appear in the Framework).
48. The Commissioner accepts that disclosure of the information would allow significant insight into the pricing for DMR agreed by the contractors. In the Commissioner's view, this would allow competitors to have a commercial advantage and to undercut the contractors listed in the Scotland Excel Framework when tendering for other DMR contracts.
49. The Commissioner notes that Scotland Excel works in partnership with all 32 local authorities in Scotland. In relation to its transport and environment services<sup>5</sup>, Scotland Excel comments that the success of these frameworks can be measured by more than their considerable cost savings for councils and associate members. The framework also provide significant efficiencies to councils in the delivery of key services and support a range of social, economic and environmental benefits for communities.
50. In the Commissioner's view, disclosure of the DMR pricing from the Scotland Excel Framework held by the Council would negate the work undertaken by Scotland Excel in negotiating pricing with contractors and achieving cost savings for councils. The Commissioner recognises the challenges facing local authorities in complying with statutory requirements such as the Waste (Scotland) Regulations 2012<sup>6</sup> in the current economic environment.

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<sup>5</sup> <http://www.scotland-excel.org.uk/home/Howwehelp/Transport-and-environment.aspx>

<sup>6</sup> <http://www.legislation.gov.uk/ssi/2012/148/contents/made>

51. The Commissioner is therefore satisfied that the disclosure of the information, in response to Mr M's request, would, or would be likely to, cause substantial harm to a legitimate economic interest. Consequently, he is satisfied that the Council was entitled to apply the exception in regulation 10(5)(e) of the EIRs to the information withheld from the Scotland Excel Framework.

#### *Public interest test*

52. Having accepted that the exception in regulation 10(5)(e) applies to the withheld information, the Commissioner must consider the public interest test in regulation 10(1)(b) of the EIRs. This specifies that a Scottish public authority may only withhold information to which an exception applies where, in all the circumstances, the public interest in making the information available is outweighed by the public interest in maintaining the exception.

#### The Council's submissions

53. The Council considered that disclosure would be in the public interest to the extent that it would inform public debate and allow the public to better understand the Council's position and way of thinking on the matter of the DMR contract. Disclosure may demonstrate that the Council acted in the best interests of the people of the Scottish Borders and would help ensure transparency and accountability.
54. The Council considered it would be in the public interest to avoid harm to commercial interests, as identified above. It submitted that disclosure in the public interest would relate to "something which is of serious concern and benefit to the public" and something that is "in the interest of the public" not merely "of interest to the public".
55. The Council argued that, although the matter which the withheld information relates is of concern to the public, the disclosure of the information is not "in the interest of the public"; it is merely "of interest to the public". Therefore, the withheld information should not be disclosed and the Council should be entitled to refuse to make the information available under regulation 10(5)(e) of the EIRs.
56. It submitted that there is significant public interest in the Council maintaining confidentiality, especially where there is an expectation that the information will be held as confidential, as this will allow the free and frank exchange of information including commercially sensitive information between parties which will assist the Council in maintaining good working relationships with its partners and contractors and in obtaining Best Value.

#### Mr M's submissions

57. Mr M commented that the Council has an obligation to spend public funds appropriately. In his view, the continued extensions of a contract with no competitive tendering since 2011, coupled with the withholding of information relating to the commercial arrangements with J&B, does not demonstrate that the Council is obtaining best value for money or meeting its obligations in relation to the expenditure of public funds. He believed it cannot be right to go on extending a contract "of this magnitude" without testing the market.
58. Mr M argued that it was in the public interest to disclose the pricing information in the Scotland Excel Framework. He stated that information previously provided to him by the Council showed that J&B was demanding a price rise. In order to determine whether best value has been achieved, it was necessary to be able to compare J&B's price with that of other companies.

### The Commissioner's view

59. As in any case, the Commissioner must consider the circumstances as they existed at the time the Council issued its response to Mr M's requirement for review (on 14 September 2018).
60. The Commissioner acknowledges that there is always a general public interest in disclosing information which will improve transparency and accountability, particularly in relation to the expenditure of public funds. However, he accepts there is a public interest in ensuring that pricing agreed by a public body with the aim of achieving best value for all 32 local councils remains confidential. He accepts that disclosing such information would directly affect the work undertaken by Scotland Excel in relation to collaborative procurement and securing best value for Scottish public authorities.
61. The Commissioner has already concluded that disclosure of the withheld information would, or would be likely to, cause substantial harm to a legitimate economic interest. The Commissioner considers such harm would be contrary to the public interest. In this context, he finds the arguments for disclosure of the information in the public interest are less compelling.
62. The Commissioner has therefore concluded that, in all the circumstances of this case, the public interest in making the withheld information available is outweighed by that in maintaining the exception in regulation 10(5)(e) of the EIRs. He is therefore satisfied that the Council was entitled to withhold the information under regulation 10(5)(e) of the EIRs.

### **Timescales**

63. Mr M expressed dissatisfaction with the Council's failure to respond to his initial request.
64. Regulation 5(2)(a) of the EIRs gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
65. The Commissioner notes that the Council failed to provide Mr M with a response within this timescale and therefore failed to comply with regulation 5(2) of the EIRs in this regard. He also notes that the Council acknowledged this failure and apologised to Mr M in its review outcome of 14 September 2018.

## Decision

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The Commissioner finds that Scottish Borders Council (the Council) partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr M.

The Commissioner finds that the Council:

- was entitled to withhold information under the exception in regulation 10(5)(e) of the EIRs;
- wrongly relied on the exception in regulation 10(5)(e) for information which it did not hold (parts (i) and (ii) of the request); and
- failed to comply with regulation 5(2)(a) of the EIRs when responding to the request.

The Commissioner does not require the Council to take any further action in relation to these breaches.

## Appeal

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Should either Mr M or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Margaret Keyse**  
**Head of Enforcement**

**4 March 2019**

### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

(1) In these Regulations –

...

"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

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- (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 paragraph (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 paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

#### 5 Duty to make available environmental information on request

(1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

(2) The duty under paragraph (1)-

- (a) shall be complied with as soon as possible and in any event no later than 20 working days after the date of receipt of the request; and
- (b) is subject to regulations 6 to 12.

...

#### 10 Exceptions from duty to make environmental information available–

(1) A Scottish public authority may refuse a request to make environmental information available if-

- (a) there is an exception to disclosure under paragraphs (4) or (5); and

- (b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.
- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-
  - (a) interpret those paragraphs in a restrictive way; and
  - (b) apply a presumption in favour of disclosure.

...

- (5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

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

...

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