



**THE RIGHT TO INFORMATION COMMISSION
ACCRA**

AFR NO: RTIC/AFR/18/2021

**CENTRE FOR DEMOCRATIC EMPOWERMENT
ACCRA.**

APPLICANT

AND

**ELECTRICITY COMPANY OF GHANA
ACCRA**

RESPONDENT

**DECISION BY THE RIGHT TO INFORMATION COMMISSION IN RESPECT OF
APPLICATION FOR REVIEW FILED BY THE CENTRE FOR DEMOCRATIC
EMPOWERMENT (CDE) AGAINST REFUSAL TO RELEASE INFORMATION
REQUESTED BY THE CDE**

The Centre for Democratic Empowerment (CDE) ("The Applicant"), a not-for-profit research and advocacy think tank made an application for information from the Electricity Company of Ghana ("The Respondent"). The application was in exercise of the Applicant's rights under Article 21 (1) (f) of the 1992 Constitution of Ghana and Section 18 of the Right to Information Act, 2019 (Act 989). The Respondent failed and/or refused to release to the Applicant the information it requested. The Applicant therefore lodged an application for review with the Right to Information Commission ("The Commission") in a letter dated 12th October, 2021 and received by the Commission the same day. It is the application for review which forms the basis of this determination by the Commission.



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It was the complaint of the Applicant that in a letter dated 13th September, 2021, he requested from the Respondent via its Managing Director, the following pieces of information:

1. Photocopies of evaluation report on contracts awarded by ECG from 1st January 2020 to date.

The Respondent, in a letter dated 16th September, 2021 with reference number: DLS/2021/V02/009, responded to the Applicant's request giving the following reasons for its failure to provide the Applicant with the information requested:

- i. The application fails to show a satisfactory capacity for which you seek the information as required under section 18 of Act 989.
- ii. The information being sought would involve disclosure of third-party information provided in confidence and consequently lead to a breach of confidentiality and privacy.
- iii. The release of such information may also expose the business relations of the parties involved.
- iv. The request for information has not been limited in scope and would be excessive in volume.
- v. Request for information relating to evaluation of contracts by the Company are classified as opinions, advice and recommendations which are meant for the deliberative processes of ECG. A disclosure of such information shall undermine the deliberative processes as provided for under Section 14 of Act 989 and accordingly exempt from disclosure.

Aggrieved by the above decision of the Respondent, the Applicant wrote to the Commission for a review of the Respondent's decision. Thus, the Commission in a letter dated 22nd October, 2021 with reference number; RTIC/AFR/18/2021, wrote to the Respondent requesting for justification for the refusal to grant to the Applicant the information requested for. The Respondent replied to this request on 15th December, 2021, indicating that the Applicant had no capacity under section 18 of Act 989 and further indicated that the information being requested for pertained to internal



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working documents as well as the economic information of third parties which are exempt under Act 989. These are the words of the Respondent:

Determination made by ECG regarding the CDE Request

a. The information being requested by CDE was determined to fall under economic information about third parties who were doing business with ECG. Among the information excluded from disclosure is information which would reveal a trade secret, research, scientific, technical, commercial, financial or labour related information supplied in confidence if the disclosure of that information can reasonably be expected to (a) prejudice the competitive position of a person, a group of persons or an organisation; (b) adversely affect negotiations with a third party (Section 11 of Act 989).

b. ECG also determined that the information requested by CDE fell under section 13 of Act 989 on internal working information of a public institution. Section 13 of Act 989 provides that information is also exempt from disclosure where the disclosure of the information will reveal (a) an opinion, or an advice given, or (b) a recommendation, consultation or deliberation made to that public institution and is likely to undermine the deliberative process in that public institution. The Respondent went on to outline its justifications for refusing the Applicant access to the information he requested for in the following terms:

Justifications

Based on the determinations made above, it was concluded that:

a. the request by CDE was for access to economic information about third parties submitted to ECG in confidence for competitive commercial activities, the disclosure of which may reveal trade secrets, commercial and financial information of the third parties, prejudice the competitive position of persons or organisations and adversely affect negotiations with other third parties. The release of same without their consent may breach the contractual confidentiality undertakings of ECG. In the case of individual contractors, the request may result in the breach



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The Respondent responded to this request by sending to the Commission the information requested for and reiterating its previous stance in the following terms:

You may please note from the reports that as we have indicated in our previous correspondence, these reports are opinion, advice or recommendation given by the Tender Evaluation Committee set up by Management for its deliberative purposes.

We respectfully wish to reiterate our assessment of the request as being excessive, made with intent to annoy, harass, embarrass or cause discomfort to ECG and an abuse of the rights conferred by the Act. The applicant has also failed to show any capacity in relation to the information being requested.

We count on the fair assessment by Commission of the petition to avert unwarranted abuses of the purpose and intent of Act 989.

ISSUES

Upon the facts of the case, as given above, the Commission sets for its determination the following issues:

1. Whether or not the Applicant had to show the capacity in terms of their duty or role in relation to the information being sought?
2. Whether or not the information being sought is exempt information per Act 989?

ISSUE 1: CAPACITY OF THE APPLICANT

With reference to the letter dated 15th December, 2021 by the Respondent with reference number DLS/2021/V3/004, as stated above, Section 18 of Act 989 provides for the manner of procedure for access to information. The Respondent's argument was that the Applicant did not disclose its capacity in terms of its duty or role in relation to the information being sought.

For the avoidance of doubt, the Commission will reproduce section 18(1) of Act 989:

Section 18 (1) An application to access information held by a public institution shall



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of business or trade secrets of commercial value or confidential professional, or financial affairs and privacy.

b. CDE failed to provide the capacity under which the information was being requested as required by section 18 of Act 989. Whilst acknowledging that they are not obliged to provide reasons for the request, they failed to show the capacity in terms of their duty or role in relation to the information being sought.

c. The evaluation of contracts reports are internal working information containing opinions, advice and recommendations of the review committee meant for the deliberative process of ECG, a disclosure of the information shall undermine the deliberative processes as provided for under Section 13 of Act 989 on exemption to right to access.

d. It was therefore concluded that access to the information be refused as the request was deemed to be frivolous or vexatious as provided by section 27 of Act 989. The request was generally found to be one made with presumed intent to annoy, harass, embarrass or cause discomfort to ECG. It would therefore appear to be abuse of the rights conferred under Act 989 as the request was excessive in volume and excessively broad and varied in scope and without disclosing reasonable capacity of the applicant.

Upon receipt of the above-mentioned letter, the Commission wrote to the Respondent on 20th December, 2021 with reference number, RTIC/AFR/18/2021 requesting for the information described by the Respondent in its response as “information involving third-party information meant for deliberative processes.” This was to afford the Commission the opportunity to determine whether the said information was information exempt from disclosure. This request made by the Commission was pursuant to section 43 (2) of Act 989. The relevant section provides as follow:

“43 (2) (f) The Commission shall have the power to

(f) require the production of information to which access has been refused on the basis of an exemption for the purpose of deciding whether it is an information exempt from disclosure”.



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- (a) be made in writing to the public institution;*
- (b) contain sufficient description or particulars to enable the information to be identified;*
- (c) indicate the form and manner of access required;*
- (d) state the capacity of the applicant to the satisfaction of the information officer to whom the application is made, if the application is made on behalf of another person;*
- (e) state the name of the applicant, an address to which a communication or notice can be sent;*
- (f) provide identification of the applicant; and*
- (g) be signed by the applicant.*

From the Applicant's application to the Respondent, the Applicant signed the letter as Richard Danso, the Executive Secretary to the Centre for Democratic Empowerment and was specific about the information being requested for. Nowhere in the above provision does it require the Applicant to show its capacity in relation to its role or duty in respect of the information that is being sought. Section 18 of Act 989 should be applied with as little technicality as possible. Moreover, section 1 (3) of Act 989 reiterates this position by indicating that a person may apply for information without giving a reason for the application.

The Commission resolves the first issue set down for determination by finding that the Applicant showed capacity in its application. In fact, the language of Act 989 does not require an Applicant to show his capacity in relation to the duty or role in respect of the information being sought. Such a requirement being alien to the procedure for application for information under Act 989, same cannot be used as a basis against the Applicant herein by the Respondent.

EXAMINATION OF INFORMATION

As indicated above, pursuant to section 43 (2) (f) of Act 989, the Commission, in a letter dated 20th December, 2021, with reference number RTIC/AFR/18/2021, requested the Respondent to submit the information being sought for examination to determine whether or not it is exempt information. According to section 43 (2) (f), "The Commission shall have the power to require the



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production of information to which access has been refused on the basis of an exemption for the purpose of deciding whether it is an information exempt from disclosure.”

In compliance with the Commission’s request pursuant to the above provision, the Respondent responded in a letter dated 17th January, 2022 with reference number, DLS/2022/V.1/003, and received by the Commission on the 18th of January, 2022, submitting the information that was requested for by the Applicant.

The information submitted were evaluation reports of contracts awarded by the Respondent from 1st January 2020 to 31st December 2021. As stated in the opening stages of this decision, the Respondent has contended that the information requested by the Applicant is economic information of third parties which was submitted to the Respondent in confidence for competitive commercial activities and whose disclosure has the potential to reveal trade secrets, commercial and financial information of those third parties and prejudice their competitive standing and negotiations with other parties. The Respondent also contended that the information sought by the Applicant falls within the internal working information of the Respondent institution.

So, what is economic information of third parties, and what is internal working information? We find answers to these questions in *sections 11 (1) and 13 (1) of Act 989* respectively. Under section 11 (1),

11(1). Information which would reveal a trade secret, research, scientific, technical, commercial, financial or labour related information supplied in confidence is from disclosure if the disclosure of that information can reasonably be expected to

(a) prejudice the competitive position of a person, a group of persons or an organisation;

(b) adversely affect negotiations with a third party;

(c) result in undue loss or gain to a person, group, a financial institution or any other body; or



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(d) result in a public institution not being supplied with similar information where it is in the public interest that the similar information be supplied to the public.

Section 11 (1) of Act 989, as reproduced above, affords a two-prong test in determining whether a piece of information sought to be released amounts to economic information of third parties. First part of the test is, does any part of the information supplied by the Respondent for the examination of the Commission stand to reveal a trade secret, research, scientific, technical, commercial, financial or labour-related information supplied in confidence, as contended by the Respondent? Second part of the test is, can disclosure of the information be reasonably expected to either prejudice the competitive position of a person or entity; or adversely affect negotiations with a third party; or result in undue loss or gain to a person, group, financial institution or any other body; or result in a public institution not being supplied with similar information where it is in the public interest that the similar information be supplied to the public institution?

The documents submitted by the Respondent for the examination of the Commission basically comprised supplier's credit evaluation reports and tender evaluation reports (collectively contract evaluation reports). To be able to effectively apply the two-prong test outlined above by the Commission as per section 11 (1) of Act 989, there is the need to find out the contents of such supplier's credit and tender evaluation reports. The supplier's credit evaluation report contains the following information: executive summary, background, summary of the Respondent's request for quotations letter on the projects; summary of offer received; evaluation methodology; arithmetic checks and corrected offer prices; offer prices and ranking; recommendations; evaluation team; committee nomination memo; details of corrections; request for quotation letter; and engineer's estimate.

The tender evaluation report contains the following pieces of information: introduction, invitation, submission and opening of tenders; evaluation of tenders; evaluation procedures (responsiveness, correction of errors, determination of evaluated tender prices, pricing strategy); detailed analysis of tenders (Ms Highload Original Ltd, Ms Leak and Seal Engineering Services, Ms Enlargers Construction Ltd, Ms Perfect Mark Ventures); ranking (conclusion and recommendation);



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From the tax clearance certificate, a person or an opponent can gauge how well or bad a business or entity is doing, and this may give the person or opponent a competitive edge over the bidders who supplied those tax clearance certificates. With the manufacturers' authorisation, the approval for its disclosure even goes beyond the bidders. If the manufacturers turn out to be displeased about their letter written in favour of a bidder being disclosed, it might damage the business relations between the bidders and the manufacturers and a future request for such manufacturers' authorisation may be declined.

Let us now shift focus to the Respondent's second ground upon which it refused the Applicant's application for information. This is the argument couched around internal working information. According to **section 13 (1) of Act 989**,

13. (1) Information is exempt from disclosure where the disclosure of the information will reveal

(a) an opinion, or an advice given, or

(b) a recommendation, consultation or deliberation made

to the public institution and is likely to undermine the deliberative process in that institution.

The Commission agrees that the evaluation reports reveal opinion or advice or recommendation or deliberation made to the Respondent institution by tender evaluation committee or team. However, as the Commission stated in its decision in the case involving Evans Aziamor-Mensah of the Fourth Estate and Ghana Maritime Authority, once the contract evaluation and award process has already concluded, it means that the information pertaining to the evaluation reports has already been used for deliberations and decision already taken or policy adopted. That information can therefore not fall within what constitutes internal working information. These were the words of the Commission in the Ghana Maritime case: "The mention of deliberative process presupposes that the process should be ongoing, and the disclosure of the information



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approval to procure the works; sample invitation letters; list of tender evaluation team; list of invited tenderers; as-read out tender price; preliminary examination of responsiveness; schedule of corrected tender prices and their deviations from the engineer's estimate; ranking of corrected tenders; details of arithmetic errors; instructions to tenders.

Does any part of the pieces of information listed above reveal a trade secret, research, scientific, technical, commercial, financial or labour-related information supplied in confidence? The Commission does not think so. In the examination of the Commission, there is no part of the pieces of information listed above that in any way reveals a trade secret of a company or entity that bid for contract from the Respondent; same applies to research, scientific, technical, commercial, financial or labour-related information. In any case, things such as invitation for tenders as well as tender opening and the like are things never done in secret, but openly; likewise evaluation methodology, members of evaluation team, request for quotation are never kept secret. In fact, bidding for contract and all its concomitant processes are open exercises, which are never done in confidence, in line with the object of the Public Procurement Authority under section 2 of the Public Procurement Authority Act, 2003 (Act 663) as amended, which is partly to "...ensure that public procurement is carried out in a fair, transparent and non-discriminatory, environmentally and socially sustainable manner."

Having concluded that no part of the pieces of information listed above has the potential to reveal a trade secret, research, scientific, technical, financial or labour-related information supplied in confidence, we now move on to the second part of the two-prong test. Again, an examination of the information listed above does not show that the disclosure of any part of those pieces of information (save the Ghana Revenue Authority tax clearance certificates and the manufacturers' authorisation letters) would prejudice the competitive position of any of the companies or entities that bid for contract or adversely affect their negotiations with a third party or even cause them to suffer undue loss or give undue gain to anybody or institution against those bidders, or bereft the Respondent from being supplied with any similar pieces of information in future.



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should be capable of interfering with that process.” In simple terms, the deliberative process cannot be interfered with once it has ended already.

Based on the above analysis by the Commission, it hereby resolves the second issue set down for determination by holding that, with the exception of the Ghana Revenue Authority tax clearance certificates and the manufacturers’ authorisation letters, there is no part of the information requested by the Applicant and submitted to the Commission by the Respondent that is exempt information under Act 989.

Before the Commission brings its decision to a close, it would like to briefly comment on some observations made by the Respondent in respect of the Applicant’s application for information. Attached to the documents submitted to the Commission by the Respondent was a cover letter in which the Respondent, through its Director of Legal Services, opined as follows:

“We respectfully wish to reiterate our assessment of the request as being excessive, made with intent to annoy, harass, embarrass or cause discomfort to ECG and an abuse of the rights conferred by the Act.” Whereas the Commission is pleased with the Respondent’s prompt responses to the Commission’s letters, the Commission is of the view that an application for information should not be subjected to such descriptions as used by the Respondent for the Applicant’s request for information. The 1992 Constitution of Ghana has created and given a right of access to information to all persons. Act 989 has set the parameters and processes for the right of access to information. It is not in good taste for an application to be described as meant to annoy, harass and embarrass without any concrete proof of that. The Commission has seen and handled cases involving applications that asked for far more volumes of information than what was asked for by the Applicant herein. But those applications were not tagged as intended to annoy, harass and embarrass.

CONCLUSION

In the instant application under determination, the Commission does not find all the pieces of information requested by the Applicant, and which have been declined by the Respondent, as falling into the range of exempt information under Act 989. Under **Section 44 (C)** of the Act, the



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Commission shall take appropriate actions that are necessary to enable the Commission to resolve a complaint before it. **Section 43 (2) (c) of Act 989** also clothes the Commission with the power to *“make any determination as the Commission considers just and equitable including issuing recommendations or penalties in matters before the Commission.”* Moreover, according to section 71 (4) of Act 989, *“The Commission may issue directives that the Commission considers necessary for the enforcement of its decisions.”*

FINAL ORDERS

Proceeding on the strength of the power furnished under Sections 43(2) (c), 44 (c), and 71(4) of Act 989, the Commission hereby invokes its jurisdiction and makes the following specific orders directed at the Managing Director of the Respondent institution, Mr. Kwame Agyemang-Budu, who has to see to their compliance:

- a. *The following pieces of information are to be released to the Applicant not later than 14 days after receipt of this decision by the Commission: photocopies of evaluation reports of contracts awarded by the Respondent from 1st January, 2020 to 31st December, 2021. However, the GRA tax clearance certificates and Manufacturers’ authorisations should not be released to the Applicant; and*
- b. *The information ordered to be released to the Applicant under Paragraph (a) supra shall attract a reasonable charge of GH¢ 1.80 per sheet, where it is being released in hard copy. If the information is to be released in PDF format, a fee or charge of GH¢ 1.90 should be applied for each set of the information.*


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EXECUTIVE SECRETARY
25TH APRIL, 2021



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