

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

Date: 6 October 2011

Public Authority: Department for Regional Development (NI)
Address: Clarence Court
10-18 Adelaide Street
Belfast
BT2 8GB

Decision (including any steps ordered)

1. The complainant requested information from the Department for Regional Development (DRD) on the details of contracts for environmental maintenance in several geographical areas for 2010, including schedule of rates, calculations and scores achieved. DRD disclosed some information but withheld the remainder under section 43(2) of the FOIA.
2. The Information Commissioner's decision is that DRD should have handled the request under regulation 12(5)(e) of the Environmental Information Regulations 2004 but that DRD correctly withheld the information.
3. The Information Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 28 May 2010 the complainant wrote to the Department for Regional Development (DRD) and requested information in the following terms:

*"Term Contracts for environmental maintenance **2010**: EMN1, EMS1, EME2, EMW1.*

- 1) *The schedule of rates from the winning contractor for each of the four areas.*

- 2) *The schedule of rates from the contractor who was placed in the runners-up position in each of the four areas.*
 - 3) *The computation and multiples used on the schedule of rates to verify/calculate the lowest bid.*
 - 4) *The scores achieved in percentage terms from all the bids submitted for all areas in relation to the 75% ratio.*
 - 5) *The scores achieved in percentage terms from all the bids submitted for all areas in relation to the 25% quality ratio".*
5. DRD responded on 21 June 2010 and stated that it was withholding the following under section 43(2):
- 1) the schedule of rates from the winning contractor for each of the four areas;
 - 2) the schedule of rates from the contractor who was placed in the runners-up position in each of the four areas.

It was disclosing:

- 3) the computation and multiples used on the schedule of rates to verify/calculate the lowest bid.

It was partly disclosing and partly withholding the following under section 43(2):

- 4) the scores achieved in percentage terms from all the bids submitted for areas EMS1 and EMW1 in relation to the 75% ratio, but it was withholding the scores for areas EMN1 EME2;
 - 5) the scores achieved in percentage terms from all the bids submitted for all areas EMS1 and EMW1 in relation to the 25% quality ratio but it was withholding scores or areas EMN1 EME2.
6. Following an internal review DRD wrote to the complainant, after a lengthy delay, on 17 February 2011. It stated that the refusal to provide the information under section 43(2) was upheld and provided additional detail of its arguments.

Scope of the case

7. On 13 January 2011 the complainant contacted the Information Commissioner to complain that an internal review had not been completed. Subsequently on 2 March 2011, after receiving the outcome of the internal review on 17 February 2011, the complainant contacted

the Information Commissioner to complain about the way her request for information had been handled.

8. The complainant told the Information Commissioner that she disagreed that the disclosure of withheld information would prejudice the commercial interests of any person. She told the Information Commissioner that she could not see how the disclosure of the information would impact negatively on any of the winning operators as at the time of the request the contracts had been awarded.
9. During the course of his investigation, and after having inspected the information, the Information Commissioner determined that DRD had considered the request under the incorrect access regime.
10. During the course of his investigation, DRD agreed to disclose the information relating to 'scores' as requested in parts four and five of the request.
11. The scope of the Information Commissioner's investigation was therefore only to consider the handling of the request for 'rates' information in parts one and two of the request, and under the Environmental Information Regulations 2004.

Reasons for decision

12. The withheld information in this case forms part of, and relates to contracts, and bids for contracts for the supply of contract services for environmental maintenance such as grass cutting in various different geographical areas in Northern Ireland.
13. The complainant asked for the schedule of rates for the winning and runner up contractors on environmental maintenance activities such as grass cutting, weed control and gully cleaning. The Information Commissioner understands that the contractor information can be defined under regulation 2(1)(c) as a measure or activity, in this case the rates on a contract, affecting or likely to affect the state of the elements as defined under regulation 2(1)(a), in this case the landscape.
14. The Information Commissioner having inspected the withheld information is satisfied that it is clear that it is environmental information for the purposes of the Environmental Information Regulations 2004 (EIR). He has made this determination as the information can be defined as an administrative measure likely to affect an element of the environment, in this case a maintenance contract to maintain the landscape.

15. Having concluded that the information is environmental the Information Commissioner finds that DRD should have considered the request under EIR not FOIA.
16. In withholding the information DRD relied on section 43(2) of FOIA, which is an exemption to protect the commercial interest of any person. As the Information Commissioner has considered that FOIA is the incorrect access regime he has considered the equivalent exception under EIR.
17. The Information Commissioner has therefore focussed on the exception provided in regulation 12(5)(e) of EIR, which provides that a public authority may refuse to disclose environmental information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information, and where such confidentiality is provided by law to protect a legitimate economic interest.
18. For the Information Commissioner to agree that regulation 12(5)(e) of the EIR applies, it must be demonstrated that:
 - a) the information is commercial or industrial in nature,
 - b) the information is subject to a duty of confidence provided by law;
 - c) the confidentiality is required to protect a legitimate economic interest; and
 - d) the confidentiality required to protect a legitimate economic interest would be adversely affected by disclosure.
19. Regulation 12(5)(e) of the EIR is also subject to the public interest test. In addition to demonstrating that the above bullet points are met for each document, the Council must also demonstrate that the public interest in maintaining this exception outweighs the public interest in disclosure.
20. Parts one and two of the request were for information on the schedule of rates for both the winning and runner up contractors, and which the Information Commissioner can broadly describe as monetary figures clearly associated with individual environmental maintenance contractors on various specific proposed functions such as weed control or grass cutting. The Information Commissioner is therefore satisfied that the information is commercial in nature.
21. The information was provided as part of a tendering process for various contracts. The rates information provided by the companies was provided, along with other information, in order that DRD could make comparisons with each of the bids in order to decide which company to

award a contract to. The Information Commissioner accepts that the detail of such bids would include information specific to the commercial operation of a company, particularly the financial and resource aspects in carrying out specific functions. Accordingly, the Information Commissioner accepts that there would be an expectation of commercial confidence provided in law for such information in a situation where competitors are bidding for the same contracts.

22. The Information Commissioner has considered whether confidentiality is required in order to protect a legitimate economic commercial interest. As already stated, the information in this case is the schedule of rates provided by successful and unsuccessful bidders for various contracts. The Information Commissioner has inspected the information which comprises cost figures for carrying out various activities. It is clear to the Information Commissioner that the pricing is quite specific to each bidder on each activity and differs considerably in price and detail. He is therefore satisfied that an obligation of confidence is required to protect the economic interests of the bidding companies.
23. DRD told the Information Commissioner that it was its view that disclosure of the information would prejudice the commercial interest of the contractors, as it believed that should those rates become known it would affect the ability of those contractors to effectively compete for other similar contracts. It told the Information Commissioner that such similar contracts came up on a regular basis. It also told the Information Commissioner that those monetary figures were provided by each contractor for each part of the work being bid for, for example £x per defined area of weed control or grass cutting.
24. Having considered the arguments put forward by DRD the Information Commissioner is satisfied that the information, being commercial in nature, does give rise to a duty of confidence, and that confidentiality of that information is required to protect legitimate economic interest as described. He is further satisfied, having inspected the information, that the disclosure of that information would adversely affect the economic interests of a number of companies.
25. The Information Commissioner, having inspected the withheld information, is satisfied that an adverse effect on the commercial interests of the companies would occur if the rates information were disclosed and accordingly that regulation 12(5)(e) is engaged.

Public interest arguments for disclosure

26. DRD argued that disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed participation by the public in the democratic process.

27. The Complainant argued that disclosure of the rates information could contribute to the public interest in how decisions to spend public money are made and contribute to an understanding of value for money.
28. The Information Commissioner notes that under the EIR there is a specific presumption in favour of disclosure. He accepts the arguments that disclosure of the specific information in this case could contribute to openness and transparency in how decisions to spend public money are made. This in turn can help to increase public understanding and participation in decisions taken by public authorities.
29. In addition to the general considerations, the Commissioner also appreciates that there is a strong public interest in being as transparent as possible in relation to any measures that would have a significant impact upon the environment or which concern public money.

Arguments against disclosure

30. In relation specifically to the withheld information, DRD argued that the disclosure of the rates information would not be in the public interest, as it could lead to competing firms being in an unfairly advantageous position when submitting tenders for similar environmental maintenance contracts across Northern Ireland. DRD told the Commissioner that those contracts do not fundamentally change as the requirements are quite specific to environmental maintenance such as 'grass cutting' in a given geographical area.
31. The Information Commissioner attributes significant weight to the argument that an unfair advantage could be gained by competing firms if the information on the rates provided by those companies as part of competitive bids for tender were to be disclosed. This would not be in the public interest if such competitions could not be fairly competed for.
32. The Information Commissioner also considered that the successful contractor is publicly known – given that the maintenance is being carried out – but that the details of runners-up are not. The Information Commissioner has considered, given the geographical area of Northern Ireland, whether it could be considered that the same contractors may continually compete for the same contracts in the various districts of Northern Ireland when contract renewals arise. If the competitive market in Northern Ireland is confined to a handful of competitors, and, if specific rates of competitors in previous tender bids were known, it would affect future bids for those similar contracts.
33. The Information Commissioner accepts that under regulation 12(5)(e) there are certain circumstances in which information can be withheld if it can be seen that disclosure would harm the commercial interests of a third party or the public authority itself. Therefore, there is a public

interest in ensuring that the commercial confidences are not prejudiced in circumstances where it would not be warranted and proportionate.

Balance of arguments

34. The Information Commissioner understands that there is a strong public interest in public authorities being as accountable as possible in relation to decisions that affect the environment and concern public money.
35. However, he does not accept that accountability arguments would at least balance the commercial interests of companies who are engaged in fair competition. Having inspected the specific information, he accepts DRD's arguments that the rates are so specific to individual contractors for specific areas of work that disclosure of that information would be disproportionate. Accordingly, he has determined that the public interest in withholding the information outweighs that in disclosing the information.

Procedural matters

36. Under regulation 11 of EIR an internal review must be completed within 40 working days of the receipt of request for review. The Information Commissioner notes that the complainant requested a review of the decision on 13 August 2010 but that a review was not conducted by DRD until 17 February 2011, which far exceeds the 40 working days stipulated. This is a breach of regulation 11(4).
37. The Information Commissioner reminds DRD of its obligations in this regard and also draws its attention to the Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004 (SI 2004 No. 3391).

Right of appeal

38. Either party has the right to appeal against this decision notice to the first-tier tribunal (information rights). Information about the appeals process may be obtained from:

First-tier tribunal (information rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

39. 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.
40. Any Notice of Appeal should be served on the tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jon Manners
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