

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 March 2017

Public Authority: Brighton and Hove City Council
Address: Kings House
Grand Avenue
Hove
BN3 2LS

Decision (including any steps ordered)

1. The complainant has asked Brighton and Hove City Council for copies of the presentations from the six applicants for the development of Hove's King Alfred Leisure Centre. The Council has confirmed that it does not hold copies of the presentations but it does hold the two Outline Solutions and the two Final Tenders. The Council has refused to provide this information to the complainant in reliance on Regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that Brighton and Hove City Council has properly applied Regulation 12(5)(e) of the EIR to the Outline Solutions and Final Tenders it holds.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 24 November 2015, the complainant wrote to Brighton and Hove City Council and requested information in the following terms:

"Please supply each presentation from all six applicants for the development of Hove's King Alfred Leisure Centre."

5. On 24 December the Council sent the complainant its response. The Council confirmed that it holds the information which he seeks and that it is refusing to disclose it in reliance on Regulation 12(5)(e) of the EIR.
6. The Council informed the complainant that the requested information is commercially confidential.
7. On 27 December the complainant wrote to the Council to ask for a review of its decision to withhold the information he seeks. The complainant asserted that, "The Council is obliged to inform partners in controversial projects that they may attract FOI enquiries and confidentiality cannot be guaranteed", and; "Publication of tender documents will help businesses submit future proposals."
8. The Council wrote to the complainant on 29 January 2016 to advise him of its final decision. The Council referred the complainant to the provisions of the Public Contract Regulations 2006 ("the PCR"), which provides a statutory prohibition on disclosure for information which is provided to a local authority by a contractor during a procurement exercise.
9. The Council made clear to the complainant that, at the time he made his request, the procurement process was still live and that a decision on the successful bidder was not made until 21 January 2016. Furthermore, the bids contain a variety of information about the transaction and the developers which is of significant commercial value to a number of parties.
10. The Council undertook a public interest exercise and determined that the balance of the public interest fell in favour of maintaining the duty of confidence owed to the developers.

Scope of the case

11. The complainant contacted the Commissioner on 29 January 2016 to complain about the way his request for information had been handled.
12. The has investigated whether the Council is entitled to rely on Regulation 12(5)(e) of the EIR in respect of the information it is withholding.

Reasons for decision

Background information

13. The Council has advised the Commissioner that it has broadly interpreted the complainant's request as being for copies of the final tender submissions from potential contractors in respect of the King Alfred Development. This is a project which concerns the delivery of a high quality sports and leisure facility and an enabling housing development.
14. The Council received six Pre-Qualification Questionnaire (PQQ) responses, following which it selected two bidders to bid for the contract. The selected bidders were required to use the competitive dialogue procedure under the Public Contracts Regulations 2006 (as amended).
15. Shortlisted bidders were invited to prepare and submit outline solutions to establish whether they were capable of developing proposals that had the potential to meet the Council's requirements. Meetings were then held to enable the bidders to refine their proposals and develop a detailed solution.
16. Following the meetings, bidders were invited to submit final their tenders. These included a presentation to an Elected Member Project Board which was cross-party and non-decision making.
17. The Council has informed the Commissioner that it does not hold copies of presentations but has provided the Commissioner with the two Outline Solutions and the two Final Tenders. The Council has confirmed that it relies on Regulation 12(5)(e) to withhold this information.
18. The Public Contracts Regulations (PCR) implement EU Directive 2004/18/EC which aims to promote a single European market and increase competition for public sector procurement. The PCR set out procedures that must be followed when awarding public sector contracts for the delivery of capital projects or for the provision of goods and services. This includes the requirement that contracts are advertised in the Official Journal of the European Union (OJEU) which provides contractors throughout Europe with an equal opportunity to tender. The PCR only applies to contracts over particular values

Regulation 12(5)(e) – Commercial confidentiality

19. Regulation 12(5)(e) of the EIR allows a public authority to refuse to disclose recorded information where the disclosure would adversely affect "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".
20. For the 12(5)(e) exception to be appropriately applied, the Commissioner considers that the following conditions need to be met:

- 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 economic interest?
 - Would the confidentiality be adversely affected by disclosure of the information?
21. For the withheld information to engage the exception provided by regulation 12(5)(e) it must relate to commercial activity or be industrial by its nature. The information must relate to the commercial activity of either the public authority concerned or to that of a third party.
 22. The Commissioner considers that the essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
 23. The Commissioner has examined the withheld information and she has also considered the representations made by the Council in respect of its role as a contracting authority under Regulation 3 of the Public Contract Regulations 2006 ("the PCR"). The Commissioner has no difficulty in finding that the withheld information is commercial in nature and that the first element of the exception is satisfied.
 24. For the second element to be met the information must be subject to confidentiality which is provided by law. This may include confidentiality imposed under a common law duty of confidence, a contractual obligation or be provided by statute.
 25. The Council considers that all of the withheld information is of a commercial nature as it is procurement information submitted by bidders prior to the award of the final contract. It asserts that, at the time the request was made, the procurement information was considered to be confidential.
 26. The Council has directed the Commissioner's attention to the provision of Regulation 43 of the PCR. This prohibits the Council from disclosing information which has been provided by an economic operator [a contractor] which has been designated as being confidential and where confidential information concerns technical or trade secrets and the confidential aspects of tenders.
 27. In this case, only one contractor was ultimately selected – Crest Nicholson. Crest Nicholson is an economic operator, which is defined by the PCR as a contractor, a supplier or a services provider. At the time the complainant's request was received not all of the precise terms of

the contract had been agreed and there were significant on-going negotiations.

28. The Council advised the Commissioner that the on-going negotiations concern issues which are far-reaching and that confidentiality is still relevant. It points to the fact that documents contain comments from Crest Nicholson's lawyers on the draft Heads of Terms and that these terms were still subject to contract. Likewise, the Method Statements are also considered as being commercially sensitive and confidential.
29. Due to the complexity of this tender and the on-going negotiations at the time of the complainant's request, there was still a need for confidentiality and for safeguarding the commercial interests of the bidders.
30. On the basis of the Council's representations and assurances, the Commissioner accepts that the withheld Outline Solutions and the two Final Tenders are subject to a duty of confidence. The Commissioner has decided that the second element of the exception is satisfied.
31. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
32. In consideration of the Council's submissions, the Commissioner is satisfied that the Outline Solutions and Final Tenders is information which is not otherwise accessible. She is content that the information contained in the withheld documents is not trivial in nature.
33. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*¹, Megarry J, suggested that the 'reasonable person' test may be a useful one. He explained:

"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence."
34. Accepting the 'reasonable person' test, together with the non-trivial nature of the withheld information and the very limited distribution of the withheld information, the Commissioner has concluded that the

¹ *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

Outline Solutions and the Final Tenders information has the necessary quality of confidence.

35. The Commissioner is also satisfied that the confidentiality owed to the bidders/contractor is necessary to protect their legitimate economic interests and that disclosure of the Outline Solutions and Final Tenders would adversely affect those interests.
36. In the Commissioner's view, on the balance of probabilities, the bidders/contractors interests 'would' be harmed by disclosure. In making this determination, she is assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that 'would' means 'more probably than not' and she notes the interpretation guide for the Aarhus Convention which gives the following guidance on legitimate economic interests:

"Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".

The Commissioner's conclusions

37. The Commissioner acknowledges that the withheld information contains information which is of commercial value. She considers that disclosure of the Outline Solutions and Final Tenders would adversely affect the Council's and bidders'/contractors' legitimate economic interests.
38. The Commissioner considers that disclosure of the withheld Outline Solutions and Final Tenders would provide third parties with information which neither the Council nor its bidders had conceived would be made public in the context of a competitive market. This is particularly so in consideration of the expectation the bidders and contractors would have in recognition of Regulation 43 of the PCR.
39. The Commissioner finds that disclosure of the withheld information would be of detriment to the commercial interest of both the Council and to those of its bidders and selected contractor.
40. The confidential nature of the information leads the Commissioner to conclude that the disclosure of the Outline Solutions and Final Tenders would adversely affect legitimate economic interests. She therefore finds that the exception provided by regulation 12(5)(e) is engaged.

The public interest

Arguments which favour disclosure of the minutes

41. Reliance on regulation 12(5)(e) is subject to consideration of the public interest.

42. The Commissioner will always give significant weight to the public interest where disclosure of information provides accountability and transparency for decisions taken by public authorities and where the decisions concern large amounts of public expenditure.
43. In this case disclosure of the Outline Solutions and two Final Tenders would promote transparency in respect of the King Alfred Leisure Centre Development and would allow the public to judge whether the Council was achieving value for money in respect of this prestigious development.
44. The Outline Solutions and Final Tenders information, should they be disclosed could promote public debate and allow the Council's council tax payers to greater understand the Council's decisions which affect them. The Council acknowledges that there is significant local interest in the King Alfred Leisure Centre Development.

Arguments which favour withholding the minutes

45. The Commissioner notes that the Council has put into the public domain the general principles of the bidding process. The question which now arises is whether disclosing the bids themselves would assist the public in its understanding of the bidding process or add to public debate so as to outweigh the Council's obligation of confidence.
46. In this case, the Council argues that, where it is engaged in negotiating or concluding an agreement, it is in the public's greater interest for it to do so without its status as a public authority having a significantly detrimental effect on its ability to achieve value for money.
47. Likewise it is in the public interest for companies who bid for public works to be able to complete on an equal footing with their competitors. These companies should not be disadvantaged by having their experience, costings or expertise made available for free to their competitors, by virtue of a disclosure under the FOIA.
48. The King Alfred Leisure Centre Development requires a significant expenditure of public money: The Council is the guardian of this money and it is charged with achieving best value. Should the withheld information have been disclosed at the time the complainant made his request, achieving best value is less likely to have been achieved.
49. All the parties involved need to be confident that they are engaged in a process which is truly confidential in order to provide commercial benefit to the Council and its constituents.

The Commissioner conclusions

50. The Commissioner has given weight to the arguments relating to the promotion of transparency and accountability of the Council through the disclosure of publicly held information. This is especially the case where large amounts of money are involved and where the expenditure concerns a prestigious development as in this case.
51. The Commissioner considers that accountability is partially achieved through the publication of the general principles of the bidding process.
52. Ultimately the Commissioner has decided that the greatest weight has to be given to the confidential nature of the withheld information. She cannot dismiss the obvious need for the Council and its bidders and contractors to operate with a necessary degree of commercial confidentiality.
53. Recognition has to be given to the competitive market which operates in respect of reasonably large commercial developments.
54. In the Commissioner's opinion bidders and contractors would be reluctant to enter into a process which would expose their commercial operations to unfair scrutiny, particularly by their competitors. The long-term effect of the disclosure required by the complainant would be to weaken competition in a competitive market and thereby reduce the Council's ability to achieve best value for its local tax payers. It is for this reason that the Commissioner has decided that the Council is entitled to withhold the Outline Solutions and Final Tenders information in reliance of Regulation 12(5)(e).

Right of appeal

55. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

56. 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.
57. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF