

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

Date: 19 October 2017

Public Authority: Haringey Council
Address: 6th Floor
River Park House
225 High Road
Wood Green
London
N22 8HQ

Decision (including any steps ordered)

1. The complainant has requested information from Haringey Council relating to specific aspects of the tender process for the development of Hornsey Town Hall in respect of the preferred bidder. Haringey Council refused the request citing FOIA section 43 – commercial interests.
2. The Commissioner's decision is that Haringey Council had incorrectly considered the request under FOIA. Given the opportunity to consider its position under EIR, Haringey Council relied on regulation 12(5)(e) (commercial confidentiality). The Commissioner has considered the withheld information in the context of regulation 12(5)(e) EIR and considers that the exception is not engaged. The Commissioner further considers that in failing to provide an internal review within 40 working days of the request for a review, Haringey Council has breached regulation 11 of the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information of the description specified in the request.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 3 October 2016, the complainant wrote to Haringey Council and requested information in the following terms:

"a public announcement was made on Friday 30/09/16, that the tender process has now entered the preferred bidder stage. I would like to formally request the evidence of the preferred bidder's (Far East International) previous track record in delivering this particular type of community involvement, during a complex and high value development scheme. More specifically, it strikes me that the context of this project would suggest that the evidence should demonstrate their track record on previous projects where (Far East International) have previously successfully engaged with an ethnically and socially diverse local community to maintain significant aspects of a public building for the benefit and use of the community as an arts, cultural and community building.

Separately, I assume that evidence of a track record in heritage buildings, such as this one - a grade II listed buildings would be at least implied if not expressly required as part of the tender documents. Therefore I would like to also request evidence of their track record in this area.*

On 2 November 2016, the council responded and confirmed its interpretation of the request to be:

- *"Bidder's tender response relating to track record of engaging/involving the community.*
- *Bidder's tender response relating to track record of engaging with the community on an arts/community public building.*
- *Bidder's tender response relating to track record on working on heritage buildings"*

6. Haringey Council confirmed that it held information falling within the scope of the requests, specifically related to the track record provided by the preferred bidder within the Pre-Qualification Questionnaire (PQQ). It refused to disclose the information relying on section 43(2) – commercial interests.
7. On 2 November 2016, the complainant requested an internal review and disputed that the requested information was commercially sensitive. The complainant also explained that he considered that the public interest favoured disclosure which would allow the public to

know whether the preferred bidder has the requisite experience to deliver the scheme.

8. As a result of the Commissioner's intervention, Haringey Council issued a response to the internal review on 22 May 2017 and upheld its position in respect of section 43(2).
9. Having requested and received a submission from Haringey Council which included the withheld information, the Commissioner considered that the request should have been handled in accordance with the EIR not FOI.
10. The Commissioner wrote to Haringey Council on 1 August 2017 and advised that the EIR was the correct legislation in this case; she asked if Haringey Council wished to proceed on the basis of regulation 12(5)(e) or, if it wished to rely on a different exception, to notify her office. Following three reminders dated 15 August 2017, 4 September 2017 and 28 September 2017. Haringey Council notified the Commissioner, on 4 October 2017, that it wished to rely on regulation 12(5)(e) and provided a further submission.

Scope of the case

11. The complainant contacted the Commissioner on 28 April 2017 to complain about the way his request for information had been handled. Having initially complained about the lack of response to his request for an internal review, upon receipt of that review he specifically complained about the reliance on FOIA section 43 to refuse his request.
12. Haringey Council had identified three strands to the request
 - *"Bidder's tender response relating to track record of engaging/involving the community.*
 - *Bidder's tender response relating to track record of engaging with the community on an arts/community public building.*
 - *Bidder's tender response relating to track record on working on heritage buildings"*
13. Of the three points set out by Haringey Council in relation to the request for information, the PQQ addresses points 1 and 3 with Haringey Council advising that pre-qualification did not include a specific question about engaging with the community on an arts/community public building.
14. Having viewed the PQQ (which was provided for context but does not constitute withheld information), the Commissioner is satisfied that there is no specific question about community engagement in relation to

an arts/community public building. She also considers that this was not a specific request for information by the complainant; rather it was his expectation as to what the 'evidence' should demonstrate.

15. The Commissioner considers that the scope of the request is therefore to consider whether Haringey Council was entitled to rely on regulation 12(5)(e) EIR.

Reasons for decision

Appropriate Legislation

16. The Commissioner must first determine whether the request should be considered under the FOIA or the EIR.
17. Regulation 2 provides the definition of environmental information for the purposes of the EIR. It defines environmental information as:

"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;

18. The requested information relates to a regeneration project at Hornsey Town Hall. The Commissioner considers that this falls squarely within regulation 2(1)(c) of the EIR in that it relates to information about measures which impact on the elements of the environment and in this case, particularly the landscape. Accordingly the request falls to be dealt with under the EIR rather than the FOIA.

Regulation 12(5)(e) – commercial confidentiality

19. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such information is provided by law to protect a legitimate economic interest.
20. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e), a public authority must demonstrate that:
- the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
21. All four of the conditions must be satisfied for the exception to be engaged.
22. Regulation 12(2) EIR sets out that a public authority should apply a presumption in favour of disclosure when a request is received under EIR.

(i) Is the information commercial or industrial in nature?

23. This request concerns the Council's plans for the redevelopment of Hornsey Town Hall and elements of the tender from the preferred bidder, FEC. Haringey Council confirmed that at the time the request was received, the tendering process had been completed and FEC announced as the preferred bidder. Coplan Estates Ltd. is working in conjunction with FEC on the Hornsey Town Hall Project.
24. The withheld information, details of previous projects undertaken by Coplan Estates Ltd and details of its approach to community engagement, have both been provided as part of the tendering process for regeneration of Hornsey Town Hall.
25. The Commissioner is therefore satisfied that the information is of a commercial nature.

(ii) Is the information subject to confidentiality provided by law?

26. The Commissioner has gone on to consider whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
27. In order to consider this aspect, the Commissioner considers that it is necessary to confirm that the information is not trivial and is not in the public domain.
28. The Commissioner considers that confidence can be explicit or implied and may depend on the nature of the information itself, the relationship between the parties, and any previous standard practice regarding the status of similar information.
29. In terms of the common law of confidence, the Commissioner accepts that the information is not trivial given that it relates to the multi-million pound renovation of Hornsey Town Hall and she accepts that the information, provided as part of a tender process, is not in the public domain. Haringey Council has set out that there is an expectation that information provided as part of a tendering process will not be shared with third parties. The Commissioner therefore accepts that the information has the necessary quality of confidence.

(iii) Is the confidentiality provided to protect a legitimate economic interest?

30. The Commissioner considers that to meet this criteria, disclosure would have to adversely affect a legitimate economic interest of the person/body the confidentiality is designed to protect. It is not, in the Commissioner's view, sufficient that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure.
31. Haringey Council has set out its position that disclosure would prejudice both its and FEC's commercial interests because although the tendering process had been completed and the preferred bidder announced, the deal is not expected to be completed until early 2018. It has also explained that having consulted FEC regarding disclosure, its position is that the direct wording on all parts of its bid is commercially sensitive as it relates directly to its bidding style.
32. The Commissioner accepts in theory that information in relation to community engagement could be of use to competitors but does not accept that this is the case in relation to the information about previous projects.

33. Haringey Council has provided the Commissioner with a copy of the PQQ which is used to process an organisation's ability to deliver a project. It has explained that whilst the PQQ usually contains standard questions, in the case of the Hornsey Town Hall tender, it included more specific questions about the particular project.
34. Turning first to the 'working on heritage buildings' aspect of the case, Haringey Council has provided the Commissioner with a dossier of five projects undertaken by two senior members of Coplan Estates Ltd. and provided as part of its tender.
35. Having viewed the information, the Commissioner considers that it is factual information relating to previous projects; there is no sensitive information in the body of the dossier and the Commissioner considers the information to be anodyne.
36. The information has been provided in direct response to a question on the PQQ about experience in delivering projects which have required active community engagement; it follows that the same information could not be used by a competitor unless that competitor had in fact worked on any of the projects and in those circumstances the competitor would be entitled to cite his/her relevant experience. In terms of being representative of the bidder's bidding style, the Commissioner does not consider that this part of the withheld information reveals anything about the bidder's style but is more about experience and successful projects.
37. With regard to the request as it relates to community engagement, the Commissioner has considered the withheld information.
38. Although she accepts that in theory the information in relation to community engagement could be of use to competitors, she considers that the information is limited and is set in the context of an extensive tendering process. The Commissioner's position is that this element of the tendering process would be considered in addition to a wealth of other information provided by the bidder and accordingly she does not consider that disclosure of the withheld information in this case *would* adversely affect Coplan's/FEC's interests.
39. In providing a submission, Haringey Council has set out that its interests would also be affected. The Commissioner considers that the common law of confidence relates to the confider rather than the individual/body in receipt of the information. She considers therefore that the commercial interests of Haringey Council are not relevant to the application of regulation 12(5)(e).

40. Haringey Council has also set out that Hornsey Town Hall is listed as an 'asset of community value' and that a community group has exercised its right to bid. It also sets out the possibility of a further community bid.
41. As the Commissioner understands it, when an 'asset of community value' is put up for sale, a moratorium will be applied. This means that there is a six week interim period during which a community group may express interest in bidding. If a community group expresses such an interest, then a six month moratorium begins from when the asset is put up for sale. In other words the initial six week period is part of the total period of six months.
42. It appears that the Town Hall was put up for sale in late 2015 and the Commissioner notes that at the time of the request, 3 October 2016, the six month time limit would have expired. The Commissioner further notes that once a moratorium period has ended, another moratorium period cannot begin for a further 12 months. This, coupled with the statement that the bidding process had been completed and the preferred bidder announced, leads the Commissioner to consider that the reference to a community bid is not specifically relevant in terms of the application of regulation 12(5)(e) and has covered this point in the interests of completeness only.

Regulation 11 – representations and reconsiderations

43. Regulation 11(4) of the EIR states that a public authority shall carry out an internal review and notify the applicant of its findings within 40 working days of receipt.
44. The complainant requested an internal review of its decision on 2 November 2016 and a response was eventually issued on 22 May 2017 following the Commissioner's intervention.

Right of appeal

45. 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 7395836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF