

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 June 2018

Public Authority: Cambridgeshire County Council
Address: Shire Hall
Castle Hill
Cambridge CB3 0AP

Decision (including any steps ordered)

1. The complainant has requested rent values for facilities that are part of a Waste PFI contract. Cambridgeshire County Council withheld the information under the exception for commercial confidentiality – regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that Cambridgeshire County Council has failed to demonstrate that regulation 12(5)(e) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information to the complainant.
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.

Background

5. As part of its submissions, Cambridgeshire County Council (the "council") provided the Commissioner with background information relevant to the request.
6. The Cambridgeshire Waste PFI Project is a 28 year PFI contract from March 2008 between Cambridgeshire County Council and Amey. The contract covers the treatment and disposal of all municipal waste collected in the county with the exception of waste collected for recycling by District Councils.
7. The value of the Waste PFI contract is £731 million over 28 years. The Waste PFI project attracted £35 million of government funding to pay for a proportion of the infrastructure in the contract. Annual spend currently c. £32.4m – for the 2016/17 financial year.
8. The Mechanical Biological Treatment (MBT) Plant at Waterbeach is the centrepiece of the contract and treats the county's residual household waste to maximise diversion from landfill.
9. In addition to the provision of the MBT, the main elements of the contract are:
 - Landfill site at Waterbeach
 - The design and build of an In-Vessel Composting (IVC) facility at Waterbeach
 - Open window Composting facility at Waterbeach
 - The design and build of a Waste Transfer Station at March
 - The provision of a second Waste Transfer Station at Alconbury
10. The request asked for details of the rental amounts for facilities as part of the council's Waste PFI contract.

Request and response

11. On 30 August 2017, the complainant wrote to Cambridgeshire County Council (the "council") and requested information in the following terms:

"Could you please confirm the value of the rents that pass for the premises that are used to provide the services under the PFI contract. In particular what rents are paid for the Waterbeach MBT plant and Waterbeach Landfill facility."

12. The council responded on 20 September 2017. It stated that it was withholding the information under the exception for commercial confidentiality – regulation 12(5)(e) of the EIR.
13. Following an internal review the council wrote to the complainant on 11 December 2017. It stated that it was maintaining its position.

Scope of the case

14. On 12 December 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
15. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information under regulation 12(5)(e) of the EIR.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

16. The council withheld the rents for 12 months from July 2016 to June 2018 (the most recent quarter at the time of the original request) for the MBC IVC and Alconbury WTS sites, invoiced by Amey and paid by the council separately on a quarterly basis
17. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect “the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”.
18. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
 - 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?

Is the information commercial or industrial in nature?

19. The council has stated rental payments are commercial in nature as they are a record of the agreed price between the two parties for renting these facilities as part of the PFI contract. This directly relates to Amey's commercial activities in respect of the rent fees negotiated with the council and the income they subsequently receive.
20. Having considered the council's submissions and referred to the withheld information the Commissioner is satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

21. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
22. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
23. The council has stated that the information has the necessary quality of confidence as it is specific financial information relating to Amey's commercial activities. The council has confirmed that the information is not trivial in nature and there is a clear and legitimate expectation of confidentiality in respect of the information. The council referred the Commissioner to the relevant section of the Waste PFI contract which directs that rental amounts for the facilities should be considered to be "commercially sensitive" information.
24. Having considered the council's submissions the Commissioner is satisfied that the information is not trivial in nature, that it has not been shared publicly, and that it is subject to an obligation of confidence.

Is the confidentiality provided to protect a legitimate economic interest?

25. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
26. In the Commissioner's view it is not enough 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.

27. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

"Determine harm. 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".

28. In this case the council has confirmed that confidentiality is designed to protect its own legitimate economic interests and those of Amey.

The council's legitimate economic interests

29. The council has stated that rental values agreed for the facilities in question are relevant to future negotiations with other neighbours on the same shared site. It has argued that disclosing the specific payments would make the information available to these neighbours and compromise its bargaining position in future negotiations. The council has stated that this would have a "...direct and specific adverse effect as it would be highly pertinent to the negotiations and unsettle the commercial negotiations between the parties."
30. The Commissioner put to the council that the price of commercial rents is routinely available in the public domain, or it is at least possible for an average price to be ascertained by a straightforward comparative exercise. The council has counter-argued that the specific commercial rents in question are not in the public domain and, whilst an average price might be ascertained, that would be on the basis that an average price provide a summary figure which is "less sensitive" than knowing the precise figure paid for a specific premises. The council considers that an understanding of the exact values, rather than a general guide, would be directly applicable to negotiations for other shared site facilities.
31. The council confirmed to the Commissioner that, in respect of all 3 facilities (the IVC, MBT and Alconbury waste transfer station), Amey own the buildings during the period of the contract, with ownership of the MBT facility reverting to the council on the expiry of the contract. It further confirmed that, for all 3 facilities the lease is for 28 years and one day from and including the term commencement date of 17th March 2008.

32. Having considered the council's arguments and the relevant facts the Commissioner does not see how disclosure of the information would in any respect harm the council's legitimate economic interests. In relation to the sites themselves, it is implausible (given the fluidity of the rental market) that knowledge of the rental costs would hinder negotiations some 18 years hence.
33. In relation to associated sites and difficulties in negotiations in respect of these, the council has provided no details of these sites or explained how knowledge of the rental value of the sites referred to in the request would have a direct impact on its discussions with neighbours on the shared site.
34. In view of the above the Commissioner has concluded that the council has failed to demonstrate that disclosure would adversely affect its legitimate economic interests.

Amey's legitimate economic interests

35. In relation to Amey's legitimate economic interests the council confirmed that, in accordance with the code of practice issued under regulation 16 of the EIR¹, it consulted with Amey as to the potential effects of disclosing information. The Commissioner has had sight of the relevant correspondence and it satisfied that the submissions provided by the council reflect Amey's views.

36. The council has argued, after Amey, that

"...whilst the council's spending justifiably merits a level of transparency, it should not be forgotten that Amey operates its own private commercial waste business. Disclosing details relating to these rental payments could undermine their commercial operations by allowing their competitors an insight into their business model. A considerable amount can be gleaned through published information about the different facilities in respect of their size and nature and therefore competitors would be able interpret that information to inform potential future contract tender pricing and their own negotiations around rental costs for similar facilities.

¹ https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

37. Having considered the arguments provided and referred to the withheld information, the Commissioner is not convinced that disclosing details of rental payments made will provide much of an insight into Amey's business model, certainly not to the extent that it would allow competitors to benefit to Amey's detriment. The Commissioner is also struck by the terminology used in the council's submission, namely, that disclosure "...could undermine" Amey's commercial operations. As set out above, the threshold for engaging the exception requires it to be demonstrated that disclosure *would* adversely affect any legitimate economic interests.
38. Whilst the language used is instructive in itself, the Commissioner considers that the submissions provided do not make a sufficiently concrete link between the information and ascribed adverse effects. In the Commissioner's view, having knowledge of a specific, discrete amount of money paid for rental does not, in itself, result in the unravelling of Amey's commercial position or the disclosure of the mechanics of its business model.
39. The Commissioner is left with the impression that the council has attempted to apply the exception to withhold the information on a general basis without regard for the level of detail required in order to meet the requirements of the EIR. On the basis of the submissions received and, having referred to the withheld information, the Commissioner considers that it has not been shown that disclosure of the information would result in adverse effects to Amey's legitimate interests. As the exception is not engaged, she has not gone on to consider the public interest.

Right of appeal

40. 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

41. 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.
42. 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
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