

Environmental Information Regulations 2004 (EIR)

Decision notice

Public Authority: London Borough of Lambeth
Address: 1 Ivor House
Acre Lane
London
SW2 5BF

Decision (including any steps ordered)

1. The complainant has requested information regarding the procurement of a developer to rejuvenate Lambeth Council's Town Hall. It relied on regulation 12(5)(e) to withhold some requested information.
2. The Commissioner's decision is that London Borough of Lambeth has not persuaded her that the exception at regulation 12(5)(e) is engaged in respect of the withheld information
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information, save for the information that is personal data for the purposes of regulation 13.
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. The Your New Town Hall project sought to rejuvenate Lambeth's historic Town Hall, preserve its features and make it more open and accessible to residents. It sought also to reduce Lambeth Council's core office buildings from 14 to two, and save at least £4.5m a year¹.
6. The procurement exercise was undertaken under the terms of the Official Journal of the European Union² (OJEU) with the final stage inviting bids from Muse, Kajima, and United House. The final evaluation selected Muse after a trial and then final bid. Each submission included designs, costings, construction programme, detailed proposals, and a bespoke development agreement which had been negotiated with each bidder. The Muse bid was successful.

Request and response

7. On 14 June 2017 the complainant wrote to Lambeth Council ("the council") and requested information in the following terms:

Could you please provide the following documentation in relation to the procurement of the developer for the "Your New Town Hall Project":

1. Approved procurement strategy
 2. Approved tender scoring matrix
 3. Signed Tender opening pro-forma
 4. Tender submissions from the companies tendering for the work
 5. Tender report recommending the appointment of Muse
8. The council responded on 14 July 2017 and provided some information within the scope of the request. This included the approved procurement strategy and the approved tender scoring matrix but refused to provide the remainder. It cited the following exception as its basis for doing so:
 - Regulation 12 (5)(e) Confidentiality of commercial or industrial information

¹ <http://yournewtownhall.org/>

² <https://www.ojeu.eu/>

9. It explained to the complainant why it considered Regulation 12(5)(e) to be engaged by saying as follows;

“The Council will lose confidence of Economic Operators (contractors) if it were to disclose their confidential commercial information submitted under PCR rules and procedures. This would not only detriment the Council long term in losing the ability to enter competitive dialogue within a varied and competitive market, but could prejudice current and/or future negotiations the Council and/or these specific Economic Operators are in or about to enter into”.

10. The council provided an internal review on 31 October 2017 in which it maintained its original position.

Scope of the case

11. The complainant contacted the Commissioner 8 January 2018 to complain about the way his request for information had been handled.
12. The complainant has informed the Commissioner that he is not complaining about the council withholding information that also constitutes personal data for the purposes of regulation 12 (3).³
13. The Commissioner considers that the scope of this decision is whether the council correctly withheld the requested information by relying on Regulation 12(5)(e).
14. As part of her investigation the Commissioner wrote to the council on, amongst other dates, 30 May 2018. In that letter the Commissioner sought from the council its full and final submissions to support its reliance on Regulation 12(5)(e). The Commissioner wrote to the council again on 12 July and 29 August seeking the said full and final submissions. The council provided its substantive reply, to the Commissioner, on 6 September 2018. Accordingly the Commissioner notes the council's full and final submissions were in the making for in excess of 12 weeks

³ Complainant to Commissioner on 10th December 2018

Reasons for decision

15. Regulation 5(1) of EIR states that a public authority that holds environmental information shall make it available on request.
16. However, 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".
17. 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?
18. The council's full and final submissions (see paragraph 13 above) to the Commissioner's conditions are quoted and laid out fully below.
19. Is the information commercial or industrial in nature?

"Information relating to a procurement process is necessarily commercial in nature".
20. The information has to be subject to a duty of confidence provided by law;

"The Council considers that information provided to it in order for a company to bid for a contract has an implied duty of confidence due to the circumstances in which the information is provided. The information held is not trivial; not otherwise published and not shared within the Council beyond the necessary officers involved in the procurement process".
21. iii) The confidentiality has to be required to protect an economic interest; and iv) That economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of information.

"There are a number of areas of risk in disclosure of which the main ones are:

- Impact of future bids:- Bidders on future contracts will be aware that Lambeth may release their best commercial proposals publicly to the market in response to FOIs and may be more cautious resulting in bids of lesser quality being submitted to the Council.
 - Legal challenge. While the Council took a lot of time to be confident of the approach the risk of a legal challenge is reopened if full bids of each competitive bidder are released. The Council would expect to successfully defend any challenge but it would be a significant cost to do this both in resources and financially.
 - Selective reporting. The process was complex and the bid documents were extensive requiring an evaluation team from across the Council. Many aspects had to be balanced but the full bids provide a considerable amount of information that can be taken in isolation and presented in a misleading way. This is not an argument against transparency but an issue that would have to be carefully managed and would require significant additional work to respond to".
22. The Commissioner was given access to the withheld information. She notes that the withheld information pre-dates April 2013, this being the closing month for the submission of the tenders. The withheld information was therefore some four years old by the time of the information request. Accordingly what may have been confidential (if such it was) four years ago is less likely to be confidential four years later. Especially in the dynamic area of re-development with shifting costs and economic parameters. Some of the withheld information clearly consists of account information that would have been lodged with Companies House.
23. In addition to the above, the Commissioner takes cognisance that the council has not submitted in evidence submissions from the companies concerned that releasing withheld information would harm their legitimate economic interests.
24. Coupled with the above and having read all of the council's submissions (including what it said to the complainant) on why it believes the exception is engaged, the Commissioner has not been so persuaded. In particular the council has not persuaded her that economic interests would be adversely affected by disclosure of information. A mere assertion, lacking detail and evidence, that potential bidders on future contracts "may be cautious" when submitting future bids is not persuasive material that the exception is engaged.

25. Similarly a fear of legal challenge does not, in the Commissioner's view, give rise to an "economic interest" that qualifies for protection under the exception provided by regulation 12(5)(e). In any event the council is confident that it would "win" such legal challenges and, in such circumstances likely recover its legal costs.
26. The Commissioner not being persuaded by the council's submissions or her view of the withheld information, that Regulation 12(5)(e) is engaged, must therefore direct that the presumption that environmental information is to be released is to be applied. The Commissioner is satisfied that it would not be unfair or disproportionate to order disclosure without requesting further arguments. Therefore she directs that the withheld information be released to the complainant and the public.
27. The Commissioner stresses that public authorities must make their case why a relied upon exception is indeed engaged. The Commissioner cannot speculate or "fill in the gaps" for weak and ineffectual submissions.
28. The Commissioner notes that the withheld information also consists of the personal data of individuals other than of the complainant. In accordance with Regulation 12(3) this information is not to be disclosed to the complainant

Right of appeal

29. 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: GRC@hmcts.gsi.gov.uk

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

30. 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.
31. 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

[Name of signatory]

[Job title of signatory]

Information Commissioner's Office

Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF