

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

Date: 6 March 2019

Public Authority: Leicester City Council
Address: 115 Charles Street
Leicester
LE1 1FZ

Decision (including any steps ordered)

1. The complainant has requested information relating to a highways contract. Leicester City Council disclosed some of the information and withheld other information under the exemption for commercial interests – section 43(2) of the FOIA. During the Commissioner’s investigation the council reconsidered the request under the EIR and withheld the information under the exception for commercial confidentiality – regulation 12(5)(e).
2. The Commissioner’s decision is that Leicester City Council initially wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14 and that it failed to demonstrate that the exception in 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 withheld 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.

Request and response

5. On 18 September 2018 the complainant wrote to Leicester City Council (the "council") and requested information in the following terms:

"With regard to Balfour Beatty's contract whether or not this involved a joint venture (j/v):

1. Is (or was) it Balfour Beatty (or the j/v) that pursued Third Party Drivers for damage to Crown Property; street furniture, such as barriers, signs and the road surface

2. what is / was the basis of Balfour Beatty (or the j/v) charging you for damage to Crown Property

3. what is / was the basis of Balfour Beatty (or the j/v) their charging Third Parties for road works following damage to crown property I am seeking:

4. the means by which the schedule of charges is compiled and whether they differ at '2' and '3' above.

5. The rates charged to the council and TP's and make up during the contract

period for:

a. An Operative - road worker

b. a 2.5T van

c. 7 an 18T TM Rig

6. The last complete Balfour Beatty or j/v schedule of rates for operatives, plant and materials"

6. The council responded on 18 October 2018 and disclosed the information in parts 1-4 of the request. The council withheld the information in parts 5 and 6 of the request under the exemption for commercial interests – section 43(2) of the FOIA.
7. Following an internal review the council wrote to the complainant on 29 October 2018. It confirmed that it was maintaining its original position, also citing section 41 of the FOIA and regulation 12(5)(e) of the EIR as further grounds for withholding the information.

Scope of the case

8. On 29 October 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the requested information.
10. At the outset of the investigation, it occurred to the Commissioner that, given the nature of the request, it was likely that the information was environmental in nature and fell to be considered under the EIR. The Commissioner, therefore, directed the council to reconsider the request under the EIR in its entirety. The council did this and confirmed that it was relying on the exception in regulation 12(5)(e) to withhold the information in parts 5 and 6 of the request.

Reasons for decision

Is it Environmental Information?

11. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
12. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is as any information in any 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...'

13. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc. in question.
14. In this case the withheld information relates to contractual arrangements for roads and street lighting. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment or a measure designed to protect the environment. This is in accordance with the decision of the Information Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").
15. In view of this, the Commissioner has concluded that the council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council subsequently corrected this the Commissioner does not require the council to take any steps in this regard.

Regulation 14 – refusal to disclose information

16. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR.
17. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR as the council actually dealt with the request under FOIA.
18. Since the council has subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

Regulation 12(5)(e) – commercial confidentiality

19. The council withheld the information in parts 5 and 6 of the request, namely:

"5. The rates charged to the council and TP's and make up during the contract period for:

a. An Operative - road worker

b. a 2.5T van

c. 7 an 18T TM Rig

6. The last complete Balfour Beatty or j/v schedule of rates for operatives, plant and materials"

20. 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".

21. 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?

22. The Commissioner notes that the information relates to the provision of contract to a Balfour Beatty (the "contractor") for the provision of services to the council. The Commissioner is, therefore, satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

23. In relation to this element of the exception, the Commissioner has considered whether the information is subject to confidentiality provided

by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.

24. In relation to the common law duty of confidence, the Commissioner considers that the key issues to consider are whether the information has the necessary quality of confidence, which involves confirming that the information is not trivial and is not in the public domain, and whether the information was shared in circumstances creating an obligation of confidence.
25. The council has stated that it believes the information was imparted by the contractor in circumstances which gave rise to an obligation of confidence. It stated that it considered that the information is not trivial, is not available from other sources and that it has the necessary quality of confidence.
26. Having taken all of the above into consideration, the Commissioner is satisfied that the information is subject to confidentiality provided by law. Therefore, this element of the exception is satisfied.

Is the confidentiality provided to protect a legitimate economic interest?

27. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
28. The council has stated that it considers disclosure of the information would result in adverse effects to its own legitimate economic interests and to the interests of the contractor.
29. In relation to its own interests the council has argued that the contractor has indicated that, should the Commissioner order the information to be disclosed, there will be a real possibility that it would "appeal" such a decision and "instruct their Counsel". The council considers that disclosure would result in it committing an actionable breach of confidence and of it being subject to legal action which would have an "adverse effect on public funds and future procurement activities in the public sector".
30. The council has further argued that disclosure would "clearly compromise the Council's interests and could dissuade future bidders from tendering, resulting fewer bids and higher costs to the Council."
31. In relation to the argument that disclosure will leave it at a serious risk of legal action from the contractor which will have a prejudicial effect on the legitimate commercial interests of the council, the Commissioner notes that public authorities cannot contract out of their obligations

under the EIR through confidentiality clauses. She considers that legal action against the council may result in damage to its financial interests but it doesn't necessarily follow that damage would be caused to its commercial interests and the council has not explained how this would occur in this case.

32. In relation to the argument that potential providers will be discouraged from submitting detailed information in response to future tender processes, the Commissioner considers that, in practice, many companies may be prepared to accept greater public access to information about their business as a cost of doing business with the public sector. She considers that private companies will still need, and want, to bid for lucrative public sector contracts regardless of disclosure under the EIR or FOIA. She also considers that the council will still be able to stipulate what information it requires from businesses to assess their suitability for procurements.
33. In relation to the contractor's interests the Commissioner notes that the council, as recommended in the code of practice issued under regulation 16 of the EIR¹, consulted with the contractor and sought its views in relation to the request. The council provided the Commissioner with submissions it had received in this regard from the contractor.
34. Having viewed the contractor's submissions to the council, the Commissioner cannot see anything that relates to harm to the contractor's legitimate economic interests – the focus is on the putative harm disclosure would cause to the council's interests.
35. In relation to adverse effects to the contractor, the council submitted the following argument:

"The legitimate economic interests of the contractor could be adversely affected by the disclosure of the information as disclosure could provide information on the contractor's methods of business which may be of advantage to its direct competitors. If the pricing information is disclosed the contractor will lose its competitive advantage over its rivals when competing for other contracts of a similar nature."

¹ See part VII of the EIR code, published online here: https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf

36. The Commissioner does not consider that the arguments presented are sufficiently detailed to demonstrate the adverse effect. No precise examples have been provided of how the release of specific information would result in the effects claimed.
37. Whilst the Commissioner can follow the general chain of consequences identified, she does not consider that the council has linked such consequences to the specific withheld information or sufficiently explained the causal sequence.
38. The Commissioner considers that although the council appears to have consulted with the contractor in relation to this matter, the arguments relating to adverse effect are couched in generic terms and are not specifically linked to the withheld information in this case. She considers that there is little clarity around the specific nature of the alleged adverse effects which disclosure could cause and how this would be generated by the withheld information. This lack of clarity indicates that the council has struggled to meet the evidential and explanatory burden set by the exception.
39. As stated earlier, in order for the exception to be engaged it is necessary to demonstrate that disclosure of information would result in specific harm to a party or parties' economic interests and to explain the causal sequence. She considers that the council's arguments, whilst identifying possible effects, fails to make these effects sufficiently concrete and fails to identify the causal link with the withheld information. She considers that it is for public authorities to fully explain the relevant causes and effects.
40. The Commissioner considers that the council has been given sufficient opportunity to provide evidence and arguments in support of its position. When making her enquiries in this case, the Commissioner informed the council that her general approach is to allow one further opportunity for a public authority to submit thorough arguments in support of its position, with reference to the specific withheld information and the precise circumstances of the case, before recommending a decision.
41. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exceptions are engaged, the Commissioner is not obliged to generate arguments on a public authority's behalf or to provide the causal link. In this case, the Commissioner does not consider that sufficient arguments have been provided in relation to the third and fourth elements required in order for the exception to be engaged, namely, whether the confidentiality is protecting a legitimate economic interest, and the confidentiality would be adversely affected by disclosure.

42. The Commissioner has decided that the council has failed to demonstrate that the exception is engaged. As the exception is not engaged, the Commissioner has not gone on to consider the public interest.

Right of appeal

43. 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

44. 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.
45. 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

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