

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 January 2021

Public Authority: North Tyneside Metropolitan Borough Council
Address: Quadrant
The Silverlink North
Cobalt Business Park
North Tyneside
NE27 0BY

Decision (including any steps ordered)

1. The complainant has requested a copy of a contract between a company called Kier and its subcontractor. Kier contracted with the council to erect fences in an area, and its subcontractor contracted with Kier to carry out the necessary work. The complainant also requested details on the costs for part of the job. The council provided information on the overall costs of erecting the fences but said that it does not hold a copy of the contract between Kier and its subcontractor.
2. The Commissioner's decision is that, on a balance of probabilities, the council was correct to state that it has disclosed all of the information which it holds falling within the scope of the request to the complainant.
3. The Commissioner does not therefore require the council to take any steps.

Request and response

4. Following previous correspondence, on 16 May 2020, the complainant telephoned the council and requested information in the following terms:

"I am aware that the Local Authority has a contract with Kier and that Kier sub-contract some of their work.

I request a copy of the contract between Kier and the sub-contractor who undertook maintenance, replacement and/or construction of fences on the Millfield and Bywell Grove Estate area on behalf of the Local Authority.

I believe the sub-contractor may have been called Derless, however I can't be sure. I also believe the work started around October 2018 and ended in December 2018.

I would also like to know the cost of the fencing work on the Millfield and Bywell Grove Estate area for the same time period."

5. The council responded on 30 May 2020. It said:

"The contract is a direct contract awarded by Kier to the Sub-contractor, therefore, North Tyneside Council do not hold this information.

Payments for this work are made direct to Kier and will include their costs as well as sub contractor costs. The total spend for these estates was £67,655.95."

6. The complainant requested that the council review its decision. It provided the outcome of its internal review on 22 June 2020. It maintained its position that no information is held in respect of the first part of the request.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. He considers that the council holds further information in respect of its response to part 1 of the request.
9. The Commissioner considers therefore that the complaint is whether further information is held falling within the scope of the request for information.

Reasons for decision

Regulation 5(1)

10. Regulation 5(1) of the EIR provides that – “...a public authority that holds environmental information shall make it available on request.”
11. The council has not sought to apply exemptions to withhold the information from disclosure. It argues that it has provided the information which it holds to the complainant. It argues that the contract requested in part 1 of the complainant's request for information is a contract between Kier and its subcontractor Deerless, and that it does not therefore hold a copy of this document.
12. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
13. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
14. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority which is relevant to her determination.
15. During the course of her investigation, the Commissioner asked the council to describe the searches it carried out for information falling within the scope of the request, and the search terms used. She also asked other questions, as is her usual practice, relating to how it established whether it held further information within the scope of the request.

16. The Commissioner firstly asked the council to outline why it considered that the information was not held. It said that:

"The requested contract was exclusively between external parties Kier NT and Deerness. The Authority did not have access to this contract information at the time of the works, nor has a copy been provided following the end of the partnership with Kier NT. This is not Authority information."

17. It said that it had asked several former Kier NT officers, who have transferred back to the Authority whether this information was ever passed to or held by the council. The all confirmed that this type of information was not shared with the council by Kier. The council said that those asked included the Operations Manager for the maintenance contracts.
18. It said therefore that, as the information is not council information no searches were therefore necessary of its electronic records. The information was never held, and therefore would not be held on these systems.
19. It said that it does not know whether the contract would be held in an electronic, or a paper format. It said that *"At no time did the Authority have access to the requested information. We do not know if a copy of the contract (either paper or electronic) still exists, but the Authority would have no access to this information"*.
20. It said that the council's records management procedures are not relevant to this document as it is not, and has never, been held by the council.
21. It confirmed that it does hold detailed information on the costs associated with the project from both Deerless and Kier NT, however it had no business reason to obtain or hold a copy of the contract itself; the contract was between Kier NT and Deerless.
22. It also confirmed that it has no statutory reason or requirement to hold a copy of the information.

The Commissioner's conclusions

23. Having considered both the arguments of the council, and of the complainant in this instance, the Commissioner has seen no evidence of a requirement for the council to hold the relevant information in this case. It would also not have a business purpose for holding that information, other than potentially that the information might have been asked for during due diligence checks with Kier prior to the contract

being entered into. The Commissioner has seen no evidence suggesting that that was the case, however.

24. The council had a contract for the provision of services with Kier NT. It had no direct contract with Deerless. Keir NT subcontracted part, or all of the services it had been contracted to carry out to Deerless, and therefore the legal agreement was between these two parties, not the council. From her experience in other cases, the Commissioner notes that it is not unusual for services to be subcontracted out in such a manner.
25. Should Deerless have failed to carry out the work it had contracted to do, to the standard agreed, the resolution of that for the council would legally have been between Keir NT and Deerless.
26. The council's legal avenue for recompense for any breach of contract would have been to take legal action against Keir NT. It would have no legal route to make a breach of contract claim against Deerless directly as it did not have an agreed contract with it. Deerless had no contractually binding legal obligations with the council itself.
27. The Commissioner notes therefore that the council had no specific reason for holding a copy of the contract between Kier NT and Deerless as it had no specific rights or obligations relating to this contract.
28. Having considered the evidence and submissions of both parties, the Commissioner has therefore decided that, on a balance of probabilities, the council has provided all of the information which it holds to the complainant falling within the scope of his request for information.
29. She has therefore decided that, on a balance of probabilities, the council has complied with the requirements of Regulation 5(1).

Right of appeal

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

31. 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.
32. 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
Head of FoI Casework and Appeals
Information Commissioner's Office
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