

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 30 July 2024

Public Authority: East Suffolk Council
Address: East Suffolk House
Station Road
Melton
Woodbridge
IP12 1RT

Decision (including any steps ordered)

1. The complainant has requested copies of the contract specifications and service delivery plans that are held by East Suffolk Council (the council) in relation to its waste and recycling collection, ground maintenance and street cleansing.
2. The council confirmed to the complainant that it does not hold copies of the service delivery plans requested.
3. With regard to the contract specifications, the council confirmed that it considered this information to be exempt from disclosure under the exception at regulation 12(5)(e) (confidentiality of commercial information) of the EIR. The council also confirmed that it considered the public interest to favour withholding this information.
4. The Commissioner has decided that the council is not entitled to rely on regulation 12(5)(e) as its basis for withholding the information contained within the contract specification documents relevant to the request.
5. The Commissioner therefore requires the council to take the following step to ensure compliance with the legislation.
 - Release the information contained within the withheld contract specifications.
6. The council must take this step within 30 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

7. On 20 December 2023, the complainant wrote to the council and requested information in the following terms:

“Please could the following information be provided for the current Waste and Recycling Collection, Grounds Maintenance and Street Cleansing Services by East Suffolk Services Ltd (ESSL).

 - Copies of the Contract Specification (referred to as the Output Specification in the signed Contract) including any appendices and/or schedules.
 - Copies of the Service Delivery Plan provided by ESSL in response to the above Specification”.
8. On 15 January 2024, the council provided its response to the complainant, advising that it was refusing part 1 of the request (for copies of the contract specifications), under regulation 12(5)(e) of the EIR. The council confirmed that it had considered the public interest test, and had decided that this favoured withholding the information in this case.
9. The council went on to confirm to the complainant that it did not hold information relevant to part 2 of their request (copies of service delivery plans).
10. Following an internal review, the council advised the complainant that whilst it considered that its original response to the request was correct, it should have provided more information about its consideration of the public interest test. The council then went on to describe in greater detail why it considered the balance of the public interest to favour maintaining the exception at regulation 12(5)(e) in this case.

Scope of the case

11. The complainant has not contested the council's response to part 2 of the request, where it states that it does not hold copies of the service delivery plans.

12. The Commissioner will therefore decide whether the council is entitled to rely on regulation 12(5)(e) of the EIR when refusing to comply with part 1 of the complainant's request.

Reasons for decision

Regulation 12(5)(e) – confidentiality of commercial or industrial information

13. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information, if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
14. The construction of the exception effectively imposes a four-stage test and each condition as set out below must be satisfied for the exception to be engaged:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
15. If all four of the above criteria are found to be met, the public authority should then go on to consider the public interest test.

The complainant's position

16. The complainant has said that the contract between the council and ESSL was awarded under the Teckal exemption (which allows for an exemption from public procurement for the award of a contract by a public authority, provided certain requirements are met). Given this, the complainant argues that further transparency is warranted as the contract to deliver services on behalf of the council did not involve a competitive bidding process.
17. The complainant has said that the council should be transparent about the contract, as it is valued at over £12 million annually, is funded by the public, and has an impact on services. They also argue that disclosure of the information would not harm any party's commercial interests.

The council's position

18. The council has said that it considers that the withheld information meets all four of the criteria set out within paragraph 14 of this decision notice, and that therefore the exception at regulation 12(5)(e) is engaged.
19. The council claims that the information requested is commercial in nature as it relates to a commercial purchase of services by the council from a third party, ESSL.
20. The council has said that when considering if the information is subject to a confidentiality provided by law, it has had regard to the case of *Coco v A N Clark (Engineers) Limited* [1968] FSR 415, which provides a framework for assessing whether a disclosure of information would constitute a breach of confidence.
21. The council states that the obligation of confidence is clearly marked within the withheld documentation and that it is understood by both parties that the information is confidential.
22. The council goes on to say that the information requested is not trivial, or in the public domain, and relates to the provision of services to the council from a third party that are specific and significant to both the council and to ESSL.
23. The council has said that the information also relates to services that ESSL may provide to others, and that its disclosure could therefore affect ESSL's commercial negotiations and bargaining position. The council claims ESSL would then suffer a financial loss that could result in a claim made against the council for breach of confidence and improper disclosure.
24. The council has also argued in its submissions that disclosure could adversely affect its own ability to enter into contractual agreements in the future, as private companies would not be willing to enter into confidential agreements with the council, should sensitive commercial information be disclosed to the world at large, including their competitors.
25. The council goes on to say that there is a real risk that third party tenderers would not be operating from a level playing field, should confidential information be disclosed which is likely to be used within a bid. The council says that, for example, disclosure of the service specifications to a competitor could lead to that competitor claiming that they can deliver the same or over and above in order to win work without having the internal mechanisms (capacity, staffing, skills, etc) to deliver the services at the level and price outlined. The council has said

that this could lead to poor quality services or increased expenditure by the council in order to ensure that the service standards are still met.

26. The council also states that it would not get best value for money if competitors were able to access information which provided them with an unfair advantage in the marketplace.
27. The council argues that revealing the withheld information to the world at large would therefore have an adverse effect on the economic and financial interests of both the council and ESSL, as it would hamper future contract negotiations for both parties. It also says that the financial viability of ESSL is of vital interest to the council as an impact of a financial nature to ESSL will automatically impact the council as a shareholder of the company.

The Commissioner's analysis

28. The Commissioner understands that ESSL is wholly owned by the council, and operates as a Local Authority Trading Company (LATC). As well as providing services on behalf of their parent company, LATCs are free to operate as commercial companies and can therefore also compete in the wider marketplace for commercial contracts.
29. In July 2023, after a commercial contract between the council and Norse Group had come to an end, responsibility for the delivery of waste and recycling collections, street cleansing and ground maintenance services in East Suffolk was taken over by ESSL. As far as the Commissioner is aware, ESSL took over responsibility without the need for a competitive procurement exercise.
30. The Commissioner's guidance states that for information to be commercial in nature, it needs to relate to a commercial activity, either of the public authority or another party. It goes on to say that the essence of commerce is trade.
31. Where ESSL provides services on behalf of its parent company (the council), the finance, contractual arrangements, terms and conditions that are in place to provide these services will differ to that which would occur if an external company had been awarded the contract following a competitive procurement exercise.
32. However, the Commissioner acknowledges that ESSL has the ability to compete for commercial contracts in the open market, and when doing so, will provide services to non public bodies with the aim of making a profit. It may also be the case that in the future, the council will decide to put the award to deliver services currently provided by ESSL out to competitive tender.

33. The Commissioner therefore accepts that information that sets out details of the delivery of services by ESSL on behalf of the council could be considered to relate to a commercial activity, and therefore be commercial in nature.
34. The Commissioner has gone on to consider the content of the withheld information, which consists of service specification "contracts." Generally speaking, service specification documents will often consist of written guidelines that set out in detail the requirements and objectives, and the minimum standards expected, in the delivery of a service. It will also often include details about how the objectives and requirements will be managed and measured.
35. The Commissioner is aware that other councils have published service specification documents, some of which are very detailed, when inviting external bidders to compete for the contract to deliver similar services¹ to that currently provided by ESSL on behalf of the council. The Commissioner considers that it is not unreasonable to assume that this information is often made available so that bidders can submit bids that accurately reflect the full costs required to meet the objectives of a council in the delivery of a service.
36. The council states that there is an obligation of confidence clause within the contracts that both parties are bound by. However, the Commissioner has been unable to find such a clause within the withheld information provided for his consideration.
37. Furthermore, the withheld information does not appear to contain any unusual or unexpected clauses, and does not set out any unique terms or conditions that may be included within a commercial contract between parties for the provision of services. It also does not reveal how ESSL will meet the requirements and objectives, in terms of its own business resource and strategy.
38. The Commissioner acknowledges that, in the future, the council may decide to invite bids for new contracts from external companies for the services that are currently being provided by ESSL. In addition, ESSL may bid for contracts for work outside the council. It is therefore important that the council, and ESSL, are not placed at any unfair

¹ [Grounds Maintenance Contratac Specification.pdf \(stalbans.gov.uk\)](#)
[Street Cleansing Specification \(huntingdonshire.gov.uk\)](#)
[H&F waste collection and street collection specification \(lbhf.gov.uk\)](#)

disadvantage in the marketplace as a result of the council being a public authority, rather than a privately owned company, and on the basis that it is subject to FOIA, and the EIR.

39. The arguments presented by the council explain in detail how disclosure of information that is considered to be commercially sensitive and confidential within contracts could have an adverse effect on the commercial and economic interests of involved parties. However, whilst the Commissioner acknowledges that there are instances where revealing information contained within a contract or agreement between parties could reveal a company's unique bargaining position or selling points, he has found difficulty establishing how the disclosure of the withheld information would have such an effect in this particular case, or how it would place any party at a disadvantage in the competitive marketplace.
40. Furthermore, in the Commissioner's opinion, it would not be unreasonable for any public authority to make available details which set out how it intends to meet certain standards when providing services, and how it measures these standards to ensure that the public is getting the best services from the public purse.
41. Whilst fully accepting that openness and transparency about the council's activities has to be balanced with protecting the commercial interests of both the council and the third parties who deliver services on its behalf, the Commissioner has not been persuaded that the withheld information in this case is commercially sensitive, or would cause the harm described by the council, if disclosed.
42. The Commissioner has therefore decided that the council has not sufficiently demonstrated that the four criteria set out in paragraph 14 of this decision notice have been met in respect of the specific information that has been withheld in this case.
43. As a result, the Commissioner must find that regulation 12(5)(e) is not engaged in respect of the withheld information relevant to part 1 of the complainant's request.

Right of appeal

44. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

45. 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.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Suzanne McKay
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