Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: **28 September 2020**

Public Authority: **Wirral Metropolitan Borough Council**

Address: **Town Hall**
Brighton Street
Wallasey
Merseyside
CH44

Decision (including any steps ordered)

1. The complainant has requested information regarding survey work and costings for a proposed flood wall.

2. The Commissioner's decision is that Wirral Metropolitan Borough Council has correctly relied upon regulation 12(5)(e) to withhold the requested information. However, it failed to issue an adequate refusal notice within the statutory time periods and therefore breached regulation 14.

3. The Commissioner does not require any steps.

Request and response

4. On 24 February 2020, the complainant wrote to Wirral Council ('the council') and requested information in the following terms [numbering added for reference]:

> *"[1] By way of a supplementary request under FOI, please provide the full report and findings commissioned by the Council in respect of sub surface survey work carried out on the Council's behalf along the length of proposed Flood Wall site during a period of weeks in late Spring and early Summer 2019. I shall be grateful if the response also includes revised costings and revised construction methodology for the proposed scheme.*
>
> *[2] In addition, please provide details of the total number of* ***businesses*** *(as opposed to private individuals/residents) which have participated in all consultation activity regarding the proposed Flood Alleviation Scheme at South Parade, West Kirby."*

5. On 9 March 2020 the council responded as follows:

> [1] It refused to provide the requested information and cited the exemption at FOIA Section 43 (commercial interests).
> [2] It provided the requested information.

6. The complainant requested an internal review on 9 March 2020.

7. Following an internal review, the council wrote to the complainant on 26 March 2020. It revised its position on [1] to cite both Section 43 and Section 22 (information intended for future publication).

8. During the course of the investigation the council revised its position further to rely upon the EIR. It wrote to the complainant on 2 September 2020 to advise that it continued to withhold the information in scope of [1], but cited EIR 12(5)(e) (commercial confidentiality), as the basis for doing so.

Scope of the case

9. The complainant contacted the Commissioner on 8 April 2020 to complain about the way his request for information had been handled. Specifically, that the council has withheld the information in scope of [1] in its entirety.

10. The Commissioner considers that the scope of the case is to establish whether the council has correctly engaged regulation 12(5)(e) to withhold the requested information. Furthermore, she will consider whether the council incurred any procedural breaches in the handling of the request.

Reasons for decision

Regulation 12(5)(e)

11. 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;"*

12. The Commissioner's published guidance on this exception explains that in order for this exception to be applicable, there are a number of conditions that need to be met. These are:

- 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?

13. The information withheld under Regulation 12(5)(e) comprises:

- A document named the *Ground Investigation Report* ('the Report'), which is an interpretive report of geotechnical information, including of the site specific ground investigations commissioned by the council. It is written by an infrastructure consulting firm to interpret relevant information and aid the design of a proposed flood alleviation scheme.

- The consulting firm and the council undertook a public consultation to develop a number of design options for the proposed West Kirby Flood Wall in March 2019. A *technical note* named *Scheme Options Overview* ('the Options Overview') provides feasibility, costs and a high level appraisal comparison of a number of flood defence options proposed during the consultation.

Is the information commercial or industrial in nature?

14. For information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade. A commercial activity will generally involve the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information. In particular, information about a public authority's revenues or resources will not generally be commercial information, unless the particular income stream comes from a charge for goods or services.

15. The council explained that the purpose of the documents is to inform the detail design for the foundation of the floodwall, and to create a detail cost estimate for budgeting purposes. This would also include an assessment of cost contingency and risk associated with the work.

16. Furthermore, the council is at an early stage of the procurement process. The detailed design information will be shared with prospective suppliers once the bid process commences. It will be shared with all identified suppliers at the same time to ensure that no unfair advantage is given. The design information will remain confidential to those suppliers invited to tender for works during the procurement process.

17. During the competitive procurement process, the council will be assessing the different tenders submitted by suppliers in terms of their approach to the design, the risks, the costs, etc. and therefore the council's internal assessment, made for budgeting purposes would not be made available as this may influence the responses.

18. The Commissioner accepts that the information is commercial in nature, being fundamental to the budgeting and procurement processes for the proposed West Kirby Flood Wall development.

Is the information subject to confidentiality provided by law?

19. The Commissioner considers this to include to confidentiality imposed on any person by the common law duty of confidence, contractual obligation, or statute.

20. The council states that the flood alleviation scheme is a task that it performs in the public interest, that has a clear basis in law being defined in the Land Drainage Act 1991 and the Coast Protection Act 1949 as amended by the Flood & Water Management Act 2010.

21. Furthermore, it advised that funding for the scheme is partly provided by a grant which is awarded subject to the terms and conditions of the

Grant Memorandum 2016[1]. Section 26 of the Grant Memorandum requires the use of competitive tendering process.

22. The council states that the procurement policy in place for these works is in compliance with the council's Contract Procedure Rules[2].

23. The Commissioner is satisfied that the withheld information is not currently in the public domain, that it is required for a competitive tendering process and as such it is not trivial. Some of the information will be shared through the tendering process to selected suppliers. However, it will be imparted with a duty of confidence to be maintained by the suppliers that are selected to submit bids. The Options Overview also contains detailed information that will be used during the procurement process to evaluate tender proposals.

24. The Commissioner therefore finds that the withheld information satisfies the criteria to be understood as subject to confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

25. The council argues that the information is sensitive due to the early stage of the procurement exercise. The council have not yet chosen which suppliers they will invite to tender for construction works.

26. The procurement process is time limited. There will be a managed release of detail design information to potential suppliers, to ensure equal and fair competitive conditions for all that are invited to tender for works. As a fundamental feature of the process, the time constraint on the availability of the information is also required to protect the council's legitimate economic interest in comparing suppliers' tenders on equal terms in order to make a selection.

27. Providing access to detail cost estimates that were used by the council to determine the scheme budgets would provide suppliers with insight into the council's approach to risk and contingency. This is likely to

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1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/290027/LIT_7080_84163c.pdf

2 https://www.wirral.gov.uk/sites/default/files/all/business/tenders%20and%20contracts/CONTRACT%20PROCEDURE%20RULES.pdf

influence the supplier proposals, their risk appraisals and approach with a resulting impact on the costs submitted.

28. As described previously the scheme is partly funded by grant. This is made up from two distinct sources: Flood Defence Grant in Aid, provided by Defra, and administered by the Environment Agency; and also Local Levy provided by the Environment Agency's North West Regional Flood and Coastal Committee. The other funding for the scheme is defined as capital funding provided by Wirral Council. The application for the grants require that a competitive tendering process is held.

29. The council accepts that as the project progresses, the sensitivity of the information will diminish and further information will be able to be released. However, disclosure of the information at this stage would undermine and adversely impact the competitive procurement exercise.

30. The council confirmed that information regarding the proposed scheme will be made public at a later stage through the planning application process.

31. The Commissioner accepts the arguments that if suppliers are aware of the estimated costs and risk appraisals that the council have budgeted for then proposals may be limited to converge on those parameters.

32. The Commissioner also accepts that the managed disclosure of information is a necessary feature of a competitive procurement process aimed at achieving the best value. Furthermore, she notes that this is also required to obtain some of the funding for the project.

33. The complainant expressed concern that *"a cost effective and transparent procurement process cannot be completed if prospective contractors prepare tenders without knowledge of the Sea Wall foundation survey findings."* The Commissioner considers that this concern has been addressed in the above explanation of the competitive tending process and the managed release of information.

34. Having considered the council's arguments together with the withheld information, the Commissioner is satisfied that a disclosure of the information, at this time, would affect the council's commercial interests in identifying the best value supplier contract and jeopardise its ability to obtain funding for the project.

<u>Would the confidentiality be adversely affected by disclosure?</u>

35. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it is inevitable that this element will be satisfied. She acknowledges that disclosure of truly confidential information into the public domain would

inevitably harm the confidential nature of that information by making it publicly available and would also harm the legitimate economic interests that have already been identified.

36. The Commissioner has therefore concluded that the exception at Regulation 12(5)(e) is engaged in respect of the withheld information. She has therefore gone on to consider the balance of the public interest regarding the disclosure of the information.

The public interest

37. Regulation 12(5)(e) is subject to the public interest test. This means that even when the exception is engaged, public authorities have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure.

The public interest in the information being disclosed.

38. The complainant raised a number of public interest arguments for the information to be disclosed:

- The public need to be satisfied that funds are being allocated in a way that ensures value for money.
- The public need to understand more about the management and delivery of the project.
- There are concerns that the council has been inconsistent regarding release of information relating to the floodwall foundation survey and that costs are increasing. The complainant referenced a letter from a Councillor stating that £1m funding had been secured in relation to *"additional costs associated with the foundation".* As such, it is contended that, further public scrutiny is required with all relevant information in the public domain.
- The council is denying the information to other potential contractors who may submit tenders for the work. In doing so the council is compromising its ability to secure best value procurement since the results and findings of the survey work will be essential if prospective contractors are to submit meaningful tenders.

39. The council stated that it had considered the public interest argument for disclosure in allowing a greater degree of scrutiny over how public money is spent, while contributing to transparency over how decisions

have been reached. It stated that it is important that public authorities allow their decisions to be scrutinised by the public to ensure that funds are managed appropriately.

The public interest in the exception being maintained

40. The council advised that the public interest factors to withhold the information relate to the prejudicial impact that the disclosure would have on the commercial interests of any person (including the public authority itself). It would not, for example, be in the public interest to disclose information if that information was not common knowledge and would be likely to be used by competitors in a particular market to gain a competitive advantage.

41. The council advised that the information requested is commercially sensitive information and that disclosure would have an adverse impact on competitiveness during any future procurement processes held for the construction phase of the works, and therefore undermine value to the public:

- Disclosure of this information may be used to commercial advantage by a contractor bidding for the construction phase of the scheme as previously described. As a consequence, there would be an adverse impact on competitiveness within the market of supply of this particular service;

- Disclosure would undermine the public interest inherent in maintaining commercial confidences. As the procurement process is being undertaken for a current live project, disclosure of details are likely to undermine the council's approach to commercial confidences and competition.

The balance of the public interest

42. The Commissioner acknowledges that there is public interest in disclosure given that the resulting contracts for the infrastructure project will involve substantial public expenditure.

43. With regard to the public expenditure, there is clearly an interest in understanding the costs and ensuring that value for money is achieved and that project costs are managed. An element of which will be to confirm that the council has fully considered available options and suppliers in reaching its preferred choices.

44. The Commissioner also recognises there will be strong public interest in terms of wider environmental impacts such as how the scheme will address flooding issues, whether it will change local amenities or public spaces, and the impact on the local community during construction.

45. However, the Commissioner must also consider the council's position that disclosing the withheld information will have a prejudicial impact on the procurement process. Essentially, this would be releasing detail design and survey information in an uncontrolled manner which is contrary to the competitive tendering process; and by releasing other information regarding costs and commercial risks that may ultimately sway supplier responses and therefore result in reduced competitiveness.

46. The Commissioner recognises that disclosure of the withheld information, at this stage in the procurement process, could ultimately affect the council's bargaining position in the context of future negotiations for the construction works and the resulting supplier contracts. She concurs that this could result in a less optimum outcome for the council and therefore the public purse. She is also mindful that some of the funding for the project is dependent upon the council running a competitive tendering process and that it would not be in the public interest to jeopardise that funding.

47. The Commissioner considers that some of the public concerns raised will be addressed during the planning phase for the project when the council has advised that further information will be released. She recognises that the council is operating in accordance with its published procurement policy and councils contract procedure rules which should provide the public with some assurance that due process is being followed.

48. Having considered the above points, the Commissioner considers that the public interest rests in the exception in regulation 12(5)(e) being maintained for the withheld information.

Procedural matters

49. Regulation 5(1) of the EIR states that, subject to any exceptions, environmental information must be made available on request. Regulation 5(2) requires that the information be made available promptly, and in any event no later than 20 working days after the date of receipt of the request. Where no information is held, Regulation 14(2) requires a refusal notice to be issued within that time.

50. The request was made on 24 February 2020 and council's initial response was provided on 9 March 2020 which is within the time limit. The council revised its response on 26 March in the internal review, also being within the time limit. However during the course of the investigation, the council agreed that the information should be

considered under the EIR and communicated the changed response to the complainant on 2 September 2020.

51. The Commissioner therefore concludes that the council failed to issue an adequate refusal notice within the required time limit and thus breached Regulation 14(2) of the EIR.

52. No steps are required.

Right of appeal

53. 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

54. 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.

55. 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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