

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

Date: 7 January 2013

Public Authority: Hertfordshire County Council
Address: Information Governance Unit
County Hall
Pegs Lane
Hertford
Hertfordshire
SG13 8DE

Decision (including any steps ordered)

1. The complainant has requested a WRATE report (a Waste and Resources Assessment Tool for the Environment) submitted to Hertfordshire County Council by Veolia, a waste management company who submitted a bid to manage its waste management functions. The council claim that the information is subject to the exceptions in Regulation 12(5)(c) (intellectual property rights) and 12(5)(e) (commercial confidentiality).
2. The Commissioner's decision is that Hertfordshire County Council was not correct to apply Regulation 12(5)(e).
3. The Commissioner also considers that the council was not correct to apply Regulation 12(5)(c) (intellectual property rights). He considers that the information is subject to copyright protection however the harm is not caused to Veolia. The initial disclosure would not however infringe copyright as the Copyright, Designs and Patents Act 1988 (the CDPA) provides that acts authorised by statute, such as a disclosure under the EIR, are permitted. Losing control over the future use of the information would not therefore be caused by a loss of the copyright. Instead the specified harm is due to the disclosure of commercially sensitive information. The commercially sensitive information cannot be excluded under Regulation 12(5)(e) as it is information on emissions. Regulation 12(9) excludes the application of Regulation 12(5)(e) to information on emissions.

4. The Commissioner therefore requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information to the complainant.
5. 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

6. On 1 March 2012, the complainant wrote to Hertfordshire County Council and requested information in the following terms:

"I write to request an electronic copy of the following document: Veolia Environmental Services, (2011), ISFT: A WRATE assessment of the VES (UK) proposed solution, January 2011."
7. Following an internal review the council wrote to the complainant on 28 March 2012. It upheld its original decision that Regulations 12(5)(c) and 12(5)(e) apply.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The complainant wishes the Commissioner to decide whether the council was correct to withhold the WRATE report.

Reasons for decision

10. Regulation 12(5)(c) of the Regulations states that environmental information may be exempted where its disclosure would adversely affect intellectual property rights.
11. Regulation 12(5)(e) states that environmental information may be exempted where 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.

Regulation 12(5)(e)

12. Regulation 12(9) states that, "to the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs 12(5)(d) to (g)".
13. This means that where the information relates specifically to emissions the exemption in Regulation 12(5)(e) cannot be applied.
14. The Commissioner has previously decided that the Regulation does not discern between emissions which have occurred, and emissions which are forecasted.
15. The Commissioner notes the description of the purpose behind WRATE reports from the Veolia document 'New Barnfield Recycling and Energy Recovery Facility Climate Change Statement'. Paragraph 2.1 provides an explanation of WRATE Reports as:

2.1 Environmental Impacts

2.1.1 The Environment Agency has developed an assessment tool to compare the environmental impacts of different municipal waste management systems. The Waste and Resources Assessment Tool for the Environment (WRATE) software uses life cycle assessment to include the resources used, waste transportation and operation of a whole range of waste management processes with their environmental costs and benefits.

2.1.2 WRATE calculates the potential impacts arising from all processes in the waste management system including the collection, transportation, transfer, treatment, disposal and recycling of materials. The model takes account of the construction and operation of infrastructure and vehicles and offsets this burden against the avoided burdens associated with materials and energy recovery. All inputs of waste, energy and materials, and outputs of energy, process residues, materials and emissions are accounted for."

16. The Commissioner considers that the majority of the information held in the WRATE report actually deals with emissions. It provides data input by Veolia relating to the various factors outlined in its solution, including the efficiencies of the systems it proposes, and the report then outlines a lifetime analysis of the impact of the systems as regards intakes and emissions which the system will produce.
17. In reaching the above decision, the Commissioner has applied the plain, and natural meaning of the words 'emission' and 'emit'. In the Shorter

Oxford English dictionary these are as follows "something emitted; an emanation" and "to give off, send out from oneself or itself (something imponderable, as light, sound, scent, flames etc); discharge, exude" respectively. Generally he considers that emissions will be a by-product of another activity or process added (or potentially added) to the environment and over which any control is relinquished. In accordance with these definitions and the emphasis placed on the release of information relating to emission in the European Directive 2003/4/EC on public access to environmental information implemented by the EIR, he will give a broad interpretation to the phrase "information on emissions".

18. As mentioned above, information on emissions includes predicted or forecasted emissions. The Commissioner is satisfied information on emissions is sufficiently broad to encompass assumptions upon which such predictions are based as well as information that details the possible consequences of such emissions. Therefore the Commissioner has concluded that, in the circumstances of this case, all the information in sections 3 to 5 of the report is information directly on emissions. In view of this that information cannot be exempted under Regulation 12(5)(e) due to the application of Regulation 12(9). Therefore the Commissioner has considered this information further within his consideration of Regulation 12(5)(c) below.
19. The Commissioner considers that the only information which does not fall within the definition of emissions held within the report is the information held within parts 1 and 2 of the report. He has therefore only considered whether the information contained within sections 1 and 2 can be exempted under Regulation 12(5)(e).
20. Section 1 and 2 are introductory sections only, and do not provide any specific information on the systems to be employed within the proposal. The purpose behind the exception is to protect confidential commercial or industrial information which, if disclosed, would damage the legitimate economic interests of one of the parties concerned. The Commissioner notes that the council and Veolia argue that a disclosure would damage Veolia and its subcontractors' commercial or financial interests because it would provide details of its proposal and of the systems (and efficiencies of those systems) it is proposing to meet the needs of the council.
21. When considering if the exception is applicable the Commissioner must consider if the following criteria are met:
 - a. Is the information commercial or industrial?
 - b. Is the information subject to confidentiality provided by law?

- c. Is the confidentiality protecting a legitimate economic interest?
 - d. Would disclosure adversely affect the confidentiality?
22. (a). The information relates to the implementation of a new waste management system within the county. It was used as part of a tendering bid for the contract. As such the Commissioner considers that the information is commercial information.
23. Parts 1 and 2 do not however provide information on the systems and industrial machinery which is used to manage waste. The Commissioner is however satisfied that it remains commercial information as it still forms part of the 'selling' point of Veolia.
24. (b). The council argues that the duty of confidentiality required by the exception is "provided by law" under a contractual obligation. It has provided relevant sections of the contract between the parties which demonstrates the intention for the information to be held in confidence. The Commissioner is therefore satisfied that confidentiality is provided by law.
25. (c). The council has provided its arguments after consultation with Veolia over the issues it would face if it disclosed the information. The basis of its arguments is that a disclosure of the information would adversely affect the commercial interests of Veolia and its subcontractors by divulging information which would aid its competitors in formulating tender bids when bidding against Veolia and/or its subcontractors in the future.
26. It says that that information is not in the public domain, and that as the information forms part of its bidding strategy a disclosure would damage its commercial interests. It says that this bidding strategy is a unique solution which it considers provides it with an advantage over its other competitors. It says that information included within the report provides a statement of the capabilities and efficiencies of the system offered by Veolia and its subcontractors.
27. The Commissioner has considered this argument further. He recognises that the WRATE model provides an overview of the expected inputs and outputs of the system over its life. It therefore provides a clear understanding of the forecasted impact of choosing Veolia's bid.
28. Clearly it could be damaging Veolia's commercial interests if information is disclosed which Veolia uses to demonstrate superior or more effective systems to its competitors, and this is one of the factors via which it wins tender bids over its competitors.

29. The Commissioner recognises that the solution provided in the WRATE report will be unique to the circumstances of this particular area, and of the requirements of the council's tender. Although that is the case, enough information may be included which is transferable to other tenders to provide a working example of Veolia's strategy when bidding for the tender. However he has established that the majority of this information is included within the information on emissions which cannot be withheld under Regulation 12(5)(e). He therefore has only considered the application of this argument to sections 1 and 2 of the contract.
30. The Commissioner is also satisfied that as a means of presenting a competitive bid for a contract the WRATE Report is one of a number of factors which the contractor presents as part of its 'bidding strategy'.
31. The Commissioner also highlighted to the council that other authorities have published WRATE reports on their websites. The Commissioner asked the council what was different about Veolia's report that made it unable to be disclosed. The council suggested that WRATE reports can differ dependent upon what is being modelled. It suggested that in this case the information was commercially sensitive as it included details including guaranteed values which are not generally contained within reports. It also suggested that the report contained information which was the intellectual property of Veolia and its subcontractors and that other reports may not contain such commercially sensitive information. However having considered the WRATE reports of other authorities the Commissioner notes that the information held within these is fairly similar, including in some cases the input materials for incinerators and the values of efficiency created by the different processes involved. However a disclosure of parts 1 and 2 of the report would not present competitors with information on Veolia's strategies in tender bids, nor would it provide them with details of the systems and technical abilities of the systems proposed. This information is only contained within parts 3 to 5 which the Commissioner has decided cannot be exempted under Regulation 12(5)(e).
32. The Commissioner is therefore satisfied that a disclosure of parts 1 and 2 of the report would not adversely affect the legitimate economic interests of Veolia. In view of this conclusion it has not been necessary to consider part d) of the test referred to above.

Regulation 12(5)(c)

33. Regulation 12(5)(c) exempts information where its disclosure would adversely affect intellectual property rights.
34. The council stated that it considers that a number of intellectual property rights are attached to the information. It argues that Veolia's

solution was designed for the council using its knowledge and experience and that the solution it has proposed is based upon industrial processes that are trade secrets. It explained that a disclosure of the report would disclose details of Veolia's working methods. It further added that information such as the values input into the WRATE system is commercially sensitive and that it contains commercial and industrial information which is commercially sensitive to Veolia and its subcontractors. Further, it argued that if competitors were to be able to analyse this information its competitors would gain commercial advantage in gaining access to these trade secrets without the need to invest in the underlying experience and development.

35. The Commissioner also recognises that the WRATE report itself is likely to acquire copyright protection as an original literary document.
36. Regulation 12(9) does not apply to the application of Regulation 12(5)(c).
 - i) Trade secrets
37. The council argued that the system Veolia had designed to deal with the counties waste was innovative and designed specifically as a solution for the county. It argued that using its knowledge and experience, it had developed technical processes and systems which, when combined in this form provide it advantageous results. It said that this combination amounted to its 'trade secret'.
38. It further argued that if that information were to be disclosed then Veolia and its subcontractors would find it extremely difficult to protect their position in law. It stated that it would be difficult to establish whether its competitors had used the information to its own advantage, and costly and time consuming to protect its position in this way.
39. The Commissioner accepts that that is the case, and recognises that the information held within parts 3 -5 of the report may be commercially sensitive.
40. The Commissioner questions however whether Regulation 12(5)(c) is intended to encompass trade secrets or whether the correct exception for the consideration of such arguments is under Regulation 12(5)(e) or 12(5)(f).
41. The Commissioner considers that there are recognised intellectual property rights within the UK. These include, for instance copyright, database rights and patents. Further consideration on the specific intellectual property rights as applied to Regulation 12(5)(c) is available at http://www.ico.gov.uk/for_organisations/guidance_index/~media/docu

[ments/library/Environmental_info_reg/Detailed_specialist_guides/eir_intellectual_property_rights.ashx](#).

42. In general, recognised intellectual property rights are provided specific and identifiable rights of protection within the UK. Trade secrets, whilst recognised in English Law, are not provided with the clearly identifiable rights which, for instance, the award of a patent or a trade mark does.
43. The Intellectual Property Office website states that where trade secrets do not fall within one of the intellectual property rights (e.g. copyright, database rights, patents etc) then protection is afforded by the law of confidence and the use of non-disclosure agreements. A trade secret has no specific intellectual property protection of its own.
44. The Commissioner considers that as trade secrets have no specific intellectual property protection of their own Regulation 12(5)(e) or 12(5)(f) are the relevant exceptions to recognise and consider this rather than Regulation 12(5)(c). These regulations specifically relate to information which is subject to the laws of confidence. As stated, however, these are of limited use to the council and Veolia in this instance as information on emissions is specifically excluded from the scope of these exceptions by Regulation 12(9).
45. Although the council has not specifically claimed Regulation 12(5)(f) as the Commissioner has identified this as a possible exception he has commented briefly on the potential application of it to the information in the 'Other Matters' section below.
46. The Commissioner's decision is therefore that the council was not correct to apply Regulation 12(5)(c) to the information as regards the information being a 'trade secret'.

ii) Copyright

47. The Commissioner recognises that the completed report, as submitted to the council by Veolia may be subject to copyright protection as it is an original literary document. However copyright protection does not prevent the disclosure of information under the Act or the Regulations. An initial disclosure under the Act or the Regulations does not infringe copyright because the Copyright, Designs and Patents Act 1988 (the CDPA) provides that acts authorised by statute, such as a disclosure under the EIR, are permitted.
48. Copyright does however prevent the further use of the information where that use would be in breach of the copyright. If information which is subject to copyright is disclosed in response to a request, the copyright is maintained and individuals receiving that information are legally required to ensure that any use of that information does not

breach the owner's copyright. Copyright breaches are remedied via the courts.

49. To engage regulation 12(5)(c) the public authority must be able to demonstrate that an adverse effect would occur to their intellectual property rights. The First-tier Tribunal has found that this means that harm should flow from an infringement of the Intellectual Property right by a disclosure of the information.
50. The Commissioner notes that in this instance it would not be an infringement of their copyrighted information which would cause harm to the third parties. It would be the disclosure of the information it considers to be commercially sensitive; the innovative mix of processes, equipment and systems which produces Veolia's overall solution. However simply communicating potentially sensitive information to someone does not in itself engage the exemption. The harm that is envisaged is not caused by the council losing control over the future use of the document itself but because competitors would become aware of the mix of processes, systems and capabilities of Veolia's solution. As mentioned above this is caused by the initial disclosure which itself would not infringe copyright as the CDPA provides that acts authorised by statute, such as a disclosure under the EIR, are permitted.
51. In effect, the argument is not that competitors would copy Veolia's WRATE report but that they would use the information from the report to amend their own systems and processes to gain an advantage when submitting tenders in the future. It is however the WRATE report, as a literary work, which is protected by copyright, not the systems and mechanisms described within the document. Competitors would not breach copyright by copying the systems used, and as the initial disclosure by the council is specifically allowed under the CDPA that information would already be in the public domain.
52. The Commissioner is therefore satisfied that any copyright protection is not affected by the disclosure of the information under the Regulations.
53. The council was not therefore correct to apply Regulation 12(5)(c) to the information.

Other Matters

Regulation 12(5)(f)

54. The Commissioner notes that the council could potentially have chosen to apply Regulation 12(5)(f) to the information but did not do so. This regulation states that information may be exempt where a disclosure

would be of information which was provided voluntarily by a third party, and its disclosure would have an adverse effect upon the interests of the person providing the information.

55. The exception cannot be claimed if the authority has the legal ability to require the information concerned from the third party or person concerned. Given that the information was submitted as part of a tender the Commissioner is assuming that the council has no legal right to require the information from Veolia. The council did require that the bidding parties submitted a WRATE report as part of their tender, however this does not equate to it having the powers to legally require that information.
56. In any event the Commissioner is satisfied that the information held within parts 3 – 5 of the report could not have been withheld under 12(5)(f) because it constitutes information on emissions and therefore Regulation 12(9) would apply.
57. As in his analysis of Regulation 12(5)(e) above, he considers that the information held within parts 1 and 2 of the report is not commercially sensitive. Its disclosure would not therefore have an adverse effect upon the interests of Veolia.
58. The Commissioner is therefore satisfied that if the council were to now claim Regulation 12(5)(f) that his finding would be that the exception would not be engaged.

Right of appeal

59. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

60. 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.

61. 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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