

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

Date: 6 May 2014

Public Authority: Cardiff Council
Address: County Hall
Atlantic Wharf
Cardiff Bay
Cardiff
CF10 4UW

Decision (including any steps ordered)

1. The complainant requested various pieces of information about Prosiect Gwyrdd. Cardiff Council ("the Council"), provided some information and withheld other information under regulation 12(5)(e) of the EIR. The Commissioner's decision is that the Council has correctly applied regulation 12(5)(e) to the withheld information. The Commissioner does not require any steps to be taken.

Request and response

2. On 17 June 2013, the complainant submitted a 14 part request to the Council relating to Prosiect Gwyrdd.
3. The Council responded on 15 August 2013. It provided some information and stated that other information was not held but advised that it was likely to be held by another public authority. The Council withheld information relating to part 14 of the request but did not cite any specific exception under the EIR. The Council also confirmed that some

personal data had been redacted from the information provided under section 40 of the FOIA.

4. On 3 September 2013 the complainant requested an internal review of the Council's handling of the request, specifically in relation to the delays experienced in the provision of the information disclosed and the delay in the Council advising him that some of the information he had requested may be held by another public authority.
5. The Council provided the outcome of its internal review on 2 October 2013. It acknowledged that it failed to comply with regulation 10 of the EIR in terms of the transfer of certain parts of the request to another public authority. The Council also acknowledged that it had incorrectly applied regulation 7 to extend the deadline for response to the request. In relation to question 14 of the request relating to the technical assessment underpinning the R1 calculation, the Council stated that it considered the information to be exempt under regulation 12(5)(e) of the EIR.
6. On 2 October 2013 the complainant asked the Council to conduct a further review into its decision to withhold information relevant to part 14 of the request under regulation 12(5)(e).
7. The Council responded on 11 October 2013 stating that it had already conducted a full review into its handling of the request. It upheld its decision that information relevant to question 14 was exempt under regulation 12(5)(e). The Council stated that although the project had announced the preferred bidder, the procurement exercise had not been concluded and the formal contract had not been awarded. The Council stated that regulation 12(5)(e) applied because disclosure would breach another law enactment in respect of the Public Contracts Regulations 2006.
8. The complainant wrote to the Council again on 11 October 2013 and pointed out that, as the information related to emissions, he considered that it was unable to rely on regulation 12(5)(e) as the basis to withhold the information requested.
9. The Council responded on 11 October 2013 and upheld its decision that information relevant to question 14 was exempt under regulation 12(5)(e).

Scope of the case

10. The complainant contacted the Commissioner on 11 October 2013 to complain about the way his request for information had been handled. He asked the Commissioner to investigate whether the Council should have disclosed the information he had requested at part 14 of his request of 17 June 2013. He also pointed out that he considered this part of his request to relate to emissions and, as such, regulation 12(5)(e) could not apply.
11. During the course of the Commissioner's investigation, the Council disclosed related information relevant to the request, namely a copy of the proposed R1 application that the developer (Viridor) intended to submit to Natural Resources Wales ('NRW'). However, it maintained that the detailed R1 calculation submitted by Viridor as part of the tender was exempt under regulation 12(5)(e). In light of this disclosure, the Commissioner contacted the complainant to see whether he was satisfied with the information which the Council had disclosed. The complainant indicated that he still wished to pursue his request for full disclosure of the R1 calculation as he considered the public interest in disclosure overrode any issues of commercial confidentiality.
12. The Commissioner therefore considers this complaint to be whether the Council should disclose the information held relevant to part 14 of the request, or whether it correctly applied regulation 12(5)(e) to that information. Part 14 of the request was for:

"The Final Business Case stated that 'the R1 Ratio for the [Viridor] Facility has been calculated to be 0.675, based on initial designed data and operational assumptions. The Partnership's technical advisors are satisfied that this assessment has been undertaken on a reasonable basis'.

14. Please provide the technical assessment underpinning this calculation".

Reasons for decision

Background

13. According to information on its website, Prosiect Gwyrdd (Project Green) is a partnership between five local authorities in south east Wales to

deliver a low carbon solution to residual waste after recycling and composting has been maximised in each area.

14. Following a tendering process, on 1 February 2013 the Project Board recommended Viridor as the preferred bidder to the Joint Committee. On 7 March 2013, an announcement was made that all five local authorities had agreed to the recommendation that Viridor should be appointed preferred bidder for a 25 year residual waste contract.
15. On 2 August 2013, the Welsh Government approved its funding contribution to the project – a fixed sum of £4,264,000 each year for the duration of contract. The contract with Viridor was agreed and signed by the relevant parties on 10 December 2013.
16. The EU Waste Framework Directive (2008/98/EC) ('WFD') provides the legislative framework for the collection, transport, recovery and disposal of waste. The directive requires all member states to take the necessary measures to ensure waste is recovered or disposed of without endangering human health or causing harm to the environment and includes permitting, registration and inspection requirements. Efficient waste to energy plants can be classified as energy recovery operations (R1) rather than waste disposal (D10), according to the WFD.
17. For municipal solid waste, which includes all the waste collected from households, the EU has gone further by defining what it considers to be sufficient for recovery status under R1. The WFD includes a formula relating to the efficiency of the combustion plant. A municipal waste combustion plant can only be considered to be a recovery operation under R1 if it generates energy and the plant meets the efficiency thresholds calculated using the R1 formula.
18. The R1 formula calculates the energy efficiency of the municipal solid waste incinerator and expresses it as a factor. This is based on the total energy produced by the plant as a proportion of the energy of the fuel (both traditional fuels and waste) which is incinerated in the plant. It can only be considered recovery if the value of this factor is above a certain threshold. The request in this case is for the technical assessment underpinning the R1 ratio for the proposed facility under Prosiect Gwyrdd.

Regulation 12(5)(e) – commercial confidentiality

19. Regulation 12(5)(e) of the EIR allows a public authority to refuse to disclose recorded information where disclosure would adversely affect "the confidentiality of commercial or industrial information where such

confidentiality is provided by law to protect a legitimate economic interest”.

20. 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)”. This means that where information relates specifically to emissions, the exemption in Regulation 12(5)(e) cannot be applied.
21. In his complaint to the Commissioner, the complainant pointed out that, in his view, the Council was unable to rely on regulation 12(5)(e) as the information he had requested related to emissions.
22. The Council argues that the withheld information relates directly to energy efficiency and not to emissions. The components of the withheld information reflect the way in which the various elements are captured, contained and utilised as electricity. The Council pointed out that the withheld information does not contain any information which relates to any ‘loss’ of energy/heat/stem etc.
23. The Council referred to the Commissioner’s guidance on information on emissions¹, which states that public authorities need to determine on a case by case basis if the information requested relates to the uncontrolled by-product of an activity or process. The Council referred to the example on page 5 of this guidance, as detailed below:

“information about the volume of water pumped into an open air container as part of an industrial process is information on a discharge affecting or likely to affect the air and atmosphere. However, it would not be information on emissions as it is still contained and controlled. However, information about the volume of steam and associated condensation caused by an industrial heating process would be information on emissions provided it was not captured or contained”.
24. The Council considers that the example above is analogous to the withheld information in this case, which relates entirely to resources

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/information-on-emissions-eir-guidance.ashx

which are captured, contained and harnessed as energy, rather than to those which are released into the atmosphere.

25. The Council also referred to the explanation of the background to the R1 formula contained within the relevant briefing note issued by the Environment Agency² which states that "Article 3(15) of the WfD (Waste Framework Directive 2008/98/EC) defines 'recovery' and refers to the non-exhaustive list of recovery operations in Annex II of WfD". The Council explained that, by its nature, R1 is about 'recovery' and not loss and therefore the Council does not consider the withheld information constitutes emissions data.
26. Based on the actual content of the withheld information and the Council's representations outlined above, the Commissioner is satisfied that the withheld information in this case does not relate to emissions. He has therefore gone on to consider the Council's application of regulation 12(5)(e) to the information.
27. The Commissioner considers that in order for this exception to be applicable there are a number of conditions that need to be met. He 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?

28. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
29. The withheld information relates to the implementation of a waste management project. It was submitted by the successful bidder as part of the tender process for the contract. As such, the Commissioner is satisfied that the information is commercial in nature.

² <http://cdn.environment-agency.gov.uk/geho0911bugd-e-e.pdf>

Is the information subject to confidentiality provided by law?

30. In relation to this element of the exception, the Commissioner considers that 'provided by law' will include confidentiality imposed on any person under either the common law of confidence, contractual obligations or statute.
31. The Council advised that the withheld information was provided by Viridor on a confidential basis. The Council confirmed that the contract with Viridor specifically designates the withheld information as commercially sensitive and confidential. The Council also stated that the information was not trivial in nature, and it has not been disseminated into the public domain.
32. The Council provided the Commissioner with copies of the relevant sections of the contract with Viridor which demonstrates the intention that the information should be held in confidence. The Commissioner is therefore satisfied that the information is subject to a duty of confidence provided by law.

Is the confidentiality required to protect a legitimate economic interest?

33. In the Commissioner's view, in order to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. The Council has argued that disclosure of the withheld information would adversely affect the legitimate economic interests of Viridor, as it would provide its competitors with an unfair advantage in similar future competitive exercises, thus placing Viridor at a distinct disadvantage.
34. Where, as in this case, it is a third party's interests that are at stake, the Commissioner considers that the public authority should consult with the third party unless it has prior knowledge of their views. It will not be sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party.
35. In this case, the Council sought the views of Viridor and provided the Commissioner with a copy of representations it received from Viridor. Viridor explained that the withheld information contained their unique approach and methodology to an industrial process, ensuring the most energy efficient outcome possible for the project. It explained that the R1 level that Viridor is able to achieve in respect of Prosiect Gwyrdd was

a significant contributing factor to its success in being awarded the contract for the project.

36. Viridor argued that disclosure would adversely affect their economic interests for the following reasons:
- It would very likely lead to Viridor's competitors obtaining and utilising the methodology for their own gain. The withheld information clearly demonstrates the application of Viridor's technical knowledge. Whilst the information relates specifically to Prosiect Gwyrdd, as specialists in the field, Viridor has significant concerns that it is capable of being adapted and used for similar future projects.
 - There is a strong possibility of Viridor's competitors using the withheld information in bidding for future similar projects which would place Viridor at a commercial disadvantage in any further competitive bidding exercises.
 - Disclosure would discourage innovation and development by companies such as Viridor. Development will be dis-incentivised if companies consider there is a strong possibility that detailed aspects of their unique technical solutions would be disseminated into the public domain, and therefore available to their competitors.
37. As referred to earlier in this notice, during the Commissioner's investigation, the Council disclosed a draft pro-forma which Viridor intends to submit to NRW in support of its application for R1 status. The pro-forma is likely to be published in due course on NRW's website. Viridor explained that the pro-forma is a high level document which contains less detail than the withheld information (which it considers to be highly commercially sensitive). Viridor considers it relevant to note that NRW only publishes a certain level of R1 information on its website, as opposed to all of the detail that underpins the R1 calculation. Viridor is of the view that this is because NRW appreciates the commercial sensitivity of the information concerned.
38. The Commissioner recognises that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income.

39. The Commissioner considers that the withheld information in this case lies at the heart of the commercial information which the exception at regulation 12(5)(e) is trying to protect. The information comprises detailed aspects of the R1 calculation and provides an in depth explanation of the way in which the R1 efficiency level is achieved. As Viridor pointed out, the R1 level it is able to achieve was a significant contributing factor in it being awarded the contract for Prosiect Gwyrdd.
40. The Commissioner considers it is reasonable to argue that disclosure of information Viridor uses to demonstrate innovative or more effective systems than its competitors could weaken its competitive edge by allowing competitors to copy its methodology and use it in future bids for similar contracts. Having considered the Council's submissions and the content of the withheld information, the Commissioner is satisfied that disclosure would adversely affect Viridor's economic interests.

Would confidentiality be adversely affected by disclosure?

41. 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 also be satisfied. He 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. The Commissioner has therefore concluded that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the information

42. The Council acknowledges that disclosure of the withheld information would demonstrate how Viridor reached its R1 efficiency ratio for Prosiect Gwyrdd, and therefore disclosure would promote transparency and accountability. However, the Council pointed out that the R1 calculation had been checked and verified independently by Jacobs Engineering Ltd, who is acting as the Council's technical adviser for the project. The Council considers that this significantly reduces the public interest arguments in favour of disclosure.
43. The complainant argues that the withheld information is required in order for the public to determine whether or not the R1 calculation for Prosiect Gwyrdd has been calculated correctly. Specifically, in order to do this the public needs sufficient information to check both the

calculation itself and the input values/assumptions used to generate the figures used in the calculation. The complainant considers that the public interest in disclosure is sufficient to override any commercial confidentiality associated with the withheld information.

Public interest arguments in favour of maintaining the exception

44. The Council argued that disclosure would cause harm to Viridor's economic interests as it would place Viridor at a commercial disadvantage in future competitive exercises of a similar type. Dissemination of the withheld information to Viridor's competitors would be likely to set a marker for this type of calculation which would provide its competitors with sufficient knowledge to undercut it in any future tendering exercises.
45. The Council has also argued that disclosure at the time of the request, (and even at this stage), would undermine the principle of confidentiality. The Council pointed out that the withheld information was specifically designated as being confidential in the contact with Viridor. It considers that there is a strong public interest in maintaining the principle of confidentiality.
46. The Council pointed out that the aim of the R1 calculation is to demonstrate a particular level of efficiency in waste to energy projects. The Council considers that there is a strong public interest in companies such as Viridor being able to develop processes which are as environmentally friendly as possible, without the fear that their methods will be disclosed into the public domain. Innovation will be disincentivised for companies such as Viridor if their methods are effectively provided to its competitors, and as such, it would put them at a significant disadvantage in future bidding exercises.
47. The Council stated that it had balanced the competing arguments for and against disclosure. The Council considers the potential harm which would be caused to Viridor, together with the likelihood that disclosure would stifle the development of environmentally friendly processes in the future to significantly outweigh any public interest in disclosure.

Balance of the public interest arguments

48. It should be noted that regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure. This emphasis reflects the potential importance of environmental information to the public. The Commissioner will therefore always attach weight to the general principle of transparency.

49. The Commissioner accepts that energy from waste projects can be both high profile and controversial schemes, as in this case. The Commissioner recognises and respects the complainant's point that disclosure of the detailed R1 calculations would provide greater transparency and accountability in terms of the calculation itself and the input values and assumptions used to generate the figures used in the calculation. The Commissioner accepts that such concerns should not be dismissed lightly given the significant costs of the scheme, the fact that it has secured £105 million in public funding over the duration of the contract, and indeed the length of the contract, namely 25 years. However, the Commissioner notes that the R1 calculation has been independently scrutinised by the Council's technical advisers. He also notes that the R1 application has to be approved by NRW who publish certain information relating to the application. The Commissioner therefore accepts that, to an extent, these points lessen the public interest in disclosure.
50. With regards to the public interest in favour of maintaining the exception, the Commissioner does not consider that it is in the public interest that third parties have their economic interests harmed simply because they have entered into contracts with a public authority body. The Commissioner accepts that disclosure would allow Viridor's competitors access to commercially sensitive information, which would adversely affect its ability to compete for other contracts in the open market. The Commissioner considers there is a strong public interest in maintaining a fair and competitive business environment. In light of the government's aims to prevent, reuse and recycle more of our waste, the Commissioner considers that Viridor is likely to tender for similar work with other public authorities in the future.
51. The Commissioner considers that there will always be an inherent public interest in maintaining the principle of confidentiality and the relationship of trust. The Commissioner has also taken into account the timing of the request in this case. At the time of the request, although Viridor had been announced as the preferred bidder for the project, the contract was not signed until 10 December 2013. The Council was therefore still in the procurement process at the time of the request.
52. In light of the above, and the nature of the withheld information, the Commissioner is of the view that the public interest in disclosure is, in all the circumstances of the case, outweighed by the public interest in maintaining the exception. Therefore the Commissioner is satisfied that the Council correctly withheld the information under regulation 12(5)(e) of the EIR.

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: 0116 249 4253

Email: GRC@hmcts.gsi.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

Anne Jones
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