

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 4 August 2016

Public Authority: Derby City Council
Address: Council House
Corporation Street
Derby
DE1 2FS

Decision (including any steps ordered)

1. The complainant has requested information regarding a joint waste contract relating to the Sinfin Tannery site. Derby City Council disclosed some information and withheld other information under the exception for the confidentiality of commercial information – regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that Derby City Council failed to demonstrate that the exception in regulation 12(5)(e) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
4. 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

5. On 22 October 2015, the complainant wrote to Derby City Council (the "council") and requested information in the following terms:
6. *"1 ALL CONTRACTS BETWEEN DERBY CITY COUNCIL AND DERBYSHIRE COUNTY COUNCIL RELATING TO THE JOIN WASTE CONTRACT"*

2 ALL CONTRACTS BETWEEN DERBY CITY COUNCIL AND ITS PARTNER DERBYSHIRE COUNTY COUNCIL WITH RESOURCE RECOVERY SOLUTIONS (RRS) AND / OR ITS PARENT COMPANY SHANKS / INTERSERVE

3 ALL CONTRACTS RELATING TO THE USE OF THE SINFIN TANNERY SITE - OWNED BY THE CITY COUNCIL BY RESOURCE RECOVERY SOLUTIONS (RRS) OR OTHER PARTIES"

7. The council responded on 17 December 2015. It disclosed some of the requested information and withheld some of the information in part 2 of the request under the exception for adverse affect to the confidentiality of commercial information – regulation 12(5)(e).
8. Following an internal review the council wrote to the complainant on 24 December 2015. It stated that it was maintaining its position.

Scope of the case

9. On 22 February 2016 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld some of the information in part 2 of the request under regulation 12(5)(e).

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

11. The council has withheld some of the information identified in part 2 of the request under regulation 12(5)(e). The information takes the form of a number of schedules from a Project Agreement between the council, Derbyshire County Council and Resource Recovery Solutions (Derbyshire) Limited ('RRS'), as amended by a Deed of Amendment and Restatement dated 20 August 2014.
12. 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".
13. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She

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?

14. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
15. Having reviewed the withheld information and referred to the council's submissions, the Commissioner is satisfied that it relates to a commercial activity, namely the provision of waste services.

Is the information subject to confidentiality provided by law?

16. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
17. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
18. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
19. The council has confirmed that the Project Agreement expressly identifies that the information therein was only provided on the strict understanding that its detail was to be shared exclusively between the parties to the agreement.
20. The Commissioner accepts that, at the very least there is a clear implied obligation of confidence in the information shared between the three parties. In addition to this, it is clear to the Commissioner that the information in this category is not trivial in nature as it consists of

details of the financial arrangements and modelling for the delivery of a long-term waste contract. In addition to this, the council has confirmed that the information is not in the public domain and the Commissioner is satisfied that this is the case.

21. The Commissioner considers that, where information relates to details of the delivery of a waste contract, as is the case here, it is reasonable to assume that information would be shared in circumstances creating an obligation of confidence. The Commissioner accepts that, since the passing of the EIR, there is no blanket exception for the withholding of confidential information, however, for the purposes of this element of the exception, he is satisfied that the information is subject to confidentiality by law.

Is the confidentiality provided to protect a legitimate economic interest?

22. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure.
23. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".

24. In this case the council has argued that disclosure of the information would affect the legitimate economic interests of RRS, Derbyshire County Council (the "county council") and itself.
25. In relation to the council's interests and those of the county council, the council has stated:

"...the impact on future tenders is very much an issue. The release of the contract in un-redacted form would have an impact not only on the Council for its other tendering opportunities but also its non-public authority partners..."

26. The council has also argued that another outcome of disclosing the information is that it *"...could be denied the opportunity to secure value in any such future tendering exercise."* The council has further submitted that, whilst it accepts that the "primary" economic interests to be protected in this matter are those of RRS, *"Secondary interests that, on balance, ought to be considered for protection include those of DCC and the council."*
27. The council did not expand upon these arguments in its reasoning for engaging the exception, however, in its submissions regarding the public interest regarding this matter the council confirmed that it deferred to submissions made by RRS in this regard. The council summarised these submissions in these terms:

"... unqualified disclosure would be harmful to the need for trust between the parties, bearing in mind the length of the contract in question, I can see, on balance, how a commercial relationship that lacks the degree of trust between the parties to it could be harmful in the long term. On balance therefore, I would say it is an even balance whether or not the council's and DCC's interests ought to be protected. Being so evenly balanced, my view is that the public interest in disclosure does not outweigh the need to protect the parties' economic interests."
28. During the course of her investigation, the Commissioner provided the council with further opportunities to submit arguments in support of its application of the exception. She specifically highlighted her concerns that harm to the council's and county council's legitimate interests had not been clearly defined or shown to be a direct effect of the information being disclosed. The identification of both these parties' interests as "secondary interests" and the suggestion that trust between parties "could be harmful", in the Commissioner's view, strongly indicates that the evidential burden for engaging the exemption has not been met.
29. The Commissioner considers that "trust" in this context has not been sufficiently defined and that the council has failed to explain how this concept *would* result in direct harm to its ability to secure value in future tendering exercises. Furthermore, the Commissioner will not generally accept speculation from a public authority about the harm it identifies concerning a third party's interests unless there is evidence that the arguments genuinely reflect the concerns of the third party involved. In this case the council has not provided any evidence that it sought the views of the county council in respect of this request and in the Commissioner's view, this further highlights the speculative nature of the identified harm in this case.

30. Having considered the available evidence the Commissioner has concluded that, in relation to the interests of the council and the county council, it has not been shown that disclosure would adversely affect a legitimate economic interest. She has concluded that, in relation to these parties, the exception is not engaged.
31. Turning to the council's arguments in relation to the interests of RRS, in this case the council sought RRS' views on this matter and it has provided the Commissioner with details of this.
32. The council has highlighted that the withheld information incorporates price mechanisms, volume allocations and proprietary contract management tools and processes. The council has argued that RRS operates within the competitive waste market and disclosure of this information would allow competitors to work out not only the positions it adopted on this deal but also see how the bid was structured resulting in the loss of its competitive edge in future deals.
33. The council has argued that it is more probable than not that disclosing the information would expose RRS to a significant risk of prejudice. It explained that it is not untenable that the Sinfin Waste Site's novel nature has the capacity to become a "beacon of excellence" within the waste industry which other waste collection authorities may look to model. The council has argued that RRS' competitors would benefit from the unique know-how contained within the information and thus undermine RRS' ability to utilize this for its own benefit, damaging its commercial interests.
34. In relation to the specific elements of information which have been redacted and the rationale, in each case, for it being withheld, the council directed the Commissioner to documents provided by RRS, consisting of 2 schedules. The Commissioner notes that the arguments deployed in these schedules are, essentially, expanded versions of the broad categories identified in paragraphs 26-27 above.
35. Having referred to the arguments and documents provided by RRS, the Commissioner noted that the reasoning deployed in withholding discrete items of information was largely general in nature. The Commissioner also noted that the documents in question did not make it clear which specific sections of the withheld information were being referenced. The Commissioner put it to the council that the documents contained numerous references to "clauses" which did not appear to correspond to sections of the withheld information. It was not, therefore, clear to the Commissioner what specific information was being withheld and why disclosure would result in the effects described by the exception.

36. The Commissioner put it to the council that the schedules of withheld information and arguments for their being withheld were created by RRS' solicitors but that ultimate responsibility for handling the request rested with the council. She asked the council to provide a new schedule which enabled, in each instance, the rationale for withholding information with the specific parts of the document(s) in question to be matched.
37. The Commissioner gave the council additional time to, if necessary, consult with both RRS and the county council in order to provide the additional information she needed in order to reach a decision. The Commissioner also directed the council to ensure that it identified any specific financial information such as (if relevant) profit and loss margins and other financial models within the withheld information. In doing this, the Commissioner directed the council to the Upper Tribunal in *Nottinghamshire County Council v IC; Additional Party Veolia E S Nottinghamshire Limited and UK Coal Mining Ltd* (reference EA/2010/0142) which placed special importance on such information in respect of the possibility of adverse affect to commercial interests¹.
38. The Commissioner advised the council that, without the additional clarification she had requested, it was unlikely that she would be in a position to conclude that the exception had been engaged.
39. The council advised the Commissioner that it had approached RRS and the county council but that they had declined to provide any further arguments or clarification. The council confirmed that it was providing no further submissions and directed the Commissioner to the arguments and submissions it had already provided.
40. Having considered the council's submissions and referred to the withheld information the Commissioner considers that it is not obvious from an analysis of the information in isolation that disclosure would result in adverse affects to the legitimate economic interests of RRS. She also considers that the submissions he has received from the council (included those provided by RRS) do not clearly identify specific adverse effects and link these effects to specific withheld information nor do they explain the causal link between disclosure and any ensuing adverse effects.

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i486/20120709%20UT%20Decision%20&%20other%20decisions%20EA20100142.PDF>

41. The Commissioner considers that the lack of clarity in the council's submissions suggests that the council either does not properly understand what the effects of disclosure would be or has struggled to meet the evidential and explanatory burden set by the exception.
42. The Commissioner considers that the council's arguments, whilst identifying possible effects, fail to make these effects sufficiently concrete and fail to identify the causal link with the withheld information. The Commissioner considers that it is for public authorities to fully explain the relevant causes and effects and it is not her role to generate arguments on their behalf. In any event, the Commissioner considers that the council has been given ample opportunity to provide evidence and arguments in support of its position.
43. In this instance, the Commissioner has decided that the council has failed to demonstrate that the exception is engaged. As the exception is not engaged, the Commissioner has not gone on to consider the public interest.

Other matters

44. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.
45. In its internal review response and in its submissions to the Commissioner, the council has made some confusing statements about redaction.
46. The council has explained that it considers that the complainant's internal review request suggested that public authorities were not entitled to redact information prior to disclosure. The Commissioner notes that the complainant's review request makes reference to another decision notice issued in relation to a waste contract request². In that decision notice the Commissioner ordered disclosure of information which had been withheld by the council under regulation 12(5)(e). The council understood that the complainant made reference to this notice because they believed the decision was somehow transposable to all

² ICO reference: FER0582261 (Gloucestershire County Council); decision notice published on ICO website here: https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1433039/fer_0582261.pdf

cases and that there was now a statutory prohibition on authorities redacting information under exceptions.

47. Having read the internal review request it is clear to the Commissioner that the complainant was not making such a suggestion but, rather, arguing that, as the facts of both cases had similarities, the council should follow suit and disclose the previously withheld information. In effect, the complainant was asking the council to reconsider and overturn its application of regulation 12(5)(e) in this case by appealing to the facts of a comparable case, a standard approach in internal reviews.
48. Despite pointing this out to the council, the Commissioner has concerns that it might still have failed to grasp this point. Notwithstanding the council's interpretation of the complainant's arguments the Commissioner considers that the council should be aware that the decisions set out in his decision notices are only applicable to the facts of a specific given case and are not transferable to other requests or complaints.
49. The Commissioner expects that in its future handling of requests and internal reviews it will be mindful of these matters.

Right of appeal

50. 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@hmcts.gsi.gov.uk

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

51. 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.
52. 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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