

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

Decision notice

Date: 26 April 2012

Public Authority: London Borough of Merton
Address: Civic Centre
London Road
Morden
Surrey
SM4 5DX

Decision (including any steps ordered)

1. The complainant requested information from the London Borough of Merton ("the council") concerning a contract. The council disclosed the information with the exception of some that it considered was excepted under regulation 12(5)(e) of the Environmental Information Regulations 2004 ("the EIR"), the exception relating to commercial confidences.
2. The Commissioner's decision is that the council correctly withheld information using regulation 12(5)(e).
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 3 October 2011, the complainant requested information from the council in the following terms:

"What are the terms of the Highway Maintenance and Improvement Contract awarded to FW Conway for a period of five years by the Cabinet decision of 13 June 2005?"

What amendments, including additions, exemptions, derogations and extensions, have been made to the Highway Maintenance and Improvement Contract since its adoption on 13 June 2005?"

5. The council provided a written response on 2 November 2011.
6. The complainant requested an internal review on 4 November 2011. He explained that he was dissatisfied because he considered that the council's response had failed to provide much of the information he had requested.
7. On 29 November 2011, the council completed an internal review. The council elaborated on its original response and it said that it had attached a table showing additions to the schedule of rates in date order.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. During the Commissioner's investigation, the majority of the information requested by the complainant was disclosed, thereby informally resolving that part of the complaint. The outstanding issue is the use of the exception under regulation 12(5)(e) to withhold some information i.e. the rates and percentage terms negotiated for the contract extension. This notice relates to that matter only.

Reasons for decision

Is the information environmental?

9. For clarity, the contract concerned is the "Highways Maintenance and Improvements Contract". In accordance with regulation 2 of the EIR, information will be "environmental" if it concerns activities affecting the elements of the environment, one of which is the land. The Commissioner accepts that the EIR was the correct legislation under which to consider the request given the nature of the contract.

Regulation 12(5)(e)

10. This exception concerns the confidentiality of commercial or industrial information where such confidentiality is provided by law. When assessing whether this exception is engaged, the Commissioner will consider the following questions:
 - 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?

Is the information commercial or industrial in nature?

11. 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. The withheld information relates to a contract that the council has with a third party concerning highway maintenance. The council advised the Commissioner that the specific information being withheld in this case is the schedule of rates and the precise percentage terms negotiated. In view of this, the Commissioner is satisfied that the information is clearly commercial in nature.

Is the information subject to confidentiality provided by law?

12. The Commissioner considers that “provided by law” will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
13. The Commissioner understood that the council’s position was that the information was covered by the common law of confidence. When considering whether the common law of confidence applies, the Commissioner’s approach is similar in some respects to the test under section 41 of the FOIA. The key issues the Commissioner will consider when looking at common law confidences under this heading are:
- Does the information have the necessary quality of confidence? This involves confirming that the information is not trivial and is not in the public domain.
 - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.
14. Having considered the withheld information, the Commissioner is satisfied that the information is not trivial and is not in the public domain. He therefore concludes that the information has the necessary quality of confidence.
15. The council explained to the Commissioner that there was an implicit understanding that the withheld information would not be disclosed as this was the standard practice regarding procurement information of this nature. In view of this, the Commissioner accepts that the information was shared in circumstances importing an obligation of confidence.

Is the confidentiality required to protect a legitimate economic interest?

16. The Commissioner considers that to satisfy this element of the test disclosure would have to adversely affect a legitimate economic interest of the person (or persons) 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. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probable than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) 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".

17. The Commissioner will not accept speculation from a public authority regarding harm to the interests of third parties without evidence that the arguments genuinely reflect the concerns of the third parties involved. In line with this approach, the council consulted with the contractor involved and supplied the Commissioner with a copy of their response as evidence that the arguments reflected the genuine concerns of the contractor. Having considered this, the Commissioner was satisfied that there was sufficient evidence to demonstrate that the authority was not speculating on behalf of the contractor.
18. The argument proposed to the Commissioner was that the disclosure of the withheld information would adversely affect the commercial interests of the contractor because it would essentially allow their competitors to copy their approach or undercut them in future tender exercises. There was also a concern that the disclosure could damage their relationship customers who would clearly wish to secure the best possible deal and may be dissatisfied as a result of viewing the disclosed information.
19. The Commissioner considered the withheld information together with the above argument and he was satisfied that there it was more probable than not that the disclosure of the withheld information, given the level of detail it provides, would adversely affect the commercial interests of the contractor when bidding for future contracts and damage its commercial relationship with other customers. The Commissioner notes that the contract dates from 2005-10 but includes

an extension and variation for the years 2010-12. The council told the Commissioner that the rates are still considered to be current although the contract has been extended. The Commissioner was willing to accept that the information was not of such an age that it would not still prejudice the commercial interests of the contractor.

20. The council proposed other arguments relating to its own commercial interests which the Commissioner did not find sufficiently persuasive to engage the exception. In particular, the council argued that disclosure of the information may hinder the council's ability to achieve value for money in future procurement exercises, as suppliers could become reluctant to engage with the council in the future. The council expressed concern that suppliers may offer less or incomplete information for fear that information could be disclosed to the public. The council also argued that those submitting tenders may increase their bid pricing to protect themselves from commercial losses resulting from the disclosure of information. Finally, the council said that it was concerned that disclosure may decrease the differentiation between bidders.
21. As explained above, the Commissioner has to be satisfied that the prejudice described would be "more probable than not". In the cases of the arguments put forward regarding the council's own commercial interests, the Commissioner considered that there were powerful arguments against this being the case. The Commissioner's published guidance on section 43(2), the exemption relating to commercial interests under the Freedom of Information Act 2000, states that public authorities should be wary of making the argument that the potential for commercial information to be released would reduce the number of companies willing to do business with the public sector or result in less information being provided, leading to reduced competition and increased costs. The guidance states the following:

"In practice, many companies may be prepared to accept greater public access to information about their business as a cost of doing business with the public sector. And the overall value of public sector contracts is a great incentive to tender for them.

Increasing access to information about the tendering process may in fact encourage more potential suppliers to enter the market. A better understanding of the process, the award criteria, knowledge of how successful bids have been put together, could also lead to improved bids being submitted in the future. This will lead to more competition and so decrease costs to the public authority. Indeed where a contract comes up for renewal, limiting this kind of information may well favour the current contractor and reduce competition".

Public interest test

Public interest arguments in favour of disclosing the information

22. There is always some public interest in the disclosure of information for its own sake. This is because disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.
23. There is also a more specific public interest in understanding how public money is being spent when a contract is awarded to a third party and understanding whether the contractor is providing a value-for-money service.

Public interest arguments in favour of maintaining the exception

24. The exception under regulation 12(5)(e) is designed to recognise that there are certain circumstances in which it is appropriate to withhold information that would harm the commercial interests of a third party. There is a public interest in ensuring that the commercial interests of a third party are not prejudiced in circumstances where it would not be warranted or proportionate.
25. In this case, the Commissioner was satisfied that it was more probable than not that disclosure of the withheld information would adversely affect the commercial interest of the contractor by providing information that could be exploited by its competitors and customers or which may damage the contractor's relationship with its customers.

Balance of the public interest arguments

26. The council recognised the strong public interest in accountability about public money. Such concerns are arguably even more pressing given the current economic climate and the Commissioner notes that this particular contract has been the subject of a two year extension clause which may increase the public interest in transparency surrounding costs. However, the council said that it has already provided a significant amount of information to the complainant about the contract including the total annual cost year by year. The council also said that it is satisfied that its own processes are robust enough to ensure that value for money is secured.
27. The Commissioner was satisfied that if this information was disclosed, it would prejudice the commercial interests of the contractor for the reasons described above. He is satisfied that the level of prejudice would be severe enough to outweigh the public interest in disclosure.

Disclosure of such detailed cost information would impact significantly on the contractor's ability to be as competitive as possible by disclosing to its competitors the details of its general approach. This would allow those competitors to understand, to a very detailed level, how the contractor had managed the costs involved which could lead to imitation or undercutting in the future. Disclosing information of this nature could also damage significantly the company's relationship with its other customers.

28. Having considered all the circumstances, the Commissioner agrees with the council that an appropriate level of transparency has been struck in this case and that disclosure of the total annual costs of the contract year by year is enough to satisfy the legitimate public interest in assessing whether the council is securing value for money. It is the Commissioner's view that disclosing the contractors' individual cost information and the precise percentage terms negotiated would not be proportionate in the circumstances of this case.

Right of appeal

29. 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

30. 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.
31. 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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