

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2019

Public Authority: Arc21

Address: CraigG@arc21.org.uk

Decision (including any steps ordered)

1. The complainant has requested information from Arc21 relating to a procurement process in respect of a waste management project in Northern Ireland. Arc21 disclosed some information to the complainant, however it withheld the remainder, citing sections 41 and 43 of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that Arc21 has correctly applied section 41 of the FOIA. As this applies to the entirety of the withheld information, the Commissioner did not go on to consider Arc21's application of sections 43(1) and 43(2) of the FOIA to the withheld information. The Commissioner therefore requires no steps to be taken.

Request and response

3. The complainant on 23 and 24 January 2017 made requests for information to Arc21, the exact wording of which is contained in an Annex to this Notice.
4. Arc21 on 22 February 2017 responded to the complainant's request, disclosing some information within the scope of it and refusing to disclose the remaining information, citing sections 41 and 43 as a basis for non-disclosure.

5. On 30 March 2017 the complainant wrote to Arc21 seeking clarification as to its responses to some of the questions contained within its requests of 23 and 24 January 2017, which Arc21 treated as a request for internal review. It also raised some additional questions, which were treated as new requests under the FOIA. The exact wording of these requests and the requests for clarification is contained in an Annex to this Notice.
6. On 2 May 2017, the Arc21 responded. The reviewer clarified Arc21's responses and also provided responses to the additional questions raised in the complainant's letter of 30 March 2017, again disclosing some information but refusing to disclose the remainder, citing sections 41 and 43 of the FOIA as a basis for non-disclosure.
7. On 27 June 2017, the complainant sought an internal review of Arc21's response of 2 May 2017 to his additional requests, and further clarification in relation to his original requests. Arc21 responded to this on 14 August 2017, disclosing some further information but maintaining the exemptions as set out in sections 41 and 43 of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 20 September 2017 to complain about the way his request for information had been handled. As the information relates to a waste management process, the Commissioner considered whether it could be environmental information. She has concluded that the information relates to procurement and tender submissions and that the FOIA is the correct regime under which to have handled the complainant's request.
9. The Commissioner wrote to Arc21 seeking its detailed submissions on 24 July 2018. Arc21 responded to the Commissioner on 28 September 2018, providing the withheld information together with its submissions as to its application of the above exemptions. The Commissioner has considered Arc21's handling of the complainant's request.

Reasons for decision

Section 41 – information provided in confidence

10. Section 41(1) of the FOIA states that:

Information is exempt information if–

- (a) it was obtained by the public authority from any other person (including another public authority), and*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

11. Arc21 has applied section 41 of the FOIA to the entirety of the withheld information and has provided detailed submissions as to why the exemption at section 41 applies to each component part of the information which has been withheld. The component parts are:-

- The Contingent Liability Undertaking
- The Cost Sharing Mechanism
- PQQ tracker and relevant correspondence
- ISOS, financial and technical reports ('the reports')

Was the information obtained from another person (including another public authority?)

12. Arc21 informed the Commissioner that it received correspondence from the bidder(s) in a procurement process, which informed the development of a contractual instrument known as the Contingent Liability Undertaking, which refers to a cost-sharing approach between Arc21 and the bidder(s). The Contingent Liability Undertaking contains information which has been provided by a third party or parties, i.e. the bidder(s). The Cost Sharing Mechanism consists of correspondence from the bidder(s) to Arc21 regarding the planning of potential costs associated with the procurement process being shared between the parties. The Pre-Qualification Questionnaire (PQQ) tracker, whilst the PQQ was compiled by Arc21 and the tracker is an assessment tool designed by Arc21, consists of information provided to Arc21 by the bidder(s). The reports were produced by Arc21 but contain information provided by third parties such as the bidder(s), external technical and financial advisers and other participants in the procurement process.

13. The Commissioner is therefore satisfied that Arc21 obtained the withheld information from another person or persons.

Would disclosure of the information by Arc21 constitute an actionable breach of confidence?

14. For this information the Commissioner will now consider whether disclosure would constitute a breach of confidence. The Commissioner uses the test of confidence set out by Judge Megarry at the High Court of Justice in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* as a framework for assessing whether a disclosure would constitute a breach of confidence. Judge Megarry suggested that three elements were usually required to bring an action for a breach of confidence:

- the information must have the necessary quality of confidence,
- it must have been imparted in circumstances importing an obligation of confidence, and
- there must have been an unauthorised use of the information to the detriment of the confider.

15. Dealing with the first bullet point, information will possess the necessary quality of confidence if it is more than trivial and not otherwise accessible. The Commissioner has perused and considered all parts of the withheld information with reference to that bullet point.

The Contingent Liability Undertaking

16. The Commissioner understands that the information contained in the Contingent Liability Undertaking information is not otherwise accessible and Arc21 and the third party from which it obtained the information do not consider this trivial in nature as it could potentially lead to the crystallisation of circumstances in which a very significant amount of money could be paid by Arc21 to the bidder.
17. Therefore, the Commissioner accepts that the Contingent Liability Undertaking has the necessary quality of confidence.

The Cost Sharing Mechanism

18. Arc21 states that the proposal, development and continuing obligations of the Cost-Sharing Mechanism represents information that was provided, considered and treated at all times as commercially sensitive and confidential. The Cost Sharing Mechanism and the pertinent correspondence describing its development is not accessible to any party outside of the agreement. The Cost Sharing Mechanism reflects

an agreed position during an intermediate phase of a 'live' competitive procurement process. This information is important as to how the procurement may proceed and as such is not trivial in nature.

19. Therefore the Commissioner accepts that the Cost Sharing Mechanism has the necessary quality of confidence.

PQQ Tracker and Relevant Correspondence

20. Arc21 states that this information is highly specific in nature and is not accessible to any party outside of the procurement process. The information is highly technical and practical and is or will be used by Arc21 to determine if the contract should be awarded to the bidder(s). It is therefore fundamental to the entire process and is more than trivial.
21. Therefore the Commissioner accepts that the PQQ Tracker and relevant correspondence have the necessary quality of confidence.

The Reports

22. Arc21 states that the information contained in the reports is not accessible to anyone outside of the project, i.e. only disclosed to Arc21, its constituent councils, their advisers and the bidder(s). The information evidences the unique practical solutions proposed by tenderers in the process and pertains to a 'live' competitive procurement process. Therefore it is more than trivial in nature.
23. Therefore the Commissioner accepts that the reports have the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

Contingent Liability Undertaking

24. Dealing with the second bullet point, the Commissioner notes that the 'Contingent Liability Undertaking' is noted as 'Strictly Confidential and Commercially Sensitive' on each page. The circumstances of the agreement are of such a high level of confidence that this needs to be clearly expressed and as such the Commercial Liability Undertaking is treated in all forums as highly confidential.
25. The Contingent Liability Undertaking has been created in the context of an ongoing procurement. As such it is important to maintain confidentiality to ensure the integrity and robustness of the

procurement process, which is provided for in the Procurement Regulations.

26. The Commissioner is satisfied that these are circumstances which import an obligation of confidence.

Cost Sharing Mechanism

27. The information within the Cost Sharing Mechanism is information which has been provided within the context of the ongoing procurement process. As such it has been treated as highly confidential and commercially sensitive at every stage of the process and has been provided upon this understanding and the provisions of regulation 43 of the Procurement Regulations, which provides that a contracting authority will not disclose information forwarded to it by an economic operator which that operator has reasonably designated as confidential. This includes the confidential aspects of tenders.
28. The Commissioner is satisfied that these are circumstances which import an obligation of confidence.

PQQ Tracker and Relevant Correspondence

29. The information provided in the PQQ tracker and accompanying correspondence has been treated is information which has been provided within the context of the ongoing procurement process. As such it has been treated as highly confidential and commercially sensitive during the process in order to maintain the integrity and robustness of the procurement process.
28. The Commissioner is satisfied that these are circumstances which import an obligation of confidence.

The Reports

29. Arc21 states that the evaluation and scoring of technical and financial solutions proposed by tenderers is effectively a three-stage confidential step process. Tenderers provide submissions in good faith that their information will be kept confidential. At the critical evaluation stage, those who provide input would also expect their comments to be kept confidential. The third step is where all submissions are finally evaluated at a confidential meeting of the Arc21 statutory joint committee for their governance and oversight.

30. The Commissioner is satisfied that these are circumstances which import an obligation of confidence.

Would disclosure cause any detriment to the confider?

31. The Commissioner must also consider if there would be any detriment to the confider if the information were disclosed and has considered each part of the withheld information in turn.

Contingent Liability Undertaking

32. Arc21 considers that the disclosure of the Contingent Liability Undertaking would constitute a breach of confidence to the bidder. The bidder entered into the Contingent Liability Undertaking on the basis that the information provided was treated as confidential and would not be released, at least until an appropriate time in the future. Disclosure at this stage would mean the information could be used by third parties to their commercial advantage and damage the bidder's future ability to compete in a commercial market.

Cost Sharing Mechanism

33. The Cost Sharing Mechanism provides for certain obligations and contingencies upon the parties to the agreement. This includes information which would be of interest to the public and private sector alike. Arc21 considers that the disclosure of the Cost Sharing Mechanism would constitute a breach of confidence to the bidders(s), who entered into the Cost Sharing Mechanism on the basis that the information provided was considered to be confidential and would not be released until an appropriate time.
34. Arc21 has informed the Commissioner that release of the Cost Sharing Mechanism has the potential to harm Arc21 and its constituent Councils and also the bidder(s) as it could be used by third parties to bring about circumstances which would cause either party to default on its obligations under the agreement and thereby affect the waste sector in Northern Ireland.

PQQ Tracker and Relevant Correspondence

35. Arc21 has informed the Commissioner that the information contained in the PQQ will, at some point, be assessed by Arc21 to determine if the bidder(s) should proceed to be awarded the contract for the project. Premature disclosure of the information would be likely to undermine the integrity of the process and cause harm to the bidder(s)

and members of their supply chain, who have indicated their participation in the procurement process only on the understanding of confidentiality. Disclosure could prejudice the bidder(s)' supply chain engagement, which is particularly important in respect of the use of the Value for Money protocol in the procurement process.

The Reports

36. The tenderers named within the reports participated in this stage of the procurement process on the basis that the information provided was considered to be confidential, commercially sensitive and not to be released until an appropriate time, as provided for under the Procurement Regulations. The release of this information, which details aspects of each tenderer's unique solution, could be used by competitors of tenderers, who may seek to use the information to gain a commercial advantage, to the detriment of the tenderers.
37. The Commissioner considers that disclosure of the information withheld under section 41 of the FOIA would cause detriment to the confider for the above reasons.

The Commissioner's conclusions

38. The Commissioner notes that the duty of confidence is not absolute. She recognises that information may be disclosed if disclosure is required by law and where there is a greater public interest in disclosing the information which overrides the duty of confidence.
39. When considering whether information should be disclosed, the Commissioner must consider that the disclosure is to the public at large and not just to the person who has requested it.
40. Generally, the Commissioner will give weight to the general principle that disclosure of information held by public authorities will achieve both accountability and transparency.
41. Such disclosures assist the public in understanding the basis and how public authorities make their decisions and carry out their functions. This in turn fosters trust in public authorities and may also allow greater participation in Arc21's decision making processes.

42. On the other hand, Arc21 has informed the Commissioner that the public procurement in this case has not yet been completed and the information requested captures an agreement that expresses rights and obligations by both the public and private sectors, which form part of the ongoing process. How these rights and obligations have been arrived at are complex, and without an understanding of the wider issues, these could be taken out of context and misrepresented.
43. Arc21 also states that disclosure of the withheld information, if not properly dealt with could halt the progression of and/or collapse the procurement process and jeopardise the significant investment from both the public and private sectors that has occurred to date.
44. The Commissioner accepts Arc21's position in respect of its application of section 41 to the withheld information. She is content that the withheld information engages this exemption and that there would be no public interest defence to Arc21 disclosing that information, as the public interest in disclosure would not outweigh that in maintaining the exemption.
45. Arc21 also sought to apply the exemption at sections 43(1) and 43(2) to the withheld information, however, since the Commissioner considers that section 41 applies to the entirety of the withheld information, she has not gone on to consider the application of sections 43(1) and 43(2).

Right of appeal

46. 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

47. 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.
48. 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

Deirdre Collins

Senior Case Officer

Information Commissioner's Office

Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF

ANNEX TO DECISION NOTICE

The complainant's request to Arc21 of 23 January 2017 was worded as follows:-

"As you may be aware, [name redacted] on behalf of No-ARC21, lodged a freedom of information request on 27 October 2016. A response was received from [name redacted] dated 24 November 2016.

We have some concerns regarding the response and write to ask that you review the response. Our particular concerns are as follows:

Question 8

[What is] arc21's contractual relationship with Indaver?

The response states that a contract for the procurement process has not yet been entered into. It is unclear from this whether there are, in fact, any other contractual arrangements between arc21 contractual relationship with Indaver and/or the Becon Consortium.

For the avoidance of doubt, please confirm whether there are any contractual relationships in place between arc21 and Indaver and/or the Becon Consortium.

Question 9

[Are there any] arc21 procurement agreements with Indaver?

The response states that arc21 continues to use the competitive dialogue procedure and that details and correspondence between the Becon Consortium and arc21 are confidential and commercially sensitive.

The question did not make any reference to the Becon Consortium. The question was whether there are any existing procurement agreements between arc21 and Indaver? Please confirm whether this is the case.

Question 12

Whom will be financially liable of any overspend on PAC appeal ... in relation to excess costs of £250,000 as per FOI received ... and confirmed below?

The response states, amongst other things, that:

The expected scale of hearing costs along with the relevant qualifications and caveats were presented to arc21 Councils in a confidential and commercially sensitive report.

We are unclear as to why this question would give rise to commercially sensitive information. Please state:

1. Why is it considered that information relating to the spending of public funds should be kept out of the public domain?
2. Who prepared and presented the report referred to?
3. What was the purpose of the report?
4. Who will be responsible for any overspend?

The complainant's request to Arc21 of 24 January 2017 was worded as follows:-

Please see the questions below which are lodged under the Freedom of Information Act 2000:

1. In a press statement issued on 1 July 2009, ARC21 stated that there were originally 6 bidders on the procurement shortlist:

1. Covanta Energy Ltd
2. Greenstar Holdings Ltd
3. E.On Energy
4. Indaver and John Laing joint bid
5. SITA Holdings UK Ltd
6. The Shanks Wheelabrator Consortium

The statement went on to say that ARC21 had reduced the shortlist of bidders from 6 to the following 3:

1. Greenstar Holdings Ltd
2. E.On Energy
3. SITA Holdings UK Ltd

Please confirm under what legislation decisions to include or exclude applicants from the procurement process are made?

2. Why was the decision taken to exclude the Indaver and John Laing joint bid from the procurement process?
3. As we understand it, a bid from Indaver is once again under consideration. Can you confirm this is correct?
4. If such an application is under consideration, does this remain a joint bid between Indaver and John Laing?
5. Is the bid the original application that was made by Indaver and John Laing or has a fresh application been submitted? If the latter, when was the application submitted?

6. If the application remains the original application, why is the application once again under consideration having previously been rejected?
7. Who took this decision to once again give consideration to this application and when was the decision made?
8. At a meeting on 8 December 2016 between our representatives, Declan O'Loan and Ricky Burnett, it was asked what the makeup of the Becon Consortium was. Mr Burnett stated "the full line up is yet to be determined". Was this answer given as part of Mr Burnetts understanding of the position at that time or does he speak on behalf of the Becon Consortium?
9. If the latter, please confirm Mr Burnett's precise role within the Becon Consortium."

The complainant's follow-up letter of 30 March 2017 was worded as follows:-

Thank you for your letter dated 22 February 2017. We are concerned at your failure to answer some of the questions raised and are considering our position in respect of bringing the matter before the Information Commissioner.

Ahead of doing so, we would be grateful for some further clarification.

We asked:

"Question 8 - Please confirm whether there are any contractual relationships in place between arc21 and Indaver and/or the Becon Consortium."

In reply you state that arc21 has arrangements that may or may not give rise to obligations concerning a Contingent Liability Undertaking entered into during the year 2013/14. In respect of that undertaking please provide:

1. details of the parties to the undertaking;
2. details as to the terms of the undertaking;
3. a copy of the same

You go on to state that *"...information in relationship to the relationship, discussions, procurement, submissions and solution of the Becon Consortium with arc21 is exempt from disclosure under sections 41 and/or 43 of the FOI Act 2000"*.

Section 41 of the Act relates to information provided in confidence whereas section 43 relates to commercial interests.

We have asked you simply to confirm whether there are any pre-existing contractual relationships between arc21 and Indaver and/or the Becon Consortium. A request to confirm or deny the existence of clearly does not fall within the terms of either s.41 or s.43.

As such, we repeat our request as follows:

4. Please confirm whether there are any contractual relationships in place between arc21 and Indaver and/or the Becon Consortium.
5. If you maintain your position that to provide this information would breach s.41 and/or s.43, please say precisely which part(s) of the legislation, with reference to the relevant sub-sections, you consider could be breached and precisely why you consider such a breach could arise.

We asked in the further FOI Request

"Question 2 -Why was the decision taken to exclude the Indaver and John Laing joint bid from the procurement process?"

Thank you for clarifying that the process is being undertaken in accordance with the competitive dialogues procedure set out at r.18 of the Public Contracts Regulations 2006 ("PCR").

6. In respect of this, please:
 - (i) Provide a copy of the notice of intention to seek offers as per r.4 PCR and any subsequent documentation issued pursuant to this section
 - (ii) Confirm whether the evaluation at r.10 PCR has been carried out. If so, please provide all documentation arising out of that evaluation.
 - (iii) Confirm which economic operators who originally applied and all economic operators that remain in the process.
 - (iv) Send copies of all r.16 PCR documentation sent to those economic operators to date.
 - (v) Have invitations been sent in accordance with PCR r.25(b)? If yes, to whom and when were they sent?

7. r.23 PCR details particular circumstances by which economic operators shall be excluded. Can you confirm that what checks have been carried out in respect of the economic operators in this process?

We asked:

"Question 3 - We asked "As we understand it, a bid from Indaver is once again under consideration. Can you confirm this is correct?"

In your response, you have stated that the proposed solution under consideration is *"a continuation of proposals originally put forward by the Greenstar/E.ON Energy Consortium (who named themselves the Becon Consortium)"*.

8. Please clarify precisely what is meant by *"...a continuation of proposals..."*. In particular, please state:
- (i) When did Greenstar/E.ON Energy inform you that they had named themselves the Becon Consortium?
 - (ii) Was the original proposal by Greenstar/E.ON Energy Consortium submitted in the name of the Becon Consortium?
 - (iii) If not, when was the Becon Consortium name first used and how did it become involved in the process?
 - (iv) What has changed in respect of the original bid to make you say that it is *"...a continuation of proposals..."*?
9. Has there been any changes in the consortium and/or the economic operator(s) involved in the bid that you are aware of other than those outlined in your response?
10. Is it your understanding that *Greenstar/E.ON Energy* are no longer involved in the process?
11. Do you consider that the changes to the consortium mean that the competition should be re-run? If not, why not?
12. Can you confirm that the Becon Consortium is now the only bid under consideration?

13. If yes, why are no other bids being considered?
14. Please advise what steps have been taken to ensure compliance with PCR r.23.
15. You state that the procurement competition allows for changes to the make-up of consortia. Please provide a copy of the procurement competition and state which part permits such changes.
16. At what stage is the current procurement process at?
17. Is there an anticipated date for its conclusion? If yes, when? If no, why not?

Additional Questions

In a statement by Ricky Burnett on 1 July 2009, it was announced that the following groups would be the only groups now under consideration:

- (i) The Greenstar Holdings Ltd and E.On Energy from Waste AG consortium;
- (ii) SITA Holdings UK Ltd;
- (iii) Veolia ES Aurora Ltd

The following bids were to be excluded from the process:

- (i) Covanta Energy Ltd;
- (ii) a joint bid from Indaver and John Laing;
- (iii) Shanks Wheelabrator Consortium; and,

18. Please provide the following

- (i) All notes and scores of the exercise which resulted in the exclusion of these bids. Please include the scores for all 6 applicants;
- (ii) All criteria used in making the determination;
- (iii) The minimum score needed to avoid exclusion;

The complainant's follow-up letter of 27 June 2017 was worded as follows:-

We are concerned at your failure to answer some of the questions raised and are considering our position in respect of bringing the matter before the Information Commissioner. Ahead of doing so, we have set out, below, the areas of concern to allow you the opportunity to respond before we determine our final position.

We asked:

"Question 8 - Please confirm whether there are any contractual relationships in place between arc21 and Indaver and/or the Becon Consortium."

In reply, it is stated that the information sought was deemed to be commercially sensitive. Please confirm precisely what these commercial sensitivities are and why you consider these could be prejudiced by merely denying or confirming the existence of a contract.

Should you refuse, please confirm the precise sub-section of s.41 and/or s.43 of the Freedom of Information Act 2000 upon which you rely in order to withhold this information.

"Question 9 – Has there been any changes in the consortium and/or the economic operator(s) involved in the bid that you are aware of other than those outlined in your response?"

In reply, it is stated:

The precise make-up of each consortium is confidential and commercially sensitive as such information on changes (if any) are exempt from disclosure under sections 41 and/or 43 of the Freedom of Information Act 2000.

We consider that the make-up of the consortium should be disclosed for reasons of transparency and invite you again to confirm this. Should you refuse, please confirm the precise sub-section upon which you rely in order to withhold this information.

"Question 10 - Is it your understanding that Greenstar/E.ON Energy are no longer involved in the process?"

In reply, we are referred to your letters dated 20 December 2016 and 22 February 2017. Neither of those letters confirm whether Greenstar/E.On Energy remain involved in the process.

Please confirm the position.

"Question 18(i) – (iii) – Please provide..."

(i) all notes and scores of the exercise which resulted in the exclusion of these bids. Please include the scores for all 6 applicants;

(ii) All criteria used in making the determination;

(iii) The minimum score needed to avoid exclusion;

In reply, it is contended that these items are exempt from disclosure under sections 41 and/or 43.

We consider that this information should be disclosed for reasons of transparency and invite you again to provide the same. Should you refuse, please confirm the precise sub-section upon which you rely in order to withhold this information.

In its response of 14 August 2017, Arc21 provided the complainant with further information in relation to questions 10, 18(ii) and 18(iii) and retained its position regarding the application of the above exemptions to the remaining withheld information.