

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

Decision notice

Date: 4 October 2018

Public Authority: Sheffield City Council

Address: Town Hall
Sheffield
South Yorkshire
S1 2HH

Decision (including any steps ordered)

1. The complainant's request concerns the 'Streets Ahead' contract Sheffield City Council ('the Council') has with Amey. He has requested unredacted versions of all those schedules that had not been published at the time of his request, and for the release of the information that the Council had redacted from those schedules it *had* published. The Council considered the request under the FOIA and applied particular exemptions to the requested information.
2. During the Commissioner's investigation the Council reconsidered its approach to the request and considered it under the EIR. Its revised position is that, at the time it was submitted, the Council was not obliged to comply with the request under regulation 12(4)(b) of the EIR. The Council has categorised the request as manifestly unreasonable by virtue of it being a vexatious request due to the disproportionate burden associated with complying with it.

3. The Commissioner's decision is as follows:
 - At the time it was submitted, the request could be categorised as manifestly unreasonable under regulation 12(4)(b) by virtue of being a vexatious request.
 - The public interest favoured maintaining the exception.
 - The Council breached regulation 9(1) as it did not offer the complainant appropriate advice and assistance.
 - The Council breached regulation 14(2) as it did not issue the complainant with a refusal notice under the EIR within 20 working days of receiving the request.
4. The Commissioner requires the Council to take the following step to ensure compliance with the legislation:
 - The Council failed to provide advice and assistance aimed at helping the complainant make a fresh request which was not so voluminous as to be manifestly unreasonable, in accordance with regulation 9(1). However, since the request was made the majority of the information has been published which would reduce the possibility of a fresh request being refused under regulation 12(4)(2). But should there remain a possibility of a fresh request for any or all of the residual information being refused under that exception, the public authority should consider what if any advice and assistance it is reasonable to provide the complainant and inform him of the results of those deliberations.
5. The Council must take this step 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 6 October 2016 the complainant wrote to the Council and requested information in the following terms:

"[1] ...I should therefore be grateful if you would now release in full those Schedules still to be uploaded (and in particular Schedule 2: Output Specification, and Schedule 29: Authority Policies), and also [2] reissue in full those so far uploaded as 'redacted' and which generally feature only the title and little more than a blank page (particularly Schedule 3: Method Statements). This is surely beyond what is

therefore acceptable under the Code and appears to be a misuse of the meaning of 'redacted' in any related guidance I have been able to find?"

7. The Council responded on 3 November 2016. It had considered the request under the FOIA. It provided the complainant with a particular web link and said that information that was available from this link was exempt from disclosure under section 21 of the FOIA as it was accessible to him by other means. The Council said some information was exempt under section 31 (law enforcement) and section 40(2) (third person personal data).
8. The Council provided a review on 28 August 2017. It acknowledged that there were shortcomings to its initial response. The Council advised that it considered that it should have applied section 22 of the FOIA to the complainant's request (information intended for future publication). The Council confirmed that it was applying section 22 to the request and that the public interest favoured maintaining this exemption.
9. The Council also advised that some of the information the complainant had requested was exempt under section 21 of the FOIA; having been published in the interim, albeit with redactions.
10. The Council went on to discuss commercially sensitive information and third party personal data. It concluded its review by saying that further to its application of section 22, it considered that some information within the requested documentation was also likely to be exempt under section 40(2) and 43. The Council said that these exemptions would be applied and communicated with the final published versions of the contract information where it considered this would be appropriate, following the comprehensive contract review it was undertaking.
11. During the Commissioner's investigation, the Council reconsidered its position with regard to the request. On 22 June 2018 the Council issued a fresh response to the complainant. It confirmed that it should have considered the request under the EIR. The Council further confirmed that it is now relying on regulation 12(4)(b) with regard to the request because, at the point it was submitted, almost two years ago, the request was manifestly unreasonable by virtue of compliance causing the Council a disproportionate burden.
12. The Council explained that its intention was to publish all the Streets Ahead contract schedules (with information redacted as appropriate). Preparing the schedules for publication involved liaising with Amey to ensure that publication would not harm the Council or contractors' commercial position or breach data protection legislation. The Council stated that this would be a protracted exercise due to the scale and size

of the contract. The Council also said that focussing on complying with the request within the timescale identified in the EIR (ie 20 working days) would not be a good use of its resources.

13. The Council reproduced a short extract of the Commissioner's guidance on assessing the costs associated with complying with a request, but did no more than that. It did not confirm that it was refusing to comply with the request because the cost of doing so would exceed the appropriate limit (the equivalent of section 12(1) of the FOIA).
14. The Council acknowledged the public interest in the topic of street trees in Sheffield, the interest in street tree maintenance and removals and in the subsequent scrutiny of the contract that underpins that activity. It said it had published a range of information about the street trees programme – including responses to FOI requests and elements of the Streets Ahead contract – and that this fulfilled its duty to be transparent.
15. The complainant requested an internal review on 10 July 2018. He considered that, at the time he submitted his request in October 2016, there was little work left to be done on preparing the remaining contract schedules for publication. In addition he did not accept the Council's public interest conclusion. He said that he considered there is strong public interest in the Council complying with the request: to rebuild the public's relationship and trust in the administration; and to better understand what he stated is a £66m loss of passive public assets (ie trees) and the resultant effect on the health and wellbeing of Sheffield's residents through the loss of those assets.
16. The Council provided a review on 19 July 2018. It advised that remaining elements of the Streets Ahead contract had now been published, albeit with some information redacted. The Council maintained its position that, at the time of the request, the request was manifestly unreasonable under regulation 12(4)(b).

Scope of the case

17. The complainant first contacted the Commissioner on 26 June 2017 to complain about the way his request for information had been handled.
18. The Commissioner has first considered whether the request is for environmental information that should be considered under the EIR. Her investigation has then focussed on whether the Council could rely on regulation 12(4)(b) to refuse to comply with the request, at the time it was submitted, the public interest aspects and whether the Council

complied with its obligation under regulation 9(1). She has considered the matter of regulation 7(1) (extension of time) under Other Matters.

Reasons for decision

Is the request a request for environmental information?

19. Information is 'environmental information' and must be considered for disclosure under the terms of the EIR rather than the FOIA if it meets the definition set out in regulation 2(1)(a) to 2(1)(f) of the EIR.
20. The request in question concerns the schedules of the 'Streets Ahead' contract that the Council has with Amey, which has run since 31 July 2012. The Streets Ahead contract is a large, city-wide highways maintenance contract. It attracted interest because of the high level of public scrutiny associated with how – through the Streets Ahead contract – the Council has been managing its street trees.
21. Regulation 2(1) of the EIR defines 'environmental information' as, under regulation 2(1)(a), information that concerns the state of the elements of the environment, including: air and atmosphere, landscape and natural sites and biological diversity. Regulation 2(1)(c) defines environmental information as information that concerns measures (including administrative measures) such as policies, plans, programmes and activities affecting or likely to affect the elements referred to in (a) as well as measures or activities designed to protect those elements.
22. The Commissioner considers that the 'Streets Ahead' contract and its schedules is a measure that is likely to affect the elements referred to in regulation 2(1)(a). As such, the Commissioner is satisfied that the request is a request for environmental information that the Council should have managed under the EIR at the point it received the request.

Regulation 14 – refusal to disclose information

23. Under regulation 14(1) of the EIR, if an authority refuses a request for environmental information it should communicate the refusal in writing, and the refusal should comply with particular provisions.
24. One of the provisions, under regulation 14(2), says that an authority should communicate the refusal to the applicant within 20 working days following the date of receipt of the request.
25. Because it originally handled the request under the FOIA, the Commissioner finds that the Council breached regulation 14(2) as it did not refuse the complainant's request for environmental information,

under the EIR, within 20 working days. That refusal came some 18 months later. The Commissioner is not of the view, however, that the original mis-handling was a deliberate delaying tactic on the part of the Council.

Commented [CW1]: This is the CP's view. And is why I've brought in reg 14 – not entirely sure it's relevant...

Regulation 12(4)(b) – manifestly unreasonable request

26. Regulation 12(4)(b) says that a public authority may refuse to disclose information to the extent that the request for information is 'manifestly unreasonable'. This exception can be used when a request is vexatious (the equivalent of section 14(1) of the FOIA) or when the cost of complying with a request would be too great.
27. The Commissioner considers that the inclusion of 'manifestly' in regulation 12(4)(b) indicates Parliament's intention that, for information to be withheld under the exception, the information request must meet a more stringent test than simply being 'unreasonable'. 'Manifestly' means that there must be an obvious or tangible quality to the unreasonableness of complying with the request.
28. With regard to vexatiousness, in line with her published guidance on vexatious requests, the Commissioner considers whether the request itself is manifestly unreasonable rather than the individual submitting it. Sometimes, it will be patently obvious that a request is manifestly unreasonable. In cases where it is not so clear cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually be a matter of objectively judging the evidence of the impact on the authority and weighing this against any evidence about the purpose and value of the request. Public authorities may also take into account the context and history of the request where relevant.
29. With regard to cost, the EIR does not contain a limit at which the cost of complying with a request is considered to be too great. However, the Commissioner's guidance suggests that public authorities may use the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2002 ("the Regulations") as an indication of what Parliament considers to be a reasonable charge for staff time. The Regulations specify that £450 is the appropriate limit for local authorities such as the Council, and that the cost of complying with a request should be calculated at £25 per hour; this applies a time limit of 18 hours.
30. For the purposes of the EIR, a public authority may use this hourly charge in determining the cost of compliance. However, the public authority is then expected to consider the proportionality of the cost

against the public value of the request before concluding whether the request is manifestly unreasonable.

31. When refusing a request for environmental information under regulation 12(4)(b) on the grounds of cost, public authorities should provide the requester with appropriate advice and assistance.
32. This will usually involve setting out the costs involved in answering the request and explaining how it might be refined to make it more manageable and therefore, not manifestly unreasonable. The aim of advice and assistance should be to help the requester to submit a new, more manageable, request.
33. In either case – vexatiousness or cost – where the exception is engaged it is subject to a public interest test under regulation 12(1)(b) to determine whether the information should be disclosed in spite of the exception applying.
34. In this case, from its fresh response to the complainant it appeared to the Commissioner that the Council's position was that it had categorised the complainant's request as a vexatious request, as complying with it would be a disproportionate burden. She notes that in its submission to her dated 4 September 2018, however, the Council has first stated that in its revised response to the complainant it had advised the complainant that it was relying on the manifestly unreasonable exception by virtue of the cost associated with complying with the request. It goes on to say in its submission that this was because of the complexity of the contractual information that the Council held in relation to the Streets Ahead contract. It held a copy of the contract at the time of the request; a number of elements (schedules) were already published on its website or on request (some of which, the Commissioner notes, had already been redacted); however, the Council says, it did not hold a copy of the remainder of the contract that was appropriate for publishing ie from which all commercially sensitive or otherwise exempt information had been removed, such as personal data.
35. In order to comply with the complainant's request, the Council says it would have needed to review and redact where appropriate the full contract documentation to ensure it did not breach data protection legislation or prejudice its own commercial interests or those of its contractor (Amey) or other third parties.
36. The Council's submission then states that due to the scale of the Streets Ahead contract, it considered that complying with the request would cause a disproportionate burden to it and it has therefore categorised the request as manifestly unreasonable. The Council has noted that the

information in question would be in excess of 300MBs of documentation comprising over 200 documents of varying length. The full contract is in excess of 7,000 pages and comprises 44 schedules; a number of which incorporate multiple documents, and a range of annexures.

37. In its submission, the Council has told the Commissioner that it first focussed on the time that would be required to review and assess each document and concluded that this would be excessive in terms of cost. It estimated that the time required would be well in excess of 18 hours for the Council to physically read, review and redact the documentation held to make sure it was suitable for publication. The Council said it would also need to allow time to consult with Amey which, due to the complexity and technical nature of certain elements of the contract, appeared to be necessary in this case.
38. Under FOIA, the cost of considering whether information is exempt cannot be taken into account under section 12 (the appropriate costs limit) but can be taken into account under section 14(1) (vexatious requests). This is because section 12 limits the activities that can be taken into account when deciding if the appropriate limit would be exceeded. This is not an issue under the EIR. The costs of considering if information is exempt (ie redacting information) can be taken into account as relevant arguments under regulation 12(4)(b).
39. Having broadly discussed the cost associated with complying with the complainant's request, the Council's submission then turns to the request being manifestly unreasonably due to being vexatious. The Council states that it considers the request can be categorised as vexatious because, at the time of the request, complying with it would have been a disproportionate burden to the Council. It has said that this burden has direct links to the refusal on cost grounds and the general disruption which would be caused to the Council ie it considers there is cross-over between its representations with regard to cost and the following representations with regard to vexatiousness.
40. The Council says that [at the time it was submitted] in order to have complied with the request within the 20 working days provided by regulation 5(2) of the EIR (or the extension to 40 working days provided by regulation 7) it would have required a number of its staff to work exclusively on the contract for a significant proportion or potentially all of the period provided. The Council says that, for example, if it had taken one member of staff involved in reviewing the contract only one minute to convert the document to a suitable format, to read, digest, discuss and, if relevant, electronically redact a page of the contract, it would have taken in excess of 116 hours to complete this activity for 7000 pages. This would not take account of the technical content and

issues with redacting information which, it has subsequently become clear, has been complex at times.

41. The Council says that undertaking this work would also have needed Amey's dedicated resources. Amey is not specifically subject to the EIR and the Council says that Amey could have therefore potentially levied charges against it (and ultimately tax payers) for such a "time pressured" requirement.
42. The Council has noted that, at the date of this notice, it has fully reviewed the entire contract and it has all now been published (albeit with redactions). Those involved in the review process included one of the Council's Senior Commercial Lawyers, its Lead Contract Manager for the Streets Ahead contract, and a member of its Information Management Team with FOI/EIR expertise. The Council considered these individuals were best placed to review, discuss and identify elements of the contract that should not be placed in the public domain. The Council says that to complete this review process solely to meet the time requirements of an EIR request would have taken those individuals away from their 'day jobs' for a significant period of time. It argues that this would not have been tenable for an organisation facing the resource pressures that the Council does. These specialist roles would have been needed to undertake the review activity, but forcing the individuals concerned into an 'EIR working group' would have removed them from alternative activity which, the Council says, would have caused a severe disruption to the Council.
43. The Council has gone on to discuss various indicators of vexatiousness that the Commissioner notes in her related published guidance. First, the Council has considered whether the request was designed to cause disruption or annoyance. The Council has concluded that it was not. It has observed however that the request was one of a significant number of requests that it received from members of the public and protest groups about its management of street trees and the contract to which that process linked. Requests that the Council may have received from other members of the public about similar matters – unless they were part of a coordinated campaign – cannot form part of the Commissioner's considerations as to whether the request in this case can be categorised as manifestly unreasonable/vexatious.
44. The Council has next considered whether the request can be characterised as 'obsessive'. Again, the Council has concluded that it cannot. The Council has gone on to observe that, since the contract has now been published, there seems to the Council to be little value in the complainant continuing with the current complaint. Again, the Commissioner cannot include that point in her deliberations. The complainant is entitled to progress his complaint to her about the

Council's response to his request. It appears to him that, at that time, the Council should have released particular information to him, but, in order to frustrate protests about its street tree programme deliberately, it did not.

45. As to whether the request had any serious purpose or value, the Council has acknowledged that the request has a serious purpose but says it had to balance the right of access with the Council's ability to function as an effective public authority.
46. The Council's submission then turns again to the matter of costs before concluding that it is the diversion of resources that is relevant in this case; the fact that a number of its staff would have had to sit and consider the application of exceptions. The Council refers to the very general estimate of 116 hours that it says this process would have taken to complete, and notes that this far exceeds the 18 hours provided under the section 12 FOIA exemption.
47. But again, the crux of the matter appears to be that the Council's position is that the request is manifestly unreasonable by virtue of it being vexatious. This is because the burden to the Council that complying with the request would have caused was, according to the Council, disproportionate to the request's value. By inference, the Council might have been prepared to spend the necessary (estimated) 116 hours reviewing the Streets Ahead contract in order to comply with the request - releasing all the contract (with redactions) ahead of any planned schedule - if it had considered the request to have had sufficient value.
48. The Council has told the Commissioner that the Streets Ahead contract comprises over 200 documents and approximately 7000 pages. As has been noted, the request was submitted almost two years ago. The Council has advised the Commissioner that it is not now possible to confirm what schedules had been published in October 2016 and what schedules were still to be published.
49. The complainant, however, has told the Commissioner that he took a 'screen shot' of the Council's website when he had first tried to obtain the requested information through the Council's own 'information portal'. This was in mid-2015, approximately 16 months before he submitted his request. At that time, the complainant has told the Commissioner that 14 schedules had been published: 1, 3, 4, 5, 7 (nine parts), 10, 11, 12, 13, 14, 15, 16, 17, and 19 (five parts).
50. The complainant's request is for unredacted versions of all the schedules that had not been published at the time of the request and unredacted versions of the schedules that had been published at that time. In

effect, the complainant has requested unredacted versions of all the Streets Ahead schedules. As such, what schedules had been published at 6 October 2016 and what had not is not, to a large extent, relevant.

51. In order to comply with the request, the Council would have had to go through the process of review with regard to all the schedules that had been published with redactions, in order to consider again, whether the redacted information could be released. That element of the review process might have needed to be less protracted but a degree of review would still have been necessary. The Council would have to go through a more protracted review process with regard to those schedules that had yet to be published. The Council would therefore have had to review *all* the contract schedules at the time it received the request in October 2016, regardless of whether or not they had been published.
52. The Commissioner has focussed on whether the process of reviewing all the schedules one at a time in order to comply with the complainant's request constituted an unreasonable burden on the Council or was an unreasonable diversion of resources, thus making the request manifestly unreasonable.
53. From her investigation of a separate case – FS50689106¹ – the Commissioner is aware that the Council first began a review of the Streets Ahead contract when the contract was instigated in August 2012. The Council had said it had always held a commitment to review and publish the contract since that time and elements of the contract have been available in redacted form from at least 2014. The Council had explained that further to this process, and as a result of the efforts of pressure groups related to the protests about the Council's management of street trees, the Council made a commitment in April 2017 to complete a full and refreshed review of the contract. This would review all elements of the contract, including previously published versions, to make sure that only currently commercially sensitive information [and presumably, any personal data] is withheld. Notwithstanding the Council's renewed commitment to publishing the contract, the Commissioner is prepared to accept that the Council had had a commitment to publish the contract since 2012, and had begun publishing elements from 2014.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2018/2173213/fs50689106.pdf>

54. At issue here is whether, at 6 October 2016, the process of reviewing all the contract material with a view to confirming whether certain published information was to remain redacted, and whether certain unpublished information needed to be redacted prior to its release in response to the complainant's request - in advance of its planned review and release of the (unpublished) material - constituted a disproportionate burden. In other words, does the complainant's request have sufficient value such that any burden complying with it would have caused the Council would have been proportionate? The Commissioner has considered the burden involved, and the request.
55. First, the Commissioner she sees no reason to doubt that the contract comprises over 200 documents and approximately 7000 pages. She has noted that in its discussion of the public interest arguments, within its submission to her, the Council has told her that protest groups had previously complained to it about published documentation related to the contract being redacted. The Council therefore set up the review process with a view to reviewing all documentation in the contract, including previously published material, to ensure they (published documents) had not been overly redacted initially.
56. On the basis of this, the Commissioner is prepared to accept that the Council considered it would have needed to review the contract in its entirety in order to comply with the request, and that this review would have included liaising with Amey. The Council would have had to review again the proportion of the contract that had been published at the time of the request – which might have been approximately 25% of the contract. It would have had to review for the first time the remaining elements of the contract, approximately 75% of the contract.
57. By way of an example in its submission, the Council has allocated one minute per page to read, digest, discuss and, if relevant, electronically redact one page of the contract. This does not seem, to the Commissioner, to be an unreasonable estimation. It nonetheless yielded over 116 hours of work for the Council. Even at 30 seconds per page, this would still have necessitated approximately 58 hours work. In addition, carrying out the review in order to comply with the request would have involved taking away particular members of staff from their day-to-day duties for a significant amount of time so that they could focus on this review work. Having considered the matter, the Commissioner considers that the necessary review process would have been a burden.
58. Next, the Commissioner has considered the request. She notes that the request is very broad; it is, in effect, for unredacted versions of all the contract schedules which comprises, as discussed, approximately 7000 pages.

59. From her communications with the complainant, it appears to the Commissioner that his focus is on the Council's management of Sheffield's street trees. Doubtless some of the contract schedules are relevant to Amey's management of the street trees however, in the Commissioner's view, the majority are unlikely to be. It would therefore seem to be the case that, if it had complied with the request, the Council would have had to spend a good deal of time reviewing and releasing documents – ahead of any planned schedule - that would have been of little or no interest to the complainant.
60. That all the elements of the Streets Ahead contract have now been published (albeit with redactions) gives credence to the fact that, at 6 October 2016, the Council had planned to publish the contract. That, from the time it was instigated in 2012, the Council intended to publish the contract also adds weight to the view that the Council anticipated there would be public interest in the contract and that a request for the contract therefore had some value.
61. As discussed above, at the time it was submitted the request did have some value. Locally, the Council's street tree programme had caused concern residents and elements of the Streets Ahead contract may have provided local residents with information that could have aided in their efforts to campaign against the programme. However, the request is broad. It is effectively for the entire contract; large amounts of which would not have been relevant to the any campaigners' concerns. The Council has explained the review process that it would have had to undertake in order to comply with the request, and has advised on the length of time this would have taken: approximately 116 hours. It would have diverted key staff members from their day to day duties for a significant period and also involved Amey staff. In addition, the Council intended to publish the remaining schedules over time.
62. Having considered both parties' submissions, the Commissioner is of the view on this occasion that the burden to the Council of complying with the complainant's request would have been disproportionate to the request's value. The Commissioner therefore considers that the complainant's request can be categorised as vexatious and that, at the time it was submitted, the Council could rely on regulation 12(4)(b) to refuse to disclose the requested information. She has gone on to consider the public interest arguments.

Regulation 12(1)(b) - public interest considerations

Public interest arguments in favour of disclosing the information

63. The Council has provided the following arguments in favour of disclosure:

Reference: FS50687843



- It would improve public awareness and allow members of the public to engage in public debate about decisions and initiatives that affect the locality.
- It would promote accountability and transparency in the way public money is spent including in the awarding of the Streets Ahead contract and the relevant contract provisions.
- It would allow for public review of the Streets Ahead contract above that previously available.
- It may provide sufficient information to encourage other potential suppliers to bid for future contracts leading to greater competitions, possibly decreasing the cost to the Council or other local authorities.
- It may provide information which protest groups might consider relevant to support their complaints or legal action against the Council.
- The Council's management of street trees has been high profile within Sheffield and disclosure of the contract would allow scrutiny of the contract.
- It would ensure prompt disclosure of the contract in advance of the Council's ongoing activity to review the contract for disclosure, which did not have a set publication date.

64. The complainant has provided public interest arguments for disclosure:

- The complainant has noted subsequent national media interest in the tree-felling programme, and the involvement of a Government Minister (Michael Gove) in the matter as evidence of a strong public interest in the programme.
- He has also argued that not letting the public see the contract or how it might be interpreted has led to pensioners and at least one councillor being arrested, and the exercise of injunctions and court appearances. He has noted that security guards have also been employed to manage protests against the programme. According to the complainant, disclosing the contract will remove the misleading picture he says the Council has created by partial disclosures that do not appear to match public statements, to properly inform debate and to restore trust between the Council and Sheffield residents.
- In addition, and as referred to elsewhere in this notice, the Council's public interest arguments (in its response) ignore the

impact on the public of what the complainant says is the independently estimated loss of £66m, so far, of passive public assets (ie trees) in the name of the Streets Ahead contract, and the resultant effect on public health and wellbeing in Sheffield due to the loss of those assets.

- The complainant considers that the public should be given the ability to assess the possibilities of interpreting the contract clauses in such a way as to help mitigate this, or to see any contractual evidence of the professionally assessed consideration and monitoring processes that the Council has asserted.
- In recent correspondence to the Commissioner the complainant has argued that the public interest is proved because of a current temporary pause in the tree felling programme. The complainant says that this is partly due to the outcry from information the ICO has ordered to be released in previously 'commercially redacted' documents that now appear to confirm a particular tree felling 'target' and the lack of promised 'engineering solutions'.

Public interest arguments in favour of maintaining the exception

65. The Council has provided the following arguments for maintaining the exception:

- Disclosure in full without suitable and careful consideration of commercially sensitive material may result in legal action if Amey wished to pursue a breach of confidentiality and contract. The duty of confidentiality is well established in law and there is a strong interest in confidences being maintained.
- In order to avoid difficulties in future negotiations with Amey on contract amendments, if information considered commercially sensitive is released under an FOI or EIR response.
- To maintain Amey's ability to compete in a competitive market. The information requested might benefit a rival company. In this case information about specific financing methodology, compensation events, unique methodology for the handling of the contract requirements etc would likely be of benefit to a rival company. This may result in the loss of business, Amey's ability to obtain supplies or secure finance, and in more extreme cases, jobs.
- Releasing Amey's financial model may adversely affect its own relationship with its financiers which ultimately could affect its business model and its ability to meet the requirements of the contract. The requested information is not currently information

within the public domain and does not specifically affect the management or function of the Streets Ahead contract.

- Releasing the information could discourage companies from bidding for future work with the Council amid concerns that information will be disclosed despite their wishes. This may result in fewer choices and higher costs which would undermine the Council's ability to fulfil its role in a cost effective manner.
- To avoid prejudicing the commercial interests of the Council by affecting adversely its bargaining position during future contractual negotiations, resulting in the less effective use of public money.
- Amey may suffer commercial damage through lack of competitive advantage from the release of contractual related information, possibly leading to the severe consequences noted above.
- Completing all review and redaction activity would place a strain on resources and get in the way of the Council's ability to deliver its services or answer other FOI/EIR requests.
- To avoid removing senior staff from activity for a protracted period in order to comply with the request at significant cost to the Council in terms of time lost from other activities.
- As referred to previously, protest groups had previously complained about the redaction of documentation related to the contract. The associated review was therefore set up with a view to reviewing all documentation in the contract including previously published material to ensure they had not been overly redacted initially.
- To avoid significant cost on the Council at public expense in terms of officer time and also potential costs levied by its contractors for the expedited review of the contract

Balance of the public interest

66. The Commissioner has considered the complainant's and Council's public interest arguments. She has disregarded some arguments that appeared to concern the Council's previous reliance on section 43 of the FOIA. The matter at hand here is now whether the request could be categorised as manifestly unreasonable. In addition, she has considered the situation as it was at 6 October 2016 – so far as she is able to at this point – so that, for example, any pausing of the tree-felling currently cannot be taken into account.

67. From her own research, the Commissioner understands that the Council's tree-felling programme started in 2014. Some resident protests and campaigning began from that point and this increased throughout 2015 and into 2016. Campaigners had submitted a separate FOI complaint to the Commissioner at this time. In February 2016 the High Court issued an interim injunction which paused the tree felling for three months. Permission to grant a Judicial Review was not granted and felling recommenced in June 2016. South Yorkshire Police first became involved in ongoing disputes at this point.
68. Clearly, at the time of the request, there was considerable local public interest in, and concern about, the Council's street trees programme and there was also local media interest in it. National interest came later, however, as did Michael Gove's intervention, which happened in March 2018.
69. Perhaps in part to address public concerns, an Independent Tree Panel (ITP) had been set up in 2016 to give advice on the Council's street tree replacement proposals. ITP advice letters from 2016 and the Council's associated decisions from 2016 are currently published on the Council's website. However the Commissioner cannot say at this point how many, if any, had been published by October 2016. But at that time some elements of the Streets Ahead Contract had been published on the Council's website and the Council had the intention to publish the remainder. The Commissioner also notes that the permission a campaigner had sought to apply for judicial review (of the Council's consultation on the programme, an associated planning permission matter and an injunction preventing further felling) was refused; that is, the High Court found there was no legal merit to the above grounds.
70. At October 2016, the Council's street-tree programme undoubtedly had some local public interest and activities had occurred that, to a degree, had sought to address that interest (paragraph 69). The Commissioner has taken account of the complainant's argument that disclosing the contract would have allowed the public to be better informed and to be better able to present a case for stopping or reducing the felling of trees. First however, the request was effectively for the entire contract when only a proportion of the contract, and perhaps a small proportion, was relevant to tree management. Council resources – senior members of staff – would therefore have been directed to preparing material that was of no relevance to the matter of tree management. Second, the Council has argued that some of the contract is highly technical and those elements are unlikely to be well understood by the general public. Third, if the Council had complied with the request and expedited the review process, this would not have resulted in all the contract being released without redactions.

71. To summarise, the Commissioner is not persuaded that the information the complainant has requested had sufficient public interest – given its breadth and the fact that it would be unlikely to be released without redactions - to warrant the Council spending upward of three working weeks reviewing it in order to release it in response to the complainant's request.
72. The Commissioner has considered whether the public interest that existed at the time was sufficient such that, despite the request being manifestly unreasonably, the Council was nonetheless obliged to comply with it. The matter is finely balanced. The Commissioner considers that, in this instance, the public interest in transparency about the street tree management programme was being met sufficiently. The balance therefore tipped in favour of allowing the Council to focus its resources on its day-to-day duties and to release the contract in line with its intended review process, rather than in order to comply with the request.

Regulation 9 – advice and assistance

73. Regulation 9(1) of the EIR says that a public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.
74. In her related published guidance² the Commissioner advises that she normally expects public authorities that refuse manifestly unreasonable requests under regulation 12(4)(b) because they ask for voluminous information and because of the costs (but not where the request is, in effect, vexatious) to give advice and assistance to help the requester submit a less burdensome request.
75. In its submission to her the Council has said that it does not consider regulation 9 was relevant in this case. This is because at the time of the retrospective refusal of the request it was aware that the contract would be shortly due for publication. As the request was for the full contract, the Council says that it considered it unlikely that any refined request would be relevant as it considered that any attempt to refine the request would be seen [by the complainant, presumably] as an attempt to hide

² <https://ico.org.uk/media/for-organisations/documents/2013834/eir-advice-and-assistance-regulation-9.pdf>

relevant parts of the contract. The Commissioner cannot agree with this assessment.

76. Regulation 9(1) comes in to play when the request is refused under regulation 12(4)(b) because of the cost involved in complying. Although, in this case, the Council has broadly referred to the time (and associated cost) it would take to comply with the request, the Commissioner's understanding, as discussed, is that the Council is relying on regulation 12(4)(b) because it considers the request to be vexatious.
77. However, the Commissioner goes on to note in her guidance that the First Tier Tribunal (Information Rights) (FTT) has been unwilling to support the use of regulation 12(4)(b) if the public authority has not tried to give the applicant advice and assistance. The FTT considers that, in dealing with unreasonable requests, a public authority should itself act reasonably, and this would include providing the applicant with advice and assistance if this was reasonable in the circumstances.
78. The Commissioner would therefore expect the public authority to help the applicant rephrase their request in a way that would allow it to give some information. She notes in her guidance that it is good practice for public authorities to give the applicant appropriate advice and assistance when issuing a refusal notice if, as above, this would be reasonable in the circumstances.
79. In the current case, the Commissioner is mindful of the fact that the request was submitted almost two years ago and the Council has re-considered its response and applied regulation 12(4)(b) only recently. However, she has taken account of the situation as it was at the time of the request and considered what *should* have happened.
80. The complainant effectively requested copies of all the Streets Ahead contact schedules. It appears to the Commissioner that it would have been reasonable for the Council to have discussed with the complainant whether there were specific matters or schedules that were of particular interest to him, with a view to identifying particular schedules out of the 44 in question. That is, the Council might reasonably have sought to reduce the number of schedules that would have needed to be reviewed or re-reviewed. This potentially could have reduced the burden to the Council of complying with the request to the degree that it made the burden proportionate to the request's value. A reliance on regulation 12(4)(b) would not, in that circumstance, have been necessary. For this reason, the Commissioner finds that the Council breached regulation 9(1) on this occasion.

Other Matters

Regulation 7 – applying an extension for complex or voluminous requests

81. In its submission to the Commissioner, the Council has discussed the fact that it did not consider the application of regulation 7 in its handling of the request. This is, it says, partly because of its late application of the 12(4)(b) exception; it had originally responded to the request under the FOIA. The Council has also referred to what it says is the underlying principle with regard to its response under the EIR is the burden placed on the Council if it was to comply with the request. It says the further 20 working day extension would only have aided with the considerations regarding the application of 12(4)(b). Such an extension would, at the time of its EIR response, have been inappropriate because the EIR refusal was issued such a long time after it first received the complainant's request.
82. Regulation 7(1) of the EIR says:
- "Where a request is made under regulation 5, the public authority may extend the period of 20 working days referred to in the provisions in paragraph (2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so."*
83. In her related published guidance³, the Commissioner advises that a public authority may only apply the extension where it reasonably believes it will require additional time to locate and provide the information because the requester has asked for a large amount of complex information **and** it would not be practical to provide the information or make a decision about whether to refuse the request within 20 working days.

³ <https://ico.org.uk/media/for-organisations/documents/1622/time-for-compliance-eir-guidance.pdf>

Reference: FS50687843



84. In the Commissioner's view, whether it would have taken the Council 20 working days or 40 working days to comply with the request is immaterial. The Council's position is that complying with the request would have been a disproportionate burden. By inference, had it allowed itself 40 working days to comply with the request, compliance would still have been a burden that it considered was disproportionate. In these circumstances the Commissioner does not consider that the Council ought to have relied on regulation 7(1) to extend the timeframe in which it could respond to the request.

Reference: FS50687843



Right of appeal

85. 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

86. 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.

87. 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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