

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

Date: 24 October 2023

Public Authority: Mid Sussex District Council
Address: Oaklands
Oaklands Road
Haywards Heath
West Sussex
RH16 1SS

Decision (including any steps ordered)

1. The complainant requested tendering information about a feasibility study carried out by Ricardo Plc from Mid Sussex District Council ('the council'). The council refused the request under section 43(2) of FOIA. During the course of the Commissioner's investigation the Commissioner advised the council that the information was likely to be environmental information and that it should have been considered under the EIR. It therefore applied Regulation 12(5)(e) of the EIR to withhold the information.
2. The Commissioner's decision is that the council was not correct to consider the information under FOIA as it is environmental information for the purposes of the EIR. He has, however, decided that the council was correct to apply Regulation 12(5)(e) to withhold the information from disclosure.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 10 March 2023, the complainant wrote to the council and requested information in the following terms:

"Ricardo plc provided advice to Mid Sussex District Council in a report dated 20 September 2022, a copy of which is attached.

Please could you supply a copy of Ricardo plc's letter of engagement/contract with Mid Sussex District Council for this work.

We note that the report refers to this as 'Ricardo contract 239584 dated 9th June 2021'."

5. The council responded on 11 April 2023. It disclosed a copy of the contract and a variation agreement, however it withheld tender documentation, which forms part of the contract, under section 43(2) of FOIA.
6. Following an internal review, the council wrote to the complainant on 29 June 2023. It maintained its position that it was correct to consider the requested information under FOIA, and that section 43(2) applied.

Scope of the case

7. The complainant contacted the Commissioner on 12 June 2023 to complain about the way their request for information had been handled.
8. The complainant argues that the requested information is environmental information and that that council should therefore have considered his request under the EIR rather than under FOIA. He further argues that the council was not correct to withhold the information from disclosure under either section 43(2) of FOIA or Regulation 12(5)(e) of the EIR.
9. During the course of the Commissioner's investigation, the Commissioner asked the council to reconsider whether the requested information is environmental for the purposes of the EIR. It maintained its view that it is not environmental information and that it was correct to apply section 43(2). However, it also said that if the information is environmental information, then Regulation 12(5)(e) applies.
10. The following decision notice therefore considers whether the council was correct to consider the information under FOIA, and whether it is correct to apply the exemptions/exceptions it has to withhold the information.

Reasons for decision

Is the requested information environmental?

11. Regulation 2(1) of the EIR defines environmental information as being information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
12. The requested information is Ricardo's tender bid documentation. The council argued that although any plans, policies or measures which the council subsequently produced would fall under the EIR, the contract itself is not environmental information, and it is therefore correct to consider the requested information for disclosure under FOIA rather than the EIR.
13. The withheld information is the tender documentation which led to Ricardo winning the tender to produce the feasibility report. It defines how Ricardo would approach producing the report, what areas its report would concentrate on, and it forms part of the subsequent contract

between the parties. The council has decided upon a target to reduce its emissions to zero, and the withheld information is the result of the initial steps which it took in order to identify and introduce measures to that effect.

14. The Commissioner is therefore satisfied that the information is an administrative measure which will ultimately affect the elements referred to in (a). It is also an activity designed to protect the elements outlined in (a).
15. The Commissioner has therefore decided that the information is environmental information for the purposes of the EIR, and that the council was not, therefore, correct to consider the information under FOIA.
16. He has therefore gone on to consider the council's application of Regulation 12(5)(e) to withhold the information from disclosure.

Regulation 12(5)(e) – commercial confidentiality of environmental information.

17. This reasoning covers whether the council was correct to withhold the requested information under Regulation 12(5)(e) of the EIR.
18. Information can be withheld under Regulation 12(5)(e) if disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
19. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of Regulation 12(5)(e) of the EIR, the authority must demonstrate that:
 - the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
20. Regulation 12(5)(e) is also subject to a public interest test if the exception is engaged.
21. First, the Commissioner is satisfied that the requested information is commercial in nature. It is information provided as part of a competitive tender in order to contract with the council for the provision of services.

22. Second, the Commissioner is satisfied that the information is subject to confidentiality in law. The information is not trivial and is not otherwise accessible. It therefore has the necessary quality of confidence. The council also highlighted relevant confidentiality clauses held within the contract, and information from Ricardo plc, indicating that the parties considered the information to have been provided in confidence. The Commissioner also notes that in its tender submission Ricardo Plc specifically highlighted areas of the information which it considered would be prejudicial to its business if disclosed, and specifically stated that that information was provided in confidence. The information therefore has the necessary obligation of confidence.
23. Third, the Commissioner has considered whether the confidentiality is provided to protect a legitimate economic interest.
24. The withheld information includes information such as a detailed description of its approach and methodologies, specific details on the contractor's bespoke approach and experience, and details of the operation of its intellectual property (the "Net Zero Projection" tool). Ricardo argues that these have a commercial value to it. It also contains detailed information about its staffing structure, information on the qualifications and experience of relevant employees (personal data), and its project management process, which provides insight into its working practices (i.e., how it manages its processes in order to provide it with a competitive edge).
25. Ricardo also highlighted that the information contains details such as its bid price, including day rates of its specialists and consultants, details of labour requirements by role, supply chain and names and capabilities of the delivery team, and contact details for referees. It argued that subcontractors could use this information as leverage when negotiating with Ricardo in the future, allowing them to command prices different to market value. It argued that its supply chain is a source of competitive advantage and thereby disclosure could lead to subcontractors being enticed away from working with it.
26. It also includes details about some of its past projects, some of which are subject to confidentiality provisions which were passed to the council as examples of previous work it has undertaken. Ricardo clarified that the relevant parties would have no expectation that that information may subsequently be disclosed to the wider public.

27. In all, Ricardo plc believed that its information would provide its competitors with a detailed plan for delivering a project such as this. It would also provide an example of an overall tender winning package of information, including, for instance, an example of how to write a winning tender proposal.
28. It argues that a disclosure of this information would be likely to significantly undermine it against its competitors in future tenders of this nature. It argues that the information would provide information about its strategy, approach and business model which would give an advantage to its competitors, whereas it would not have access to similar information relating to them.
29. As to the likelihood that prejudice would occur to its commercial interest, it said that it is a significant company in the net zero industry in the UK which has supplied net zero advice to numerous other local authorities. It said that it intends to continue tendering for contracts of this nature. It therefore argues that a disclosure of the requested information would cause prejudice to its commercial interests by having disadvantaged it when it enters into future tendering competitions with local authorities against its competitors.
30. The complainant highlighted that Ricardo's completed report has been published by the council.¹ He argues that the council is arguing that the report should be withheld because it outlines Ricardo's approach and methodology, but this will already be self-evident from the published final version of the report. He argues therefore that as the report already discloses information, its grounds for Regulation 12(5)(e) applying are undermined.
31. The Commissioner notes that the tender documentation includes details of Ricardo's approach and methodology rather than a completed report which used that methodology. Whilst some of its approach may be apparent from the final report, the tender submission is a different document, outlining descriptions of the process in detail, rather than a description of the outcome and findings of that process. It is also a sales pitch, describing how Ricardo would approach meeting the tender requirements if it won the contract. It includes a detailed description of

¹ <https://midsussex.moderngov.co.uk/documents/s14607/Appendix%201%20-%20Net%20Zero%20Carbon%20Emissions%20Feasibility%20and%20Options%20Report%20For%20Mid%20Sussex.pdf>

the approach it would take to meet the requirements of the tender and the people and experience it has which would make it the best option to meet the tender requirements. As such, it is a different document to the final report and covers different, albeit sometimes related, topics and information.

32. The description of the methodologies employed is specific, technical, and a clearly set out approach as to how it approaches projects of this nature. If it were to be disclosed, it would provide a significant insight into Ricardo's winning approach to tenders which would disadvantage it against its competitors in a role which it clearly intends to continue to tender for in similar contracts in the future.
33. Having considered the council's arguments, together with the withheld information, the Commissioner is satisfied that disclosing the information would undermine the Ricardo's commercial interests.
34. Finally, the Commissioner is satisfied that the confidentiality would inevitably be affected if the council disclosed this information.
35. Since the four tests have been satisfied, the Commissioner finds that Regulation 12(5)(e) of the EIR is engaged. He therefore has to consider the public interest test require by Regulation 12 of the EIR.

Public interest test

36. The test is whether, in all the circumstances of the case, the public interest in the disclosure of the information outweighs that in the exception being maintained.
37. When carrying out the public interest test, Regulation 12(2) provides a presumption towards the disclosure of the information which needs to be specifically taken into account.

The public interest in the exception being maintained

38. The public interest in the exception being maintained rests with the issues which give rise to the exception in the first instance; most notably in this case, the commercial interests of Ricardo as regards its commercial competitiveness and its position in the market, and in the risk of undermining fair and equal tendering processes in the future.

The public interest in the information being disclosed

39. There is always a general public interest in creating greater transparency over public authority decisions and how public money is spent.

40. Lowering emissions is an important issue which affects all of the local community. There is a public interest in the council being clear about the advice it has received as to how to go about achieving zero emissions. The steps required to achieve zero emissions are likely to affect the local community. It will involve changes in the way that the council works, and how it carries out its functions. Implementing the changes is likely to cost additional public money which might otherwise be used for other functions. There is a public interest in the public being aware of the advice received so that the public can understand how the changes might affect the community as a whole.
41. The complainant noted that Ricardo also has other dealings with the council and was concerned that this may have led to there being a conflict of interests. However, whether appropriate safeguards were followed as regards the council's decision making is not an issue which the Commissioner has the powers to determine. If the complainant believes that there may have been a conflict of interests, he may be able to make a complaint to the Local Government and Social Care Ombudsman. The Commissioner also notes that a planning authority acts as an independent decision-making body to its local authority, and it is not unusual for planning authorities to make decisions relating to their own local authority plans.²

The Commissioner's analysis

42. The Commissioner considers that there is always some public interest in the disclosure of information. It promotes the aims of transparency and accountability which, in turn, promotes greater public engagement and understanding of the decisions taken by public authorities. It can also improve the wider public's confidence in the decisions made by a public authority.
43. There is a strong public interest in creating transparency and openness about contracts and agreements which will affect the local community and the environment surrounding it. Introducing steps to achieve zero carbon emissions will have effect how the council carries out its functions, as well as the public generally as a result. There will also be a cost to achieve that, and this takes resources away from the council providing its other functions.

² https://www.local.gov.uk/sites/default/files/documents/34.2_Probity_in_Planning_04.pdf

44. A disclosure of the withheld information would allow the public greater insight into the council's approach to achieving zero emissions. However, Ricardo's final report has been published, which includes its recommendations as to how the council should seek to achieve this. The council has also published further documents and statements outlining its intended approach.
45. The Commissioner notes that the detailed technical analysis of Ricardo's approach set out within the withheld information, in an area of science which is still under development overall, would be likely to provide significant and detailed understanding of its approach to its competitors beyond that which can be ascertained from the publication of the final report.
46. In the Commissioner's opinion, the harm which would be caused to the economic interests of Ricardo carries considerable weight in favour of the exception being maintained. It would not be in the public interest if Ricardo's competitive position in the marketplace was eroded.
47. In reaching his decision the Commissioner has also borne in mind that Ricardo has provided advice on the feasibility of the council reaching zero emissions, and on the potential approach which the council could take to do that. The decisions which need to be made to actually implement any of the strategies suggested are however made by the council, rather than by Ricardo. It is the council which therefore needs to be transparent and accountable for its decisions on implementing any of the advice it has received, and its reasons for doing so. The planning decisions it makes are also still required to follow national guidelines, be transparent, and are appealable.
48. In the Commissioner's opinion, there is a public interest in protecting Ricardo's commercial competitiveness. Ricardo is a significant company in terms of providing advice to public authorities of this nature and it has clarified that it intends to bid for similar tenders with other local authorities on an ongoing basis. A disclosure of the tendering documents would outline to its competitors how it is likely to formulate its future bids, which would allow competitors to amend their own bids in order to better compete against Ricardo's. Undermining Ricardo's competitiveness against the other companies would damage the level playing field under which companies are intended to bid for tenders. This in turn would affect the overall market for the procurement of such advice in the future. There is a very strong public interest in protecting the fairness of the tendering processes in this respect.
49. Given this, the Commissioner has decided that the balance of the public interests lies in the exception being maintained.

50. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019):

“If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure... the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).

51. As covered above, in this case the Commissioner’s view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner’s decision, whilst informed by the presumption provided for in Regulation 12(2), is that the exception provided by Regulation 12(5)(e) was applied correctly.

Regulation 12(9) - information on emissions

52. Regulation 12(9) provides that, to the extent that the environmental information relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under specified exceptions, which includes Regulation 12(5)(e).
53. The Commissioner notes that whilst the information indicates how Ricardo will approach advising the council on how to reduce its current emissions to zero, the withheld information itself relates primarily to the methodology it will use to provide that advice, rather than specific information relating to emissions. Full information on emissions, and how the recommended approaches might address them, is included within the final report, which has already been published by the council.
54. Further to this, Regulation 12(11) provides that: “(11) *Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.*”
55. The Commissioner considers that the nature of the report is such that the information within the document which is on emissions is not reasonably capable of being separated from the other, exempt, information for the purpose of making that information available.

Right of appeal

56. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

57. 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.
58. 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

Ian Walley
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