

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

Date: 22 March 2024

Public Authority: Sandwell Metropolitan Borough Council
Address: Oldbury Council House
Freeth Street
Oldbury
B69 3DE

Decision (including any steps ordered)

1. The complainant requested from Sandwell Metropolitan Borough Council (the Council) information regarding Serco Waste Contract. The Council refused to disclose information to questions 1 and 2 of the request and cited regulation 12(5)(e) (commercial confidentiality) of the EIR.
2. The Commissioner's decision is that regulation 12(5)(e) is engaged, but the public interest favours disclosure. Therefore, the Council is not entitled to rely on this exception to refuse to provide the withheld information.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under regulation 12(5)(e) of the EIR, ensuring that any personal data is redacted where necessary.
4. 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

5. On 14 July 2023, the complainant wrote to the Council and requested information in the following terms:
 - (i) "In 2020-21, Serco was docked £755k for missed performance standards and as of October 2021 had penalties of £137k imposed for this year (total 2020-21) £892k, is this correct?"
 - (ii) Can Sandwell confirm the total fines/penalties that have been imposed since the contract with Serco was awarded (2010)?"
 - (iii) Is it the intention to reimburse Sandwell MBC council tax payers for the failed services they received but where Sandwell Council have duly received monetary recompense from Serco?"
 - (iv) Has such monetary fines/penalties with Serco been factored into the evaluation of households council tax rates?"
 - (v) Please can you also confirm the annual accounts inspection period if the notice of inspection period has already been issued?"
6. On 2 August 2023 the Council responded. It withheld information to questions 1 and 2 of the request under regulation 12(5)(e) (commercial confidentiality) of the EIR. The Council said points 3 and 4 were not considered to be information requests as they were questions as to policy rather than requests for information held. Therefore, the Council dealt with these points in a separate enquiry which had been responded to and the complainant was referred to that response. With regard to point 5 of the request, the Council directed the complainant to a notice on its website concerning a delay in the inspection period.
7. On 3 August 2023 the complainant asked for an internal review. He said the responses to points 3 and 4 did not fully address the questions. He also expressed his dissatisfaction with the Council's response to his other questions within the request.
8. On 29 August 2023 the Council provided its review response and maintained its original position in respect of points 1 and 2 of the request. It also referred the complainant again to the enquiry response that had been issued regarding points 3 and 4 of the request.

9. The Council stated to the complainant "questions 3 and 4 had already been answered in a separate response provided to a Cllr Enquiry that was logged, therefore the information was already available to you." The Council said having consulted with its Information Management Unit and the terms of its contract with Serco at the stage of responding to the original request, it maintained its view that the information is of commercial sensitivity. The Council confirmed that it would not be disclosing it and said it is "unable to advise how or where the journalist got this information."
10. During the Commissioner's investigation, the Council reported that "upon considering its response in relation to this complaint, it has recently become apparent that the information referred to by the Requestor in point 1 was previously included in a Council Scrutiny Board report published on the Council's website. Due to changes in staffing and the passage of time, the responding team were unaware of the publication of the said report when issuing both the original response and the review response. The said report should have not been published in unredacted form and this has now been rectified on the Council's website. Further, the figures referred to in that report appear to have been incorrect in any event. As such, the Council's response to point 1 could simply have been that the figures stated were not correct." The Commissioner notes that instead of this, the Council's position is it considers the information cannot be released, and therefore it cited the exception.

Reasons for decision

11. This reasoning covers why the Council was not entitled to rely on regulation 12(5)(e) of the EIR to refuse to comply with questions 1 and 2 of the request.

Regulation 12(5)(e) – Commercial confidentiality

12. Regulation 12(5)(e) states a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
13. In his assessment of whether regulation 12(5)(e) is engaged, the Commissioner will consider the following questions:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?

- Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
14. The withheld information in this case, comprises details of total penalties for the financial years which are specific to points 1 and 2 of the request.

Is the withheld information commercial or industrial in nature?

15. The withheld information relates to financial penalties imposed on a commercial enterprise with regard to their performance under a contract for waste services with the Council. The contract concerns ongoing provision of service and was procured and commissioned through an external competitive procurement process.
16. The Commissioner is satisfied the withheld information is commercial in nature, it relates to performance under a contract with the Council and concerns ongoing provision of service.

Is the information subject to confidentiality provided by law?

17. The Council explained that the agreed contract between the Council and Serco specifies the information which is deemed to be commercially sensitive and is not suitable for disclosure to the general public.

Is the confidentiality provided to protect a legitimate economic interest?

18. The Council stated that when negotiating and agreeing financial and commercial terms, it expects confidentiality. This is to enable such negotiations to be effective, and to ensure best value for money is obtained for the public money concerned. The Council considers the negotiated terms confidential between the Council and the third parties.

Would the confidentiality be adversely affected by disclosure?

19. Although this is a necessary element of the exception, once the first three elements are established, the Commissioner considers it is inevitable that this element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available.
20. For the reasons set out above, the Commissioner finds regulation 12(5)(e) is engaged. He has therefore gone on to consider the public interest test.

Public interest test

21. 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. This means that information, even though it is confidential and disclosure would harm someone's legitimate economic interests, there will be times when information should be disclosed.

Public interest in favour of disclosing the information

22. The Council acknowledges the benefit in transparency and that disclosure would increase the public understanding of the issue, the operation of this contract and the use of the public money involved. It is also aware of the public interest in disclosure and the accountability for its use of the public purse.
23. The complainant argued "Given that financial data that I quoted in my FOI request was taken directly from a press article, then in my opinion it was already in the public domain, a precedent has been set. I'd requested confirmation as to its accuracy and how much money had the Council received from Serco for similar penalties/fines since award of the contract in 2010."
24. The complainant further argued "In my view residents who are impacted by these service delivery failures are entitled to know the amount of monies that has been paid back to the Council in the form of default penalties and fines. If households Council Tax payments are determined based on the forecast costs incurred by the Council, including waste services, then any subsequent failures in these services and payments made to the Council by the service delivery contractor (Serco) should be proportionally deducted from the Council Tax charges to the households within the Borough whose services have not been delivered."
25. The Commissioner acknowledges the content of the withheld information which concerns Serco Waste Contract, and details of the total penalties for certain years. He accepts that disclosure would assist in the public's understanding of this contract, and the use of the public money involved in this. Specifically, in residents knowing the amount of money paid in default penalties and fines to the Council.

Public interest in favour of maintaining the exception

26. The Council argued that there is a wider public interest in preserving the general principle of confidentiality. It said the release of the specific financial information concerning Serco's performance under the contract, would negatively affect the trust. This, it stated, is essential in relationships between the Council and the organisations it engages with.

27. The Council further argued that parties would be discouraged from dealing with the Council in case information considered confidential could be released, causing subsequent harm to them. The Council believes that this would have an adverse effect on its ability to operate in the marketplace, as it would no longer be regarded as a trusted partner.
28. Also, it would impact on its ability to achieve value for the public which it said, goes against its function and does not serve the public interest.

Balance of the public interest arguments

29. The Commissioner accepts that there is significant public interest in ensuring commercial interests of the Council are not harmed. However, he notes that the issue in question has received significant press coverage, including information about the penalties incurred¹. The Council stated the penalty values inadvertently published on its website were not correct, and does not know where the figures referred to by the requestor have come from. The Council could, in the interests of ensuring that figures reported in the media are accurate, provide the correct figures. However it has chosen not to do so.
30. It is not disputed that penalties have been incurred by Serco. The Commissioner is not persuaded that the harm described by the Council would be caused by disclosure of the figures. He considers it highly unlikely that large companies bidding for multi-million pound contracts, would be deterred by the prospect of penalties for poor performance being disclosed under an information rights request.
31. In balancing the public interest arguments, the Commissioner accepts that there is a public interest in protecting the Council's ability to ensure value for money in the procurement and operation of contracts. However, he is not convinced that the harm envisaged is real or significant, particularly given the information already in the public domain.

¹ [Bin strikes could bring 'twelve days of chaos' to 125,000 homes in Sandwell | ITV News Central](#)

Conclusion

32. The Commissioner's decision is that the exception provided by regulation 12(5)(e) of the EIR is engaged, but that the public interest in disclosure of the information outweighs maintaining the exception. The Council was therefore not entitled to rely on this exception to refuse to provide the withheld information.

Right of appeal

33. 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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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