

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

Date: 25 November 2024

Public Authority: London Borough of Lambeth
Address: Lambeth Town Hall
London SW2 1RW

Decision (including any steps ordered)

1. The complainant has requested a copy of a contract with Serco for waste management services. The London Borough of Lambeth (LBL) initially treated this as a request made in the normal course of business. After internal review, it disclosed a Schedule from the contract but argued that EIR regulation 12(5)(e) provided an exception from its duty to disclose the remainder of the contract.
2. The Commissioner's decision is that LBL is only entitled to rely on regulation 12(5)(e) in respect of information identified in a Confidential Annex to this Notice.
3. The Commissioner requires LBL to take the following steps to ensure compliance with the legislation.
 - Disclose that information in the requested contract which is not identified as excepted from the EIR duty to disclose in the Confidential Annex to this Notice.
4. The public authority must take these steps within 30 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 26 September 2023, the complainant wrote to LBL and requested information in the following terms:

“Can you please provide me with a copy of the Council’s contract with Serco for street cleaning, waste collection and recycling. I am happy to receive the contract with commercially sensitive and personal data redacted.”
6. On 5 October 2023, LBL responded. It said that it would treat this as a “normal course of business” request and asked the complainant to make contact so that they could make mutually acceptable arrangements to view the information in situ. It explained that it closed the case as having been resolved.
7. The complainant chased a response to their request on 27 November 2023 and 28 December 2023. In the latter email they said that given the response was long overdue, they were requesting an internal review.
8. They also wrote on 9 January 2024 to explain that the arrangement proposed was not acceptable because, having had such an arrangement previously, they did not have enough time to view all of the information.
9. On 15 February 2024, LBL provided the outcome of its internal review. Missing out the second sentence of the complainant’s request when it quoted the text, it refused to provide the contract citing EIR regulation 12(5)(e) – confidentiality of commercial information.

Scope of the case

10. The complainant contacted the Commissioner on 23 February 2024 to complain about the way their request for information had been handled.
11. The Commissioner asked LBL to reconsider its position given that it had apparently already made at least some of the contract publicly available. He asked it to disclose to the complainant those parts which it had previously made available. On 16 September 2024, it disclosed Schedule 2 of the contract. The Commissioner has considered whether LBL is entitled to withhold the remainder of the contract by virtue of regulation 12(5)(e).
12. During the course of his investigation, the Commissioner sought to establish what information had been made available to members of the

public (including the complainant) to view in situ. Unfortunately, the complainant did not have a clear record of what they had seen.

13. They said:

"When I viewed the contract, I concentrated on looking at what services the contractor was contracted to provide and what the penalties were for non compliance. So I know quite a degree of detail already. For example, I know that the contract is outputs based and that the penalty for failure to collect a bin is £12.50. From memory, the only areas I didn't really look at was the pricing schedule (which I am not asking to see anyway) and the pages with the signatures on."

14. They also said:

"All of the documents in the contract which relate to performance would have been available to all the other tenderers as they would all be required to price on the same basis. Similarly, the conditions of contract, KPIs and the like would also be the same for all tenderers. So there is no basis on which these can be deemed commercially confidential. Lambeth have provided none of these documents.

The document that Lambeth has provided (Schedule 2) makes multiple references to other documents (Schedules 1, 3 and 4 noted below):

- Schedule 1 (Definitions) of the Contract.
- Schedule 3 (Method Statements).
- Schedule 4 (Payment and Performance);

From memory, I also recollect seeing several other appendices and schedules when I inspected the contract, which Lambeth have not provided. With the exception of Payment (Schedule 4), which I am not asking to see anyway, the balance of information is not commercially confidential."

15. They also said: "Furthermore, the document that has been provided (Schedule 2) cannot be understood without seeing the other schedules. For example, Clause 5.2 states "The Contractor shall produce the Community Benefit Plan within six months of the Service Commencement Date". The meaning of this cannot be understood as the definition of the Community Benefit Plan and Service Commencement Date are included in Schedule 1".

16. They added that although they were not asking to see the commercial elements of Schedule 4, "Schedule 4 will contain elements which are not

commercial, such as KPIs and performance targets. I would like to see these elements”.

17. For the avoidance of doubt, the Commissioner does not expect the complainant to have detailed memory of every aspect of the contract that they had viewed.
18. That said, it appeared that LBL did not appear to have a clear record of what it had already made public via an insitu viewing, at least not one that it communicated to the Commissioner. On 26 September 2024, the Commissioner asked LBL (along with other questions about its reliance on regulation 12(5)(e)):

“Please list which parts of the contract were previously publicly available for inspection”.
19. Unfortunately, LBL did not answer this question. LBL did explain that the contract was a live document and that “service changes have been made through formal Control Change Notices [which] has led to changes in the specification as well as financial impacts on the contract”.
20. The Commissioner notes that Schedule 2 – which has been disclosed to the complainant – is entitled “Specification”.
21. LBL provided the Commissioner with a list of contents of the contract and also said “Potentially, there may be specific schedules that the applicant may wish to view, rather than the whole contract/schedules, and we can possibly consider formatting them for public view. We do anticipate this will take considerable time.” It did not elaborate on which of these schedules might be made available to the complainant (and therefore to the public).
22. LBL then agreed to provide the Commissioner with a copy of the contract itself. The Commissioner would observe that it is, for obvious reasons, voluminous in nature.
23. Rather than attempt any further to resolve this informally between the parties, the Commissioner has considered which parts of the contract should be withheld under regulation 12(5)(e).

Reasons for decision

Is the requested information environmental?

24. 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);
25. The Commissioner is satisfied that the contract is information on a measure likely to affect the elements of the environment (or covers factors such as waste which are likely to affect elements of the environment).

Regulation 12(5)(e) – confidentiality of commercial or industrial information

26. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information, if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
27. The construction of the exception effectively imposes a four-stage test and each condition as set out below must be satisfied for the exception to be engaged:

- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
28. If all four of the above criteria are found to be met, the public authority should then go on to consider the public interest test.
29. On 16 September 2024, once it was clear that no compromise could be reached between the parties, the Commissioner asked LBL to provide him with a copy of the withheld information and for its response to a series of questions about its reliance on EIR exceptions.¹
30. LBL initially provided the Commissioner with a list of the documents that made up the contract. It identified one schedule that was, in its view very sensitive and “likely to have at least 90% redactions”.
31. It said: “Potentially, there may be specific schedules that the applicant may wish to view, rather than the whole contract/schedules, and we can possibly consider formatting them for public view. We do anticipate this will take considerable time.”
32. It invited the Commissioner to meet with its staff most closely involved in the contract “so that the Council’s position that the information held is commercially sensitive and should be withheld can be discussed.”
33. The Commissioner did not take LBL up on this offer and asked for a full copy of the contract. It is important the Commissioner has a public authority’s full written submissions in order to reach a decision. The Commissioner had supplied LBL with a link to more information about how he conducts his investigations². In the section about how the Commissioner deals with complaints, he is explicit that:
- “It is important to remember that it is your responsibility to satisfy the ICO that you should not disclose the information and that you have complied with the law. This is your opportunity to finalise your position with the ICO.”

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/key-questions-for-public-authorities-eir-2004/#12-5-e>

² <https://ico.org.uk/for-organisations/foi/foi-complaints-and-ico-enforcement-powers/>

34. The Commissioner is disappointed that although LBL eventually provided him with a copy of the contract, it provided no substantive submissions about why it was not obliged to disclose some or all of it to the complainant.
35. In the absence of any substantive input from LBL and mindful of the risk of a possibly prejudicial outcome where commercially confidential information is disclosed, the Commissioner made his own efforts to identify commercially sensitive information within the contract. In doing so, he had regard for a list of types of commercially sensitive information that was provided by the contractor to LBL and is found in a section of Schedule 3. The list is set out in the Confidential Annex to this Notice.
36. This list is one completed by the contractor in response to a request from LBL for any information which it deems sensitive for the purposes of FOIA or EIR. When considering whether third party information is commercially sensitive, the Commissioner normally expects a public authority to seek and provide a third party's comments along with its own arguments. In this case, unusually, the Commissioner only has the third party's specific comments as to what they consider commercially sensitive. The Commissioner has construed the list of information set out in the Confidential Annex (which reproduces the contractor's own list) as those comments. Given that these comments were made in the context of drawing up a contract which is explicitly mindful of LBL's FOIA and EIR obligations, he considers this to be an appropriate interpretation of that list.
37. The complainant referred to their interest in the Method Statements in Schedule 3. They also stated an interest in those parts of Schedule 4 which contained KPIs [Key Performance Indicators] and performance targets. They specifically excluded what they referred to as "commercial elements of Schedule 4".
38. The information on the list set out in the Confidential Annex includes information which is identified by the complainant as being of interest, namely some of the information in Schedules 3 and 4. The Commissioner notes, therefore, there is a tension between what the third party considers to be commercially sensitive and what the complainant wishes to see. The Commissioner has focussed his analysis in this area.
39. In the absence of any arguments as to why any of the rest of the contract is commercially sensitive, the Commissioner is not persuaded that regulation 12(5)(e) applies to it. The Commissioner has therefore focussed on:

- (i) Schedule 1,
- (ii) Method Statements in Schedule 3; and
- (iii) KPIs or other performance targets in Schedule 4.

Schedule 1

- 40. The complainant explained that without any definitions, the information disclosed to him in Schedule 2 is not meaningful. For this reason, the Commissioner has given Schedule 1 extra consideration.
- 41. Apart from two definitions - those relating to "Administrative Labour Cost" and "Maximum Amount", there appears to be no obviously commercially sensitive information in this Schedule. Had LBL pointed such information out, he would have taken that into account in his deliberations.
- 42. The Commissioner agrees that these two definitions attract the exception at regulation 12(5)(e) for reasons set out in the Confidential Annex to this Notice.

Method Statements

- 43. There are 6 Method Statements in Schedule 3. They describe how the contractor carries out its activities and undertakes its contractual obligations. Looking at the criteria in paragraph 27, the method statements are clearly commercial in nature. The Commissioner is also satisfied that the information is subject to confidentiality provided by law. The contractor has a legitimate economic interest to expect the information will be held in confidence. Were the information to be disclosed, it would reveal the contractor's unique business model and its unique approach. It would allow its competitors to gain an unfair advantage.
- 44. The Commissioner is therefore satisfied that the Method Statements attract regulation 12(5)(e). He has considered the balance of public interest in respect of regulation 12(5)(e) and the Method Statements later in this Notice.

KPI or other performance targets in Schedule 4

- 45. The Commissioner has set out his analysis with specific reference to this information in the Confidential Annex to this Notice.
- 46. There are two particular pieces of information in Schedule 4 which the Commissioner agrees is caught by regulation 12(5)(e). They meet all four criteria set out in paragraph 27 above.

47. In the absence of any substantive arguments from LBL, the Commissioner has concluded that, apart from two pieces of information in Schedule 4 that are identified in the Confidential Annex, it cannot rely on regulation 12(5)(e) as its basis for withholding Schedule 4.

Is regulation 12(5)(e) engaged? - Summary

48. For reasons outlined above, and in the absence of any substantive arguments from LBL, the Commissioner has concluded that only certain information from Schedules 1, 3 and 4 identified in the Confidential Annex is caught by Regulation 12(5)(e). Had LBL explained in submissions to him why other parts of the contract were caught by this regulation or any others, the Commissioner would have considered its arguments.

Public interest test

49. As set out above, the Commissioner is only satisfied that certain parts of the contract attract regulation 12(5)(e). This section only deals with whether the public interest favours maintaining the exception in relation to those parts.
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.
51. The complainant set out their public interest arguments as follows:
- “There is considerable public interest in the Serco contract as there has been a serious deterioration in the quality of street care since Serco took over. Serco now accounts for 9% of all the complaints to the council: <https://x.com/PeoplesAudit/status/1790993781812085243>. A mere 56% of residents are happy with their service: <https://x.com/PeoplesAudit/status/1734138861930844280>”.
52. The Commissioner recognises the strength of the complainant’s public interest arguments. There is a strong public interest in seeing as much detail as possible from the contract in order to inform public discussion of the effectiveness with which it is being carried out.
53. That said, the Commissioner is of the view that there is a stronger public interest in protecting the confidentiality of the commercially sensitive information identified in the Confidential Annex. He does not believe that the complainant would challenge this given their own expressed lack of interest in the disclosure of commercially sensitive information.
54. The complainant, however, made it clear that he did not believe the Method Statements were commercially sensitive. The Commissioner

disagrees for reasons set out above. Even if the Method Statements are commercially sensitive and attract regulation 12(5)(e), LBL can only continue to withhold them if the public interest in doing so is stronger than the public interest in disclosure.

55. Although the public interest in disclosure, as identified by the complainant, is weighty, in the circumstances of this particular case - and in relation to the specific information which the Commissioner has determined attracts regulation 12(5)(e) - the Commissioner thinks that there is a stronger public interest in protecting the confidential space in which businesses present themselves to public authorities in contractual negotiations. The Commissioner understands that this contract is still live and that, in his view, adds weight to the public interest in protecting that confidential space. Once the contract has come to an end, he might take a different view depending on the circumstances.
56. The Commissioner recognises the merit of the public seeing what the contractor said about how it would conduct its business and comparing that to its own daily experience. There is a very strong public interest in ensuring that waste management systems across the borough of Lambeth (or anywhere else) are undertaken efficiently and in accordance with the best value for public money.
57. However, and by a narrow margin, the Commissioner has concluded that the public interest in protecting the confidentiality of the information outweighs the public interest in disclosure. With regard to the Method Statements, the Commissioner is disappointed that LBL (and to an extent the complainant) could not confirm whether they had already been made public for viewing by local residents. He may have reached a different view if they had.
58. Whilst the Commissioner has been informed by the presumption in favour of disclosure, he is satisfied that, for the reasons given above, the exception has been applied correctly to withhold the information caught by regulation 12(5)(e).

Conclusion

59. The Commissioner has identified in the Confidential Annex to this Notice, that information which is caught by regulation 12(5)(e). He is satisfied that the public interest in maintaining the exception for this information outweighs the public interest in disclosure. LBL must disclose the remainder of the contract because it failed to persuade the Commissioner why it was not obliged to do so.

Other matters

60. The Commissioner considered whether LBL could argue that it is not obliged to provide the information by virtue of Regulation 12(4)(b). This is where doing so would be manifestly unreasonable, and can include on the grounds of cost. As he explains in his guidance, public authorities can take into account the time spent considering EIR exceptions where it wishes to argue that complying with a request would be manifestly unreasonable.³ LBL did not make this argument itself and the Commissioner does not ordinarily consider it appropriate for him to insert arguments into his consideration of complaints unless those arguments relate to data protection legislation (specifically, the protection of personal data).
61. In any event, given that LBL has already undertaken the work of considering what can be disclosed and what should be withheld because it had recently made information from the contract publicly available, it is difficult to argue that it would be manifestly unreasonable on the grounds of cost for it to do so again.
62. Regulation 12(4)(b) is also subject to a public interest test and the complainant's strong arguments in favour of disclosure would still be applicable.

³ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-12-4-b-environmental-information-regulations-manifestly-unreasonable-requests/#howdowe2>

Right of appeal

63. 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

64. 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.
65. 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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