

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 10 December 2018

Public Authority: Norfolk County Council

Address: Martineau Lane
Norwich
NR1 2DH

Decision (including any steps ordered)

1. The complainant requested from Norfolk County Council (the Council) information regarding incomplete CIPP (Core Investment Programme Period) streets under the current Street Lighting Private Finance Initiative (PFI) Contract. The Council refused the request under regulation 12(4)(d) of the EIR (material still in the course of completion, unfinished documents and incomplete data).
2. The Commissioner's decision is that the request relates to material still in the course of completion. The regulation 12(4)(d) exception is engaged and the public interest favours withholding the information.
3. The Commissioner does not require the Council to take any steps as a result of this decision.

Background

4. The Council explained to the Commissioner that under the PFI contract an organisation is required to upgrade the street lighting according to a specific plan. There is a list of streets that have not been upgraded by the contractor and this list includes reasons why the work has not been completed.

Request and response

5. On 22 January 2018, the complainant wrote to the Council and requested information in the following terms:

"Please provide a list of all incomplete CIPP streets under the current Street Lighting PFI Contract. This list must, as a minimum, include Parish Name, Street Name, Number of existing street lights; Number of proposed street lights, Status of the street in terms of progress to completion (e.g. not started, minor snagging items etc.). Provide this data in the form of an excel spreadsheet."

6. On 12 February 2018 the Council responded. It refused the request under regulation 12(4)(d) of the EIR - Material still in the course of completion, unfinished documents and incomplete data.
7. On 10 March 2018 the complainant asked the Council for an internal review.
8. On 24 April 2018 the Council provided its internal review response and maintained its position. The Council explained that the list which it held was not complete and up to date and that it required verification.
9. On 25 April 2018 the complainant wrote to the Council and expressed his dissatisfaction with its internal review response. The complainant argued that the list is completed but not verified and he considered the Council's timeframe for verification to be excessive.

Scope of the case

10. The complainant contacted the Commissioner on 3 May 2018 to complain about the way his request for information had been handled.
11. The following analysis focuses on whether the Council correctly withheld information within the scope of the request under regulation 12(4)(d) of the EIR.

Reasons for decision

Is the information environmental?

12. Regulation 2(1) of the EIR provides the following definition of environmental information:

"...any information in written, visual, aural, electronic or any other material form 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) and (b) 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 elements of the environment referred to in (b) and (c);"

13. It is important to ensure that requests for information are handled under the correct access regime, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
14. The Commissioner has considered the withheld information in this case, which is a list containing information regarding street lighting. It

includes programmes of work and details of completed and incomplete work relating to street lighting in Norfolk.

15. The Commissioner is satisfied that the information is environmental within the definition at regulation 2(1)(c), since it is information on activities which would affect or be likely to affect the elements and factors referred to in regulation 2(1)(a) and/or 2(1)(b). Activities in this case is upgrading the street lighting and the work involved. The Commissioner is, therefore, also satisfied that the Council considered the request under the correct access regime, and the Commissioner has considered whether it applied the exception correctly.

Regulation 12(4)(d) Material still in the course of completion

16. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.
17. The exception sets out three distinct categories and the information must fall within one of these for the exception to be engaged. The first category is that the request relates to material which is in the course of completion. The "material" in question may be a final policy document that is to be produced later, therefore although the requested information may be contained in a document which is in itself complete, if that document is intended to inform a policy process that is still ongoing, the information may engage the exception.
18. The interpretation of unfinished documents is more simple in that a document will be unfinished if the public authority is still working on it at the time the request is received. Furthermore, a draft version of a document will remain an unfinished document even once a final, finished version of that document has been produced.
19. Incomplete data is data that a public authority is still collecting at the time a request for information is received.
20. The Council explained to the Commissioner that it has a PFI Highways contract with Amey to upgrade and maintain the street lighting in Norfolk. The list was started after 2013 and the Council said that it should have included all of the CIPP streets that were not completed within the first five years of the contract. This was added to over a period of time and the Council considers the list to be inaccurate and incomplete for a number of reasons.
21. The withheld information is a list of potentially incomplete CIPP streets under the current Street Lighting PFI Contract. The Council said that a

list of deferred streets was agreed with Amey near the end of the CIPP. However, the Council considered that as this was approximately five years ago, this list needs to be verified to make sure it is correct and up to date.

22. This request relates to material which is in the course of completion. The Commissioner accepts that the timescale for verification of the list is based on the resources available within the team. She also understands the pressures of work which has to take priority over the verification of this list.
23. The Commissioner is satisfied that the withheld information relates to the list of incomplete CIPP streets under the current Street lighting PFI contract. At the time of the request for information, this list remained incomplete and therefore the withheld information relates to material which is still in the course of completion. The Commissioner finds that regulation 12(4)(d) of the EIR is engaged.

The public interest test

24. As is stated in regulation 12(1) of the EIR, the exceptions at the subsections of regulation 12(4) are subject to the public interest test. That is, a public authority may only refuse to disclose information under a 12(4) exception if *"in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information"*.
25. Therefore the Commissioner has gone on to consider the public interest test for this case.

Public interest arguments in favour of disclosure

26. The Council is aware of promoting accountability and transparency for decisions taken by public authorities. It has recognised that there is a public interest in PFI contracts and that it is important to remain accountable to the public regarding the management of those contracts. The Council said that where contractors are failing to deliver, the public is entitled to know what actions are being taken to ensure that the contracts are being managed appropriately.

27. The Council considers promoting accountability and transparency in the spending of public money, whether fulfilled or planned. The Council said it acknowledges that accurate data should be disclosed to enable the public to understand how money is being spent, where contractors are failing to deliver and what actions are being taken to recover any appropriate financial penalties.
28. The Council reported that it had not received any other requests for this information and it does not believe that there is currently any wider public interest with this. However, the Council considers the public interest lies in maintaining a good working relationship with its contractors and the Council added that maintaining a good relationship is likely to motivate the contractors to provide good value for money for the Council and the wider public.
29. The complainant argued that Amey should be able to verify the list within one month. He said that this list was compiled by the Council and he questioned why the Council need to verify it again. The complainant also argued its time frame for verification (6 to 9 months) by Amey and considered it excessive. He is of the view that the information requested (the list) is complete but not verified by Amey, therefore, the Council can release this complete list with a caveat against streets awaiting verification.
30. The Commissioner understands that, given the impact that work on the street lighting may have on the local community, the strength of the public interest in transparency and accountability in this case cannot be underestimated.

Public interest arguments in favour of maintaining the exception

31. The Council argued that to disclose this information now would be likely to result in the release of inaccurate, partial and misleading information.
32. The Council reported that there is a possibility that the information will undergo changes during the course of the verification process and that this could be hindered by releasing this data. The Council said this could make the task at hand more complex and consequently being a drain on public resources.
33. The Council stated that disclosing inaccurate information would lead to difficulties in the relationship with Amey. It added that more resource would have to be unnecessarily diverted to manage this relationship and the contract diverted from priority work of the department.

34. The Council argued that there is no public benefit in releasing this information before it is completed. It would result in a premature and rushed data set which the Council said cannot be verified and, therefore, cannot be considered as reliable.
35. The Commissioner considers there are strong public interest arguments in favour of the non-disclosure of the relevant information. She accepts that releasing information that is incomplete and inaccurate would be likely to result in misleading information. The Commissioner acknowledges that during the Council's verification process, it is possible that the information would undergo changes and that releasing this could hinder the necessary process. She understands that if inaccurate information was disclosed, it would lead to relationship difficulties between the Council and its contractor. It is also understood that additional resource would have to be diverted unnecessarily in order to manage its relationship and the contract diverted from the Council's priority work.

Balance of the public interest arguments

36. The Commissioner accepts that there is always a general public interest in disclosing environmental information. She also considers there may be an argument for informing public debate on the particular environmental issue that the requested information relates to.
37. The Commissioner understands that, given the impact that the information may have on the local community, the strength of the public interest in transparency and accountability in this case cannot be underestimated. However, the Commissioner is of the view that equally, there are strong public interest arguments in favour of the non-disclosure of the relevant information in this instance.
38. The Commissioner has given some weight to the general principles of achieving accountability and transparency through disclosure of information held by public authorities. In finding that regulation 12(4)(d) is engaged, the Commissioner accepted that the information requested is incomplete data which is still in the course of completion. She considers that this argument is relevant when considering the public interest.
39. The Commissioner accepts that there is little public interest in releasing information which the Council knows to be incomplete and inaccurate and which would cause diversion of resources away from priority matters. The Commissioner understands the importance of environmental improvements to the public and that the requested information needs to be completed before disclosure.

40. The Commissioner acknowledges the Council's aim to complete the information requested within 9 months, which it had specified in its internal review response (24 April 2018). She also notes that the Council stated it hoped to have the list completed and verified by that time and the Council had said the complainant may then wish to resubmit his request for this information.
41. The Commissioner accepts that there is a public interest in street lighting and the issues with street lighting in the area where residents live. The public interest does not require the immediate release of the withheld information. However, the public interest could be satisfied by disclosure once the material (the list) has been completed and is published.

The Commissioner's conclusion

42. The Commissioner has considered the request and the explanations supplied by the Council and she is satisfied that regulation 12(4)(d) of the EIR has been correctly applied in this case. She has decided that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Right of appeal

43. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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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