

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

Decision notice

Date: 17 January 2020

Public Authority: London Borough of Sutton
Address: Civic Offices
St. Nicholas Way
Sutton
Surrey
SM1 1EA

Decision (including any steps ordered)

1. The complainant has requested a copy of the contract for the maintenance services for parks and open spaces in London Borough of Sutton ("the Council"), save for the details of the contracts finances and personal data contained therein. The Council relied on section 43 (commercial interests) sections 41 (information provided in confidence) and 42 (personal data) Freedom of Information Act 2000 to withhold requested information.
2. The Commissioner's decision is that the information is environmental and that the Council can rely on regulation 12(5) (e) (commercial confidentiality) as a basis for withholding some of requested information. However, the Council is not excepted from its duty to disclose the remainder of the information and it must disclose it. The Commissioner also finds that the Council failed to issue an adequate refusal notice and therefore breached Regulation 14 of the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the information listed in the Confidential Annex to this Notice. However, it is not to release any personal data contained therein.

4. The public authority must take these steps 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.

Background

5. South London Waste Partnership, is a partnership formed between the London Boroughs of Croydon, Merton, the Council and the Royal Borough of Kingston upon Thames.
6. On 17 January 2017, the London Borough of Croydon, on behalf of the South London Waste Partnership, signed the 'Contract for grounds maintenance (Lot 2)' with Idverde.
7. Accordingly Idverde is the provider of parks, grounds and cemeteries maintenance services across the Council.

Request and response

8. On 23rd May 2017, the complainant wrote to the Council and requested information in the following terms:
 - This is to ask for a copy of the full specification for the procurement of maintenance services for parks and open spaces in Merton and Sutton from Idverde UK which commenced in February 2017. This should include all schedules and appendices. For the avoidance of doubt I am not requesting details of the contracts finances.
9. The Council replied on the 23 June 2017 and said;
 - "I have noted that you requested a copy of the contract with Idverde including all associated documents. This contract contains commercially sensitive information, not just the cost of work but technical detail. Unfortunately I am not therefore able to provide the information requested.

I understand a redacted version of the contract will be made available on the Council's website once prepared".
10. The complainant wrote to the Council on 23 June 2017 saying;
 - Thank you for the reply. I have been clear that the request can be met without providing commercially confidential information. I am

also aware Idverde is content with the information being made available. May I therefore ask you to provide the information requested and also to provide a date by which information will be available on the Council's website

11. The Council, on 16 January 2018, wrote to the complainant saying;

- Thank you for your Freedom of Information request (FOI 10691) regarding

"A copy of the full specification for the procurement of maintenance services for parks and open spaces in Merton and Sutton from id verde UK which commenced in February 2017. This should include all schedules and appendices."

The information you have requested can be found within the published redacted contract which is available here¹.

12. On 21 January 2018, the complainant wrote to the Council saying;

- Thank you for supplying an important part of the requested information.

The all-important appendices are not available from the information provided on the South London Waste Partnership. These have been provided by Merton Council (see <https://drive.google.com/drive/u/1/folde...>) and this is to ask if you can provide the same and thereby complete this Freedom of Information request.

13. As far as the Commissioner can discern the complainant's letter of 21 January 2018 went unanswered.

14. On 21 July 2018, the complainant asked the Council to review its decision to withhold requested information. Following an internal review The Council wrote to the complainant on 7 August 2018. It stated that it upheld its position.

15. On 13 August 2018, the complainant again wrote to the Council asserting that the person conducting the internal review had previously been involved in the process and therefore it wasn't an independent review.

¹ <http://www.slwp.org.uk/what-we-do/grounds-maintenance/>

16. On 14 September 2018, the Council informed the complainant it had undertaken a further review however it still maintained its position that the withheld information was commercially sensitive and would not be released to him.

Scope of the case

17. The complainant contacted the Commissioner 30 September 2018 to complain about the way his request for information had been handled.
18. In correspondence with the Commissioner dated 29 March 2019 the Council confirmed it was relying on section 43(2) to withhold requested information.
19. In further correspondence with the Commissioner dated 8 August 2019 the Council stated that it also relied on sections 41 (information provided in confidence) and 42 (personal data) to also withhold the information
20. Upon reading the withheld information (provided by The Council on 12 September 2019) it became apparent to the Commissioner that it may be environmental information and that this would be an initial issue to consider more fully and determine.
21. On 25 October 2019, the complainant informed the Commissioner, he was not seeking to be provided with third party personal data contained within the withheld information.

Reasons for decision

22. In considering whether the requested information is environmental information the Commissioner has had regard for her own guidance.

15. 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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."

23. The Commissioner has concluded that the withheld information in question is environmental information subject to the requirements of the EIR. The information is on a measure likely to affect the state of the elements of the environment described above. The withheld information being contained in a contract for grounds maintenance to be undertaken by a specific contractor at a number of locations including within the boundaries of the Council.
24. In the circumstances of this case, the Commissioner has concluded that the most expeditious and appropriate action is to read arguments as to prejudice to commercial interests and confidentiality under the relevant provision of the EIR, namely regulation 12(5)(e).
25. Regulation 12(5)(e) of the EIR states that a public authority can 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.
26. 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
27. In accordance with regulation 12(2) the public authority should apply a presumption in favour of disclosure. So, a public authority should only refuse to disclose the information if it considers the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception.

The Council's Submissions

28. The withheld information consists of pricing information, internal organisation information as well as business practices of the company, the disclosure of which would be likely to prejudice the commercial interests of the parties.
29. These are matters that are considered to be commercially sensitive by the Council and Idverde as disclosure may well give competitors an unfair insight into the manner in which Idverde performs its contractual obligations and its internal business arrangements.
30. The Council believes the information requested relates to performance and the manner of performance of a commercial contract and could undermine The Council's negotiating position in the future on these and other commercial opportunities in terms of securing the best value as well as most economically advantageous prices. It is important to both suppliers and customers that the financial details relating to performance are maintained in confidence.
31. It was considered that the effect of such disclosure would have an adverse impact on the market for the services so offered and that the company's competitive position would be eroded and the whole market could be less competitive with the possible result that the public benefit of having an efficient competitive market would be to some extent eroded.
32. The Commissioner agrees that certain information such as rates for items of work or key elements of bespoke formulae used for calculating costs satisfy the four elements outlined above. This information is clearly commercially sensitive and confidential. This confidentiality is required to protect a legitimate economic interest. The Commissioner also accepts that disclosure would adversely affect the expectation of

confidentiality because it would undermine the trust each party has in the other to keep such information confidential.

33. However, there is other information, which the Commissioner assumes has been redacted because the Council believes it is commercially sensitive but it has made no effort to identify it or to explain why it is sensitive. The Commissioner has listed this information in a confidential annex to this Notice. Because the Council has not explained clearly why it considers it is excepted from its duty to disclose this information, the Commissioner requires the Council to disclose it.
34. In reaching this view, the Commissioner notes that the Council is a large public authority with significant experience in handling information access requests under FOIA and EIR since January 2005. She is disappointed that it has failed to make detailed or specific arguments in support of its position despite this. It referred instead in broad terms to the information and did not take the opportunity, for example, to drill down to specific pages or sections to explain why such information was commercially sensitive. As noted above, it also failed to provide supporting evidence regarding the views of third parties despite that being a well-established usual requirement following the Information Tribunal decision in the case *Derry Council v Information Commissioner* (EA/2006/0014)²

Public interest test

35. Even though the Commissioner is satisfied that some of the information is excepted from disclosure under regulation 12(5)(e), she must consider whether the balance of public interest favours maintaining that exception.

The Council's Submissions

36. There is a potential to adversely affect the Council's ability to conduct future procurements in a fair manner and loss of income which would result from disclosure, which may be used to gain an unfair insight as to the manner in which Idverde performs its contracts.
37. Disclosure would be likely to prevent the Council from conducting its commercial affairs in a way that ensures council tax payers receive the most benefit from publicly owned property. Such disclosure would be capable of harming the commercial interests of the relevant parties by causing the potential impact to the market as stated above. The Council

² <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i69/Derry.pdf>

considers that the effect of the disclosure of such information can have the effect stated above and would likely prejudice the market place for similar services.

38. The Commissioner has concluded that there are compelling reasons in the public interest to protect certain information that is obviously commercial such as pricing and accounting formulae used in a recently agreed contract. The strongest public interest argument in favour of maintaining the exception cited is to protect the ability of the Council to obtain best value.
39. However, as regards any other information listed in the confidential annex that is not excepted from disclosure for other reasons, there is, the Commissioner concludes, a stronger public interest in disclosure where the exception at regulation 12(5)(e) appears to be engaged.
40. There is a clear public interest in knowing more about the contractual arrangements in question given well publicised controversy elsewhere about similar contracts. While controversy, of itself, is not necessarily a reason for disclosure, there is clearly a widespread concern, as evidenced by the reported controversy, which impacts the environment of the local population. There is a clear expectation that public amenities such as local parks are well maintained for the benefit of the public enjoyment and local wildlife as well as for the improvement of air quality for the local population. This is particularly the case for city parks where more people's lives are enriched by proximity to green spaces in an urban environment. There is a clear public interest in understanding more about a contract for maintaining public amenities, particularly if there is controversy about its operation. The Commissioner has concluded that this would be served by disclosure in this case.
41. In a confidential annex to this notice, the Commissioner has identified that information which is not excepted from disclosure under regulation 12(5)(e) either because that exception is not engaged in relation to it or, where it is engaged, because the public interest favours disclosure.

Regulation 14 – refusal to disclose information

42. In the circumstances of this case the Commissioner has found that although The Council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that The Council will have failed to comply with the provisions of the EIR.
43. In these circumstances the Commissioner believes that it is appropriate to find that The Council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is

because the Council failed to cite any exception(s) contained within the EIR as it actually dealt with the request under FOIA.

Right of appeal

44. 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

45. 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.
46. 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

Gerrard Tracey
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