

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

Decision notice

Date: 5 December 2011

Public Authority: Department for Regional Development
Address: Clarence Court
10 – 18 Adelaide Street
Belfast
BT2 8GB

Decision (including any steps ordered)

1. The complainant requested information about various environmental maintenance contracts in specific regional geographic areas.
2. The Information Commissioner's decision is that the Department for Regional Development (DRD) should have handled the request under regulation 12(5)(e) of the Environmental Information Regulations 2004 but that it correctly withheld the information.
3. The Information Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 23 June 2010, the complainant wrote to DRD and requested information in the following terms:

*"Term Contracts for Environmental Maintenance **2008**: EMS2 (Southern), EME1 (Eastern) and EMW2 (Western). **2010**: EMN1 (northern), EMS1 (Southern), EME2 (eastern) and EMW1 (Western).*

1. A CD pdf copy of the quality submissions as submitted by the winning contractor in each of the areas in both of the above listed contracts.
2. The scoring format used by Roads Service in allocation of the scores for all quality submission questions for all areas in the above listed contracts.

3. *The scores achieved by the winning contractor and runner up contractor on each question in the quality submissions as submitted for all areas in the above listed contracts”.*
5. DRD responded on 30 June 2010 and stated that it was disclosing the information at part two of the request but withholding that at parts one and three, relying on section 43(2) of the FOIA.
6. Following an internal review on 17 February 2011 DRD wrote to the complainant. It stated that it was maintaining its reliance on section 43(2).

Scope of the case

7. The complainant contacted the Information Commissioner to complain about the way her request for information had been handled. The complainant told the Information Commissioner that she disagreed that the disclosure of withheld information would prejudice the commercial interests of any person. She told the Information Commissioner she could not see how the disclosure of the information would impact negatively on any of the winning operators as at the time of the request the contracts had been awarded
8. During the course of his investigation, and after he inspected the information, the Information Commissioner determined that DRD had considered the request under the incorrect access regime.
9. As DRD had disclosed the information at part two of the request, the scope of the Information Commissioner's investigation was to consider whether DRD was correct to withhold the information at parts one and three of the request as commercial information and under the Environmental Information regulations 2004.

Reasons for decision

10. The withheld information in this case forms part of, and relates to, contracts and bids for contracts for the supply of services for environmental maintenance such as grass cutting in various different geographical areas in Northern Ireland.
11. The complainant asked for information about the quality submissions made by the winning contractor in each of the areas and also the quality submission scores achieved by the winning contractor and runner up contractors in each of the areas.

12. The Information Commissioner understands that the contractor information can be defined under regulation 2(1)(c) as a measure or activity, in this case the quality submissions provided as part of a bid for an environmental maintenance contract, affecting or likely to affect the state of the elements as defined under regulation 2(1)(a), in this case the landscape.
13. The Information Commissioner having inspected the withheld information is satisfied that it is environmental information for the purposes of the Environmental Information Regulations 2004 (EIR). He has made this determination as the information can be defined as an administrative measure likely to affect an element of the environment, in this case a maintenance contract to maintain the condition of the landscape.
14. Having considered that the information is environmental the Information Commissioner finds that DRD should have considered the request under EIR not FOIA.
15. In withholding the information DRD relied on section 43(2) of FOIA, which is an exemption to protect the commercial interest of any person. As the Information Commissioner has considered that FOIA is the incorrect access regime he has considered the equivalent exception under EIR.
16. The Information Commissioner has therefore focussed on the exception provided at 12(5)(e) of EIR which makes clear that a public authority may refuse to disclose environmental 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.
17. For the Information Commissioner to agree that regulation 12(5)(e) of the EIR applies, it must be demonstrated that:
 - i. the information is commercial or industrial in nature;
 - ii. the information is subject to a duty of confidence provided by law;
 - iii. the confidentiality is required to protect a legitimate economic interest; and
 - iv. the confidentiality required to protect a legitimate economic interest would be adversely affected by disclosure.
18. Regulation 12(5)(e) of the EIR is also subject to the public interest test. In addition to demonstrating that the above bullet points are met for

each document, DRD must also demonstrate that the public interest in maintaining this exception outweighs the public interest in disclosure.

19. Parts one and three of the request relate specifically to the quality submissions made by potential contractors. The Information Commissioner understands, having inspected the information, that quality submissions can be best described as the specific detail of how environmental maintenance operations would be carried out by each specific contractor. The Information Commissioner understands that the information is not specifically financial information and differs considerably from contractor to contractor. For example, the quality submissions may include reference to available equipment and resources and the capability and effectiveness to manage and deploy these resources in a given area within a specific period of time.
20. The information was provided as part of a tendering process for various contracts. The quality submissions information provided by the companies was provided, along with other information, in order that DRD could make comparisons with each of the bids in order to decide which company to award a contract. The Information Commissioner accepts that the detail of such bids would include information specific to the commercial operation of a company, particularly the quality and resource aspects in carrying out specific functions. Accordingly the Information Commissioner accepts that there would be an expectation of commercial confidence provided in law in providing the information in a situation where competitors are bidding for the same contracts.
21. The Information Commissioner has considered whether confidentiality is required in order to protect a legitimate economical commercial interest. As already stated the information in this case relates to the quality submissions submitted by contractors and the quality scores awarded by DRD on those submissions provided by successful and unsuccessful bidders. The Information Commissioner has inspected the information and it is clear to him that the quality information is specific to each bidder on each activity and differs considerably in detail. He is therefore satisfied an obligation of confidence is required to protect the economic interests of the bidding companies.
22. DRD told the Information Commissioner of its view that disclosure of the information would prejudice the commercial interest of the contractors, as it believed that should the information become known it would affect the ability of those contractors to effectively compete for other similar contracts. It told the Information Commissioner that such similar contracts came up on a regular basis.
23. Having considered the arguments put forward by DRD, the Information Commissioner is satisfied that the information being commercial in

nature does give rise to a duty of confidence, and that confidentiality of that information is required to protect the legitimate commercial interest as described. He is further satisfied, having inspected the information, that the disclosure of that information would adversely affect the commercial economic interest of a number of companies.

24. The Information Commissioner, having inspected the withheld information, is satisfied that an adverse effect on the economic and commercial interests of the companies would occur if the quality submission information were disclosed and accordingly that regulation 12(5)(e) is engaged.

Public interest

25. Since the regulation is engaged, the Information Commissioner must consider whether the public interest test favours disclosure. EIR specifically states that a presumption in favour of disclosure should be applied. Some weight must therefore be attached to the general principles of achieving accountability and transparency. This in turn can help increase public understanding and participation in decisions taken by public authorities.
26. In addition to the general considerations, the Commissioner also appreciates that there is a strong public interest in being as transparent as possible in relation to any measures that would have a significant impact upon the environment or which concern public money.

Public interest arguments for disclosure

27. DRD argued that the disclosure of the information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed participation by the public in the democratic process.
28. The complainant argued that disclosure of the information could contribute to the public interest in how decisions to spend public money are made and contribute to an understanding of value for money.
29. The Information Commissioner notes that under the EIR there is a specific presumption in favour of disclosure. He accepts the arguments that disclosure of the specific information in this case could contribute to openness and transparency in how decisions to spend public money are made and attaches significant weight to this argument.

Arguments against disclosure

30. Specifically to the withheld information DRD argued that disclosure would not be in the public interest as it could lead to competing firms being in an unfair advantageous position when submitting tenders for similar environmental maintenance contracts across Northern Ireland. DRD told the Commissioner that, with this information, a rival contractor could structure its bids in future public or private sector competitions to gain advantage. This would be both unfair to the contractors and in the longer term affect DRD's ability to achieve best value for money in future competitions, and that this would clearly not be in the public interest.
31. The Information Commissioner attributes significant weight to the argument that an unfair advantage could be gained by competing firms if the information on the quality submissions and quality scores awarded by DRD to the bids provided by those companies as part of competitive bids for tender were to be disclosed. The Information Commissioner accepts that it would not be in the public interest if such competitions could not be fairly competed for.
32. The Information Commissioner has considered whether, given the geographical area of Northern Ireland, it could be considered that the same contractors may continually compete for the same contracts in the various districts of Northern Ireland when contract renewals arise. He takes the view that the competitive market in Northern Ireland is confined to relatively few competitors so that, if specific quality submissions and scores achieved by competitors in previous tender bids were known, it would affect future bids for those similar contracts. The Information Commissioner has attributed significant weight to this argument.

Balance of arguments

33. The Information Commissioner accepts that under regulation 12(5)(e) there are certain circumstances in which information can be withheld if it can be seen that disclosure would harm the commercial interests of a third party or the public authority itself. Therefore, there is a public interest in ensuring that the commercial confidences are not prejudiced in circumstances where it would not be warranted and proportionate.
34. The Information Commissioner understands that there is a strong public interest in public authorities being as accountable as possible in relation to decisions that affect the environment and concern public money.
35. However, he does not accept that accountability arguments are as strong as those relating to the commercial interests of companies which

are engaged in fair competition. Having inspected the specific information, he accepts DRD's arguments that the quality submissions are so specific to individual contractors for specific areas of work that disclosure of that information would be disproportionate and not warranted. Accordingly he has determined that the public interest in withholding the information outweighs that for disclosing the information.

Procedural matters

36. Under regulation 11 of EIR an internal review must be completed within 40 working days of the receipt of request for review. The Information Commissioner notes that the complainant requested a review of the decision on 13 August 2010 but that a review was not conducted by DRD until 17 February 2011, which far exceeded the 40 working days stipulated. This is a breach of 11(4) of the regulations.
37. The Information Commissioner reminds DRD of its obligations in this regard and also draws its attention to the Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004 (SI 2004 No. 3391).

Right of appeal

38. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

39. 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.

40. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF