

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 18 August 2015

Public Authority: Worcestershire County Council
Address: County Hall
Spetchley Road
Worcester
WR5 2NP

Decision (including any steps ordered)

1. The complainant made a request to Worcestershire County Council ("the Council") for a variation agreement to an existing contract to build a Waste Incinerator. The Council disclosed the information it held but redacted some information by relying on the exception in regulation 12(5)(e) (Commercial confidentiality) of the EIR.
2. The Commissioner has considered the complaint and found that regulation 12(5)(e) was correctly applied to some of the requested information and that where the exception was engaged the public interest in maintaining the exception outweighed the public interest in disclosure. However, the Commissioner also found that the majority of the withheld information was not covered by the regulation 12(5)(e) exception and should be disclosed.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The Council shall disclose to the complainant an un-redacted copy of the variation agreement with the exception of certain financial information.
 - The Council should only redact details of charges, fees or prices to be paid in respect of the Variation Agreement or the WMSC contract. Only actual figures should be withheld or else any formulae or calculation used to arrive at such figures.

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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The Council, along with Herefordshire Council, have a contract with Mercia Waste Management (Mercia) to dispose of municipal waste, referred to as the Waste Management Service Contract (WSMC). The contract was signed in 1998 for 25 years and included an option to build a waste incinerator, otherwise known as an Energy from Waste (EfW) plant. This option was subsequently put on hold following a failure to obtain a suitable site for the EfW plant.
6. In December 2013 the Council agreed to progress the option to execute a contract variation to the WSMC to design, build and operate an incinerator at the Hartlebury Trading Estate, which was at a different time and site to that originally envisaged in the WSMC. It is this 'variation agreement' which is in dispute and the subject of this decision notice.

Request and response

7. On 2 July 2014 the complainant made a request to the Council for the following information regarding the WSMC contract and the Council's plans to build an Energy from Waste plant at Hartlebury.
 - The Variation Business Case
 - The Variation Agreement
 - The updated Risk Register
8. The Council responded to the request on 12 August when it disclosed to Mr Jones a copy of the variation agreement but with redactions made under the regulation 12(5)(e) exception (Commercial confidentiality). It explained that the redacted information was being withheld because it was considered to be commercially confidential and that the public interest in maintaining the exception outweighed the public interest in disclosure.

9. The complainant subsequently asked the Council to carry out an internal review of its handling of the request and it presented its findings on 19 September 2014. The review upheld the decision to redact some of the requested information by relying on regulation 12(5)(e).

Scope of the case

10. On 7 October 2014 the complainant contacted the Commissioner to complain about the Council's decision to refuse to disclose some of the information he requested.
11. The Commissioner agreed that the scope of his investigation was to consider whether the Council was correct to apply the regulation 12(5)(e) exception to redact some information from the Variation agreement, only.
12. In providing its response to the Commissioner the Council also suggested that it could have refused the request under regulation 12(4)(b) (manifestly unreasonable) given the amount of time involved in complying with the request which it estimated was 60 hours. It said that it could have considered the request to be manifestly unreasonable as the burden for the Council was too great to commit to a single request. However, it said that it had decided not to rely on this exception due to the fact that several people had made the same request for this information. The Council did not offer any further arguments on this point and it is the Commissioner's understanding that it is not seeking to rely on this exception. For clarity, the Commissioner has not considered regulation 12(4)(b) as part of this Decision Notice.

Reasons for decision

Regulation 12(5)(e) – Commercial confidentiality

13. The information in this case is the variation agreement referred to above. It is a very large document, 4100 pages in total, and is a collection of annexes and appendices relating to the introduction of the EfW plant. The majority of the information is in fact a contract between Mercia and a subcontractor, Hitachi, for the construction of the plant. The Council disclosed approximately 250 pages of information, with redactions, but the vast majority of the variation agreement was withheld.

14. The Council has applied the regulation 12(5)(e) exception to withhold the information. Regulation 12(5)(e) provides that 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.
15. The Council has said that regulation 12(5)(e) is being applied because the information is confidential and disclosure could adversely affect the legitimate economic interests of itself, Herefordshire Council, Mercia and its subcontractors.
16. In considering the application of regulation 12(5)(e) the Commissioner considers that the following four criteria have to be met:
 - (i) The information has to be commercial or industrial in nature;
 - (ii) The information has to be subject to a duty of confidence provided by law;
 - (iii) The confidentiality has to be required to protect an economic interest; and
 - (iv) That economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of information.
17. As regards part one, the Council said that the information was undoubtedly commercial in nature as it related to the commercial activity of the Council, Mercia and its subcontractors for the provision of waste services and the construction of an EfW plant. It explained that the information involves the purchase of goods and services from a third party. It suggested that some of the information was also industrial in that it related to the methods and details associated with the planned EfW plant. The Commissioner would agree that an agreement with a contractor to build an EfW plant is clearly a commercial activity and therefore he is satisfied that this element of the test is met.
18. On the second point the Council said that the information was subject to a contractual obligation of confidence. It explained that the Waste Management Service Contract (WMSC) to which the requested information is a variation, expressly states that the Councils cannot disclose without Mercia's consent, "any financial details including sums of money, details of the base financial model (as amended from time to time) and associated calculations and formulae". It went on to say that it was satisfied that the information had the necessary quality of confidence because distribution of the withheld information had been deliberately limited and not placed in the public domain.

19. The Council also suggested that the information was additionally covered by the common law duty of confidence. A common law duty of confidence will exist where information has the necessary quality of confidence and where information was shared in circumstances giving rise to an obligation of confidence. An obligation of confidence can be expressed either explicitly or implicitly and the Council explained that the basis of the provision of the information was as part of commercial negotiations and contractual agreement and therefore an obligation of confidence was applied.
20. The Commissioner would accept there was an implied obligation of confidence given the importance and sensitivity of the contractual negotiations. In any event, the Commissioner would also accept that there is a clear contractual duty of confidence in respect of the financial information.
21. However, just because the information is confidential is not enough in itself to engage the exception – it must be required to protect an economic interest. On this point the Council argued that the interests it was seeking to protect were those of the Council, Herefordshire Council, Mercia and its subcontractors. It explained that the agreement contained information which is specific to this contract and its disclosure would impact on the future commercial negotiating position for both Mercia and their subcontractors as their competitors and potential contractors would be aware of their commercial pricing and position on key commercial matters. It also suggested that the disclosure may impact on the future negotiating position of the Councils as regards any future variations to the contract or future contracts of this kind. This would, it said, result in “reduced economic and qualitative contracts and reputational damage”.
22. As regards Mercia, the Council said that the legitimate economic interest being protected by the confidentiality of the information is in ensuring that their competitors do not gain access to commercially valuable information and that its bargaining position, in existing or future negotiations, is maintained. This reasoning also applied, it said, to the interests of Hitachi and other sub-contractors and it reiterated that if competitors knew the details of the contract, this would impact on their economic interests.
23. The Commissioner has reviewed the withheld information which, as he explained, is a very large document indeed. The problem he has is that the arguments advanced by the Council focus on the prejudice that arises through disclosure of the financial information. However, the vast majority of the information is not financial and the Council has not properly explained how disclosure would prejudice its interests and

those of Herefordshire Council or the interests of Mercia and the other sub-contractors. Moreover, large amounts of the information are innocuous and it is difficult to see how disclosure would impact on the economic interests of any party. For instance the Council has withheld some definitions of key terms used in the contract and the project plan outlining how the project to build the EfW plant is intended to progress. Much of the agreement is standard clauses and schedules that one would expect to find in a commercial contract of this kind and are not sensitive or unique to this agreement.

24. It is apparent that the Council have applied the exception in a blanket fashion without properly considering the impact of disclosure of the different parts of the agreement. The Council need to be able to identify what information they consider to be commercially sensitive and which would be valuable to a competitor and they need to explain why if they want to successfully apply this exception.
25. The Commissioner is mindful of the EIR's presumption in favour of disclosure and that the European Directive 2003/4/EC, which the EIR implements, requires that exceptions be read restrictively. Furthermore, when considering the exceptions under the EIR the Commissioner interprets the wording of 'would adversely affect' in regulation 12(5) to set a relatively high threshold in terms of likelihood which has to be met in order for any of the 12(5) exceptions to be engaged. In other words it is not sufficient that disclosure may or could have some level of adverse effect, but rather that disclosure 'would' have an adverse affect. In the Commissioner's opinion this means that the likelihood of an adverse affect must be more substantial than remote. Therefore, it is not enough to simply say that the contract is commercially sensitive and would be of use to a competitor.
26. In this case the Council has not given details of what future contracts or negotiations may be prejudiced as a result of disclosure and neither has it produced any evidence to demonstrate that future variations to the WMSC contract are likely. The Commissioner would also note that the variation agreement had been signed at the time of the request and so disclosure would not prejudice negotiations on the contract at that time.
27. Therefore, the Commissioner has reached the decision that for the majority of the withheld information the Council has failed to demonstrate why disclosure would adversely affect the interests of the parties to the variation agreement and consequently, why any confidentiality attached to the withheld information is necessary to protect any economic interest. For most of the withheld information the Commissioner has decided that regulation 12(5)(e) is not engaged.

28. However, where the Council has identified specific information and has advanced a coherent argument about how disclosure would give rise to prejudice, i.e. for the financial information, then the Commissioner is prepared to accept that the exception is engaged. However, in the absence of any detailed explanation from the Council the Commissioner would extend this only to what he considers the most obviously sensitive information which can be clearly identified within the withheld information – details of prices, charges and fees made by Mercia and the other contractors which underpin the agreement and the wider WMSC contract, or any formulae upon which these are based.
29. The Commissioner is satisfied that for this information a clear link can be drawn between disclosing the prices paid for goods and services and how this might make it harder for companies to negotiate future contracts. If competitors knew the prices paid it would be able to undercut Mercia or its other contractors. Similarly, if prospective customers knew how much a company had charged in a previous contract it may be able to negotiate a more favourable deal than if the information had not been disclosed.
30. However, the Commissioner is concerned that the Council has failed to consult with the companies involved or else has failed to properly present these concerns in its response to the Commissioner. In cases like this the Commissioner's long standing approach is that public authorities should not speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party. This applies to all of the withheld information, particularly where the Commissioner has already decided that the exception is not engaged. Having said that, the Commissioner is aware that the Council consulted with Mercia when preparing to release the redacted version of the variation agreement to the complainant and he is prepared to accept that for the financial information at least, the arguments reflect the concerns of Mercia and its contractors given the more obvious potential for harm that disclosure of this information would cause.
31. The Commissioner has decided that the confidentiality attached to certain financial information is necessary to protect a legitimate economic interest of Mercia and its competitors. The final part of the test for applying the regulation 12(5)(e) exception requires that this economic interest, and thereby its confidentiality, has to also be adversely affected by disclosure of information. 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, and would also harm the legitimate economic interests that have already been identified. The Commissioner has decided that regulation 12(5)(e) is engaged in respect of some of the financial information.

Public interest test

32. The Commissioner has now carried out a public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest arguments in favour of disclosure

33. The Council acknowledged that the following factors favoured disclosure:

- *The Council is aware that there is a public interest in transparency and that Regulation 12(2) presumes disclosure where possible.*
- *The public interest in public authorities being transparent about their use of public resources, i.e. public money.*
- *The public interest in creating confidence in the decisions (including financial decisions) taken by authorities*
- *The public interest in allowing scrutiny of agreements entered into by the authority which will have a marked effect on the community.*

Public interest arguments in favour of maintaining the exemption

34. The Council made the following arguments in favour of maintaining the exemption:

- *It does not serve the public interest to disclose information that is both confidential and commercially sensitive the result of which may be to benefit the competitors in the market or indeed future bodies seeking tenders to the detriment of Mercia and EPC contractor/subcontractors if competitors know what price to beat and tendering bodies know what price those firms can be beaten down to.*
- *The public interest in specific confidences being maintained to protect the legitimate economic interests of the parties. The unique nature of elements of the commercial arrangements.*

- *The provision of the requested information in this instance would not advance any knowledge concerning decision-making by the Council either in general or in relation to the EfW facility.*
- *The public require the Council to secure the best possible financial and contractual outcomes (price, service, quality) and to disclose the information would jeopardise the relationship with the contractor and any future negotiations in relation to this contract and generally in the future if bidders lose confidence in the Council's ability to preserve commercial confidentiality. The public interest is best met by preserving the principle of confidentiality*
- *Both the Council and Mercia need a safe space in which to conduct their business. The disclosure would affect the frankness and candour of officials in this case.*
- *The wider public interest is now being met by the knowledge of the overall costs associated with the Waste Management Service Contract included in other publicly available documents.*

Balance of the public interest arguments

35. The Commissioner has first considered the arguments in favour of disclosure and would accept that there is a public interest insofar as this would increase transparency and accountability in the Council's actions and in particular the spending of public money. The building of the EfW plant involves large amounts of public money and the public are entitled to know how this money is being spent. The plans are also likely to affect a significant number of people and this also weighs in favour of disclosure. However, the Commissioner is also aware that the Council has released details of its financial liability in respect of the EfW plant and the cost of the contract and to a certain extent this satisfies some of the public interest in greater transparency.
36. As regards the public interest in maintaining the exemption, the Commissioner is satisfied that there is a strong public interest in protecting the commercial interests of the parties to the contract. In his view, companies should not be unfairly disadvantaged by doing business with the public sector. It would not be in the public interest if these companies' competitors were able to gain a commercial advantage in future contracts. Furthermore, there will always be some inherent public interest in maintaining commercial confidences. This is because third parties would be discouraged from confiding in public authorities if they did not have some assurance that confidences would be respected.

37. The Commissioner has also taken into account the Council's arguments around protecting its relationship with Mercia. Disclosure of the information would be viewed unfavourably by Mercia and it is likely that disclosure would damage relationships between the parties if it was felt that information could not be shared in confidence, which in turn could make it harder to manage the contract effectively. Given that the Variation agreement had been signed relatively recently, and the construction of the EfW plant was in its very earliest stages, at the time of the request, this factor also attracts significant weight.
38. Having taken all the circumstances into account the Commissioner has decided that, in respect of the financial information, the arguments for maintaining the exception are stronger. Given that the Council has already released details of how the EfW plant will be financed, the harm that would be caused by disclosure of the detailed financial details of the Variation Agreement outweighs any extra transparency and accountability that might be achieved by full disclosure.

Right of appeal

39. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

40. 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.
41. 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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