

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

Date: 8 March 2016

Public Authority: Shotteswell Parish Council
Address: The Old Post Office
Shotteswell
Banbury
Oxon
OX17 1HU

Decision (including any steps ordered)

1. The complainant has requested information relating to the tenders the council received in relation to the mowing of the Playing Field, Village Green and Hay Crop in the parish. He also requested information relating to the audit of accounts for 2014/15. The council disclosed some information, stated that other information is not held and advised the complainant that the two tenders it did receive were being withheld under section 43 of the FOIA.
2. During the Commissioner's investigation it was decided that the request should be considered under the EIR rather than the FOIA. The council advised that it now wished to rely on regulations 12(4)(a) and 12(5)(e) of the EIR.
3. The Commissioner's decision is that regulations 12(4)(a) and 12(5)(e) of the EIR do apply and therefore no further action is required.

Request and response

4. On 11 August 2015, the complainant wrote to the council and requested information in the following terms:

" 1. A copy of the tenders for cutting grass for both the Playing Field and Village Green.

2. A copy of the tender for the Hay Crop, as per my email of 4 June 2015.
3. A copy of the letter purporting to be the Internal Auditor's Report for the financial year 2014/15 which was tabled at the meeting 25 June 2015."
5. The council responded on 5 September 2015. In relation to question one, it stated that it considered the requested information was exempt from disclosure under section 43 of the FOIA. Regarding question two, the council confirmed that it does not hold the requested information. In respect of question three, the council advised that it had already provided a copy of the Internal Auditors Report.
6. The complainant wrote to the council again on 11 September 2015.
7. The council responded on 14 September 2015. It explained again that it considered section 43 of the FOIA applied and that it had already supplied a copy of the Internal Auditors Report. The council therefore suggested that the complainant refer the matter to the Commissioner.

Scope of the case

8. The complainant contacted the Commissioner on 10 September 2015 to complain about the way his request for information had been handled. At this time, the complainant was dissatisfied that he hadn't received a response to his request. However, by the time the Commissioner became involved the council's response of 14 September 2015 had been issued. The Commissioner felt this response was sufficient to be treated as the council's internal review and so the complaint was considered eligible for full investigation.
9. The complainant has raised issues in relation to the Audit Commission Act 1998 and the Accounts and Audit Regulation 2003 stating that he has asked for the requested information to be released under this legislation. The complainant has also made reference to the Department for Communities and Local Government's Transparency Code for Smaller Authorities advising that the requested information is not commercially sensitive.
10. The Commissioner has tried to explain to the complainant that he has no remit to consider any issues he may have relating to the Audit Commission Act 1998 and the Accounts and Audit Regulation 2003 or whether the requested information can be released in accordance with this legislation. The Commissioner can only consider whether the council

has complied with the FOIA or EIR, whichever is applicable, when a request for information has been made.

11. During his investigation the Commissioner decided that the request should have been considered under the EIR from the outset. He decided that the request relates to a measure or activity (as defined in regulation 2(1)(c) of the EIR) which affects or is likely to affect the elements of the environment outlined in regulation 2(1)(a) of the EIR. The council agreed and informed the Commissioner that it wished to rely on regulation 12(5)(e) of the EIR for question one and regulation 12(4)(a) of the EIR for question two. In relation to question three, it confirmed that it has already provided the requested information to the complainant.
12. The remainder of this notice will address each question in turn and the application of the exceptions recently cited by the council.

Reasons for decision

Regulation 12(5)(e) and question one of the request

13. Regulation 12(5)(e) of the EIR states 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.
14. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the council 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.
15. This exception is also subject to the public interest test. In addition to demonstrating that this exception is engaged, the council must also explain how it considered the public interest for and against disclosure and how it reached the view that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception.

16. Dealing with the first bullet point, the Commissioner is satisfied that the withheld information is commercial in nature. The withheld information consists of two tenders the council received for the mowing of the Playing Field and Village Green within the parish. It is the bid each contractor made for the provision of these services. The provision of a service for a cost is a commercial transaction between the parties involved.
17. In relation to the second bullet point, it is noted that the information is not trivial or otherwise publically available. It is also noted that the information was supplied to the council for the purposes of awarding this contract only and not for wider publication and so the withheld information has the necessary quality of confidence.
18. Referring to bullet points three and four, the council confirmed that it considered disclosure of the withheld information would adversely affect the commercial interests of the contractors that tendered. It explained that the contract for cutting grass in the Playing Field and Village Green is a continual and ongoing process – year on year it needs doing and services of local contractors are required. It is often the case that one contractor will fix their prices from one year to the next and even fix their prices for several years going forward. Even if a contractor does decide to increase their fee one particular year this is usually only by 5% or thereabouts and so disclosure of the withheld information would make it easy for a rival contractor to outbid, undercut and tailor a particular tender once the contract comes up for renewal. This would damage the commercial interests of the current contractor and the unsuccessful bidder in future renewals and potentially other work within the local area.
19. The council also explained that the current contractor is a local sole trader and disclosure would be particularly damaging to their small business, their ability to compete fairly in the future for this contract and other work locally.
20. The Commissioner agrees with the council that disclosure would adversely affect the commercial interests of the current contractor and the unsuccessful bidder. The withheld information reveals the price the current contractor charges and the price the unsuccessful bidder would have charged. The Commissioner also notes from the withheld information itself that the current contractor carried over the same price from last year and made no adjustment to the cost of their services. The Commissioner accepts that disclosure would enable a rival contractor or local business to see exactly what the successful contractor charges and tailor any bid they make for the contract once it comes up for renewal accordingly. Disclosure would enable the current contractor and the

unsuccessful bidder to be outbid and undercut and this would result in commercial damage to both.

21. The Commissioner also considers that disclosure would adversely affect the commercial interests of the council. It is noted that the bids are for a very small contract, something which medium to large businesses would not be interested in as it would not be lucrative enough. There will therefore only be a handful of local businesses or contractors potentially interested in providing the services that are required. If the council was ordered to disclose the prices of the current contractor and the prices of the unsuccessful bidder this could result in two of a very small number of local businesses or contractors being unwilling in the future to assist the council. The council will wish to ensure that value for money is achieved the next time the contract comes up for renewal and in order to achieve this they will need to seek at least two quotes from local businesses. This task may very well become difficult to achieve if the prices of two local businesses have already been revealed. Disclosure would hinder the council's ability to secure the best deal it can at a cost to the public purse for the local parish.
22. For the above reasons the Commissioner is satisfied that regulation 12(5)(e) of the EIR applies in this case. He will therefore now go on to consider the public interest test.
23. The council stated that it considers the public interest rests in maintaining this exception. It stated that it does not consider disclosure of the withheld information is in the interests of the wider public. It believes disclosure would adversely affect its ability to secure as favourable, if not better, terms with this contractor or others in the future and such consequences are not in the interests of the wider public. If the council's ability to secure best price is hindered this may well result in the council having to pay more for the same service and this would not be in the public interest.
24. The Commissioner considers there are public interest arguments in favour of disclosure, albeit limited in this case. There is a public interest in openness, transparency and accountability, particularly in relation to the use of public funds. He also accepts that there is a public interest in the local community understanding more clearly why one particular contractor has been selected over another and ensuring that the best possible deal has been secured.
25. However, the Commissioner does not consider this should be at the commercial detriment of small local businesses. It is noted that the value of public funds being considered here is very small and the council has already publically declared that it received two bids and awarded the contract to the cheapest one. In terms of the public being assured that

value for money has been achieved, it appears this particular interest has already been met.

26. It is also noted that the parish is small and the services that are required here will only attract a handful of likely bidders at best. If the council disclosed the prices the successful contractor has charged and the prices the unsuccessful bidder would have charged, this may well result in very few local businesses coming forward in the future to bid for the work. This would hinder the council's ability to secure the best possible deal for the community it represents and may very well result in it having to spend more public money in the future to secure the services it requires and this is not in the interests of the wider public.
27. The Commissioner also does not consider it is in the interests of the wider public to damage the commercial interests of small local businesses. He has therefore concluded that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception in this case.

Regulation 12(4)(a) and question two

28. Regulation 12(4)(a) of the EIR states that a public authority may refuse to disclose information to the extent that it does not hold the information when the applicant's request is received. Technically, this exception is subject to the public interest test but the Commissioner considers this is a fruitless exercise if he is satisfied that on the balance of probabilities the public authority did not hold the requested information at the time of the request. This may only be of relevance if it is found that the public authority came into possession of the requested information after the request was received and whilst the public authority is handling the request.
29. The council informed the complainant that it does not hold the requested information. It stated that the complainant is well aware himself that this area (top end of the field) is cut on a voluntary basis and so it is not and has not for many years been tendered for.
30. The Commissioner is satisfied that, as the council has confirmed that the area is not and has not been tendered for many years, it does not hold the requested information. He is satisfied that the council has explained why it does not hold the requested information (as it is cut on a voluntary basis and has been for many years) and he has received no evidence to suggest otherwise.
31. He is therefore satisfied that regulation 12(4)(a) of the EIR applies to this element of the request. For the reasons explained above, the Commissioner has not gone on to consider the public interest test.

Question three

32. In relation to this element of the request, the council stated that the Internal Audit Report is part of an official document and constitutes part of the required Annual External Audit Report, as prescribed by the Audit Commission. Once the Annual Return is completed and approved by the council it is sent to the External Auditor who is appointed by the government to adjudicate. The council advised that the accompanying letter from the Internal Auditor was sent to the complainant stating that there were no areas of concern. It believes correspondence it received from the complainant dated 11 September 2015 acknowledged receipt of these two items.
33. The Commissioner is satisfied that all recorded information held by the council falling within the scope of this element of the request has been provided to the complainant and there is no further recorded information that is held that should be disclosed.
34. In further correspondence to the Commissioner, the complainant refers to concerns about the authenticity of this accompanying letter and concerns that a clear and precise review may not have been undertaken. The Commissioner has informed the complainant that he has no remit to consider such issues.

Right of appeal

35. 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

36. 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.
37. 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

Samantha Coward
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