

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 5 March 2019

Public Authority: Derby City Council
Address: Council House
Corporation Street
Derby
DE1 2FS

Decision (including any steps ordered)

1. The complainant has requested information relating to a recycling contract. Derby City Council disclosed some information and withheld other information under the exception for commercial confidentiality – regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that Derby City Council has failed to demonstrate the regulation 12(5)(e) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
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.

Request and response

5. On 7 August 2018, the complainant wrote to Derby City Council (the "council") and requested information in the following terms:

"1- Why is Derby City Council being charged an extra fee by its blue bin recycling processor Biffa for recycling since China placed restrictions on waste imports?"

2- As of today what has been the total extra charge the council has paid Biffa above the previously agreed cost?"

3- How does the council audit the onward processing by Biffa of its recycled waste materials?"

4- What waste materials in the recycling are Biffa charging the extra fee for? is it specific materials or a blanket charge?"

5- Please provide copies of all internal documents and emails relating to the extra charge applied by Biffa

6-Please provide all documents and emails between Derby City Council and Biffa relating to the extra charges Biffa have applied for recycling processing

6. The council responded on 4 September 2018. It stated disclosed some information and withheld the information in parts 5 and 6 of the request under the exception for commercial confidentiality – regulation 12(5)(e) of the EIR.
7. Following an internal review the council wrote to the complainant on 5 October 2018. It stated that it was maintaining its position.

Scope of the case

8. On 30 October 2018 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly withheld the information in parts 5 and 6 of the request.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

10. The council withheld the information in parts 5 and 6 of the request, namely:

5- Please provide copies of all internal documents and emails relating to the extra charge applied by Biffa

6-Please provide all documents and emails between Derby City Council and Biffa relating to the extra charges Biffa have applied for recycling processing

11. Regulation 12(5)(e) of the EIR 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”.
12. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
- Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

13. The council confirmed that the information is clearly commercial in nature as it “...relates to financial figures and negotiated amounts. Any information relating to financial information and negotiated amounts is clearly commercial information.”
14. The Commissioner notes that the information relates to Biffa’s provision of recycling services as a contractor of the council and that she is, therefore, satisfied that the information is commercial in nature.

Is the information subject to confidentiality provided by law?

15. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
16. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
17. The council has stated that the information is not in the public domain and is not trivial. It has further confirmed that it held a negotiation meeting with Biffa in which it agreed that it "...would not disclose any of the information and would keep it confidential."
18. The Commissioner notes that the information is not trivial in nature and acknowledges that it was provided to the council with an expectation that it would be handled in confidence.
19. In view of the above, the Commissioner is satisfied that the withheld information is subject to confidentiality provided by law.

Is the confidentiality provided to protect a legitimate economic interest?

20. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
21. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm would be caused by the disclosure.
22. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. She accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".

23. The council has stated that it considers disclosure would adversely affect its own interests and those of Biffa.

Biffa's Interests

24. In relation to Biffa's interests, beyond confirming (above) that it had agreed with Biffa in a meeting to maintain the confidentiality of the information, the council did not provide any specific submissions in relation to specific adverse effects which directly originated from Biffa. The council stated that disclosing the information and thus breaching confidentiality would:

"...hinder the company in maintaining their current service levels and agreements with existing customers. In addition the likely result of the release of this information is a negative effect on the company's share price, their relationship with customers, their employees and would prejudice their negotiating position for future contracts."

25. In considering this matter the Commissioner has had regard for the decision of the First-Tier (Information Rights) Tribunal (the "Tribunal") decision in Hartlepool Borough Council vs the Information Commissioner (EA/2017/0057). In this case, in paragraph 54 of the decision, the Tribunal stated the following in relation to the affected party ("Peel")

"What Peel has completely failed to do, however, is to support its assertions with evidence. There are no witness statements, and no evidence or even arguments to link the disclosure of any specific aspect of the information with any specific business interests that would or would be likely to be prejudiced by its disclosure. Peel has not said, for example, that it is in the process of tendering for another development project which is comparable...."

26. In paragraph 55 the Tribunal goes on to say:

"The Commissioner had highlighted the need for a much greater level of specificity. Peel's response that it does not consider the Commissioner's request for a more "granular explanation" is reasonable, misses the point. The need for the explanation does not arise from the Commissioner's request. It arises because the onus rests with the party making the assertion that the exemption is engaged to make good its claim. So, for example, if a manufacturer of widgets were to claim that disclosure of information relating to its dealings with a particular commercial partner would or would be likely to prejudice its commercial interests, it would not be sufficient for it to say simply that the manufacture of widgets is a competitive business, that it enters into similar agreements as part of its business and will therefore suffer prejudice if the information became available to its competitors. It would

need to demonstrate the link between the specific information in issue and the claimed prejudice. So for example, it might show that the information would disclose that it manufactures its widgets in a particular way that is cost effective, and that is not known by its competitors, or that it had structured its agreement in a way that is unusual in the industry by charging its widgets at an unusually low mark-up because of a commitment that it would provide training at a higher return than usual.”

27. Whilst the Tribunal was referring to an instance of the application of section 43(2) of the FOIA, in relation to a party's commercial interests, the Commissioner considers that the principle, regarding the need for public authorities to identify explicit instances of harm and link this to the disclosure of specific information, is transposable to the facts of this case. Moreover, in order for regulation 12(5)(e) to be engaged, it must be shown that specific adverse effects would follow as a direct result on information being disclosed. There is, therefore, an enhanced need for public authorities to show a causal link between withheld information and claimed adverse effects.
28. In this case the council's submissions provide no detail whatsoever about the specific effects of disclosure nor do they explain how disclosure would result in actual harm to Biffa's legitimate economic interests. The Commissioner is mindful that an argument could be made that the information might be of benefit to competitors. However, as a generic category of information it is not in itself something that would automatically result in adverse effects by being disclosed.
29. As noted in the Tribunal decision above, in order to show that some adverse effects would ensue, an authority needs to identify specific elements (such as pricing) associated with delivery of a service and show how it would be of specific value to a competitor and how this would be detrimental. The council's submissions make no reference to any discrete elements of the withheld information, instead relying on generic descriptors with no explanation of how disclosure would cause the rather vague effects identified.
30. Even the terminology used by the council, which posits the “...likely result of the release of this information” being a negative impact on Biffa's legitimate economic interests, suggests that the council has not made adequate efforts to produce arguments that meet the threshold required to engage the exception.

The Council's Interests

31. The council has argued that the current recycling contract is due to be re-tendered in April 2020 and that it wants its suppliers *"to feel they can trust us, especially where they have explicitly asked us to keep certain information confidential"*.
32. The Commissioner acknowledges that it is important for public authorities to have a good relationship with their contractors. However, in the Commissioner's view, it is the responsibility of public authorities to make third party contractors aware of their responsibilities under the EIR and the potential for information provided as part of tender processes or contractual arrangements to be disclosed. Whilst there may be legitimate reasons for withholding information provided to authorities as part of these endeavours, it is the responsibility of public authorities to provide specific reasons for doing this in relation to discrete information. In short, authorities cannot 'contract out' of their responsibilities under the EIR by withholding contractual information on a blanket basis.
33. Furthermore, the Commissioner does not consider it plausible that a contractor would deny itself the possibility of winning a potentially lucrative public sector contract simply because information associated with it might be disclosed. In short, for the reasons above, the Commissioner does not find that this element of the council's submissions is compelling and does not accept that disclosure would result in the identified chilling effect.
34. The council has further argued that disclosing the information ahead of the imminent new tender exercise *"...may create a distortion in tender prices and could affect the value for money basis for inviting bids."* However, this and other associated arguments submitted have not been developed by the council in a coherent way or otherwise presented to the Commissioner in a convincing form.
35. The council has suggested that a potential provider may cut their fees to an unrealistic extent to obtain a contract (to undercut those in the existing contract), to the extent that the service provision would suffer. However, it has not directed the Commissioner to any specific elements of the information which it considers might relate to this, explained exactly how this outcome might result or how this would impact on its legitimate economic interests. It could equally be argued that the scrutiny brought to bear by the council's procurement exercise would ensure that undeliverable costings would be identified and rejected. However, the council has not provided any specific details, instead, relying on somewhat broad and not entirely cohesive arguments.

Conclusions

36. Having considered the council's submissions in relation to the putative adverse effects to its own legitimate economic interests and those of Biffa, the Commissioner is struck by the relatively high level nature of the arguments. The absence of specific details and the failure to link its arguments to any specific elements of the withheld information leads the Commissioner to conclude that the exception has been applied on a general basis. The absence of detailed scrutiny in the council's submissions and use of language suggesting the council considers disclosure would only be *likely* to result in harm, rather than *would* result in harm (as required by the exception) leads the Commissioner to conclude that, on the evidence available, the exception is not engaged.
37. As she has concluded that the exception is engaged, the Commissioner has not gone on to consider the public interest.

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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

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