

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

Date: 25 November 2019

Public Authority: Gloucestershire County Council
Address: Shire Hall
Westgate Street
Gloucester
GL1 2TG

Decision (including any steps ordered)

1. The complainant has requested information regarding costs for the Javelin Park waste management facility.
2. The Commissioner's decision is that, on the balance of probabilities, Gloucestershire County Council has located all of the information held within the scope of the request.
3. The Commissioner does not require any steps.

Request and response

4. On 2 April 2019, the complainant wrote to Gloucestershire County Council ('the council') and requested information in the following terms:

"1) The latest total projected costs for the Javelin Park Waste Incinerator.

2) The total costs to date for the Javelin Park Waste Incinerator."

5. The council responded on 29 April 2019. It provided information in scope of the request and stated that it had not withheld any information:

"The cost of the Gloucestershire Energy from Waste facility is set out in the EY Value for Money report published in December 2018, the link is below:

<https://www.gloucestershire.gov.uk/media/2084914/residual-waste-ppp-projectvalue-for-money-affordability-analysis.pdf>

The contract is structured primarily as a service for waste treatment, where GCC only pay a gate fee when waste is delivered – this has not yet commenced. However, to date GCC have made total upfront payments of £25 million towards the Gloucestershire Energy from Waste facility in line with the contract. These upfront payments have been used to meet part of UBB's financing requirement during construction and keeps the commercial loans to a minimum, which in turn reduces the interest charges which the operator would have otherwise passed back to GCC within the gate fee."

6. The complainant responded on the same day stating:

"Thank you for your email and attachment. Neither of my FOI questions was actually answered.

*Your link is to an out of date **2015** EY [Ernst and Young LLP] document that was produced **before** the project was approved. It is hypothetical (i.e. very imaginative fiction) and does not include actual costs.*

*Your link does **NOT** go to a report published in December 2018.*

We know the project was supposed to cost GCC 500m; we also know it is already approx.150m over budget. Construction is nearing completion.

Please answer the questions that were asked using actual costs and cost projections against the budget amounts."

7. Following an internal review the council wrote to the complainant on 3 June 2019. It upheld its original position, and stated

"Please note that the 2015 EY report is not out of date and takes account of the increased costs in estimating the 25 year cost. The actual cost over 25 years will be dependent upon a number of variables such as the volume of waste treated, the price of electricity and inflation. These can only be calculated once the plant is in operation and will form part of the Council's Financial Statements commencing in 2019-20."

Scope of the case

8. The complainant contacted the Commissioner on 3 June 2019 to complain about the way his request for information had been handled. Specifically that the council has provided *"a mis-described link to an out of date 2015 EY document that was produced before the project was approved."* The complainant's key concern is that the council *"have not provided any information on actual costs to date or the projected actual cost."*
9. The Commissioner notes the point made by the complainant that the link provided by the council had an error, hence it was *"mis-described."* On checking she finds that it was a typographical error of one character¹. The Commissioner also notes that in the internal review request the complainant refers to and is familiar with the document referenced to by the council. As this appears to be a case of human error, with no identified detrimental impact, she has not considered the point any further.
10. The Commissioner therefore considers that the scope of this case is to establish whether, on the balance of probabilities, the council holds any further information in scope of the request.

¹ The correct link to the document:

<https://www.gloucestershire.gov.uk/media/2084914/residual-waste-ppp-project-value-for-money-affordability-analysis.pdf>

Reasons for decision

Regulation 5(1) – Duty to make environmental information available on request

11. Regulation 5(1) of the EIR states that: "*a public authority that holds environmental information shall make it available on request.*" This is subject to any exceptions that may apply.
12. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to check that the information is not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
13. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner applies in this case.
14. In discussing the application of the balance of probabilities test, the Tribunal stated that, "*We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.*" The Commissioner has therefore taken the above factors into account in determining whether or not further information is held, on the balance of probabilities.

The Complainants view

15. It is the complainants view that:

- The disclosed report, being a *"Value for Money Report...dated 5 November 2015 cannot contain information about the actual costs to date and is of little relevance to the actual information that was requested."*
- The council's response to the request states *"The cost of the Gloucestershire Energy from Waste facility is set out in the EY Value for Money report published in December 2018."* However the report which the council refer the complainant to is dated 5 November 2015.
- An increase in the project costs was reported in the press in January 2019, therefore the council must hold further information on the actual costs².
- The complainant states that *"A project of this size would have regular cost and budget information produced. It would be ridiculous or exceedingly incompetent for GCC to suggest that there was no such information about costs other than the E&Y report dated 2015."*
- The complainant's position is that the council *"have an unfortunate history of obfuscation and failure to answer simple questions about the Javelin Park Waste Incinerator."*

The Council's response

16. The council stated that it has *"provided the requester all the information it holds in relation to this request. This included a web link to information already publicly available and some further background details explaining that the actual cost over 25 years will be dependent upon a number of variables such as the volume of waste treated, the price of electricity and inflation. These can only be calculated once the plant is in operation and will form part of the Council's Financial Statements commencing in 2019-20."*
17. By way of further explanation the council stated *"This is a PFI type contract and the price/cost and mechanism for updating are set out in the published contract. Please note that this is only based on estimated throughput and the actual costs will be based on actual tonnage over the 25 year life of the contract."*

² <https://www.bbc.co.uk/news/uk-england-gloucestershire-46964672>

18. The Commissioner asked why the council refers to the document named the "EY Value for Money report", which is dated 5 November 2015, as being "published" in December 2018. The council explained that December 2018 is the date that the document was made available to the public, therefore this is the published date.

19. The Commissioner asked the council to respond to the complainant's point that an increase in the project costs was reported in the press in January 2019, therefore further information must be available. The council provided:

"In December 2018 the county council published an up to date value for money report, produced by EY. This report remains the council's best estimate of the contract costs. In table 1 of the report there is a reference to £633m which indicates the costs without a capital contribution being made. This contribution was made and therefore £633m ceases to be a relevant figure. We can only surmise that this is the BBC source. We should point out that in this type of contract the costs are by and large fixed at signature and the main source of changes will be for inflation and volume which by the nature of the contract must be estimates. Please find here a link to the EY report and the press release that we issued at the point it was published³."

20. The Commissioner asked for details of searches undertaken to locate further information in scope of the request. The council confirmed that all information, which is in scope of the request, is held centrally and electronically on a network drive and within emails. No paper records are kept. It advised that searches were undertaken based upon the terms "incinerator, Javelin Park, waste contract, EY report".

21. It provided further detail, stating: "The council has searched all its files held by Commercial Services and the Waste Management Team relating to this contract. Any information held in relation to the total budget costs is already publicly available on the council's website (as provided to the requester in our previous responses). The information on the council's website has been updated in light of previous ICO reviews and FOI requests."

22. The council advised the Commissioner that no information in scope of the request had been deleted or destroyed. It confirmed that any such records "would be retained throughout the life of the contract (with this

³ <https://www.gloucestershire.gov.uk/gloucestershire-county-council-news/news-december-2018/value-for-money-proven-through-newly-published-document/>

particular contract due to run until 2045) and for 6 years beyond the end of the contract."

23. The Commissioner asked whether there are any statutory or business purposes for retaining the requested information. The council confirmed that there is, being the *"financial management of the council's residual waste treatment contract with UBB and to inform annual budget allocation based on the project's affordability."*
24. The Commissioner asked whether the council held similar information to that requested and whether it had given appropriate advice and assistance to the applicant. The council confirmed that *"the value for money report for the project has been provided which sets out the project costs, value for money and affordability of the project. This document has already been provided via a web link, with an explanation of how the project costs work."*

Conclusions

25. In coming to her conclusion, the Commissioner has considered the issues raised by the complainant, and their view regarding why further information should be held by the council. The Commissioner has also considered the responses provided by the council during the course of her investigation.
26. The Commissioner is satisfied that the *"EY Value for Money report"* dated 5 November 2015 and the report that is referred to by the council as *"published"* in December 2018 are the same document.
27. The Commissioner considers that the project cost increases, reported in the press in January 2019, are likely to be derived from the EY Value for Money report published in December 2018. In any event, without substantive evidence to the contrary, the Commissioner does not consider that the information reported in the press demonstrates that further information is held by the council.
28. The Commissioner is satisfied that, in explaining the nature of the charging mechanism for the contract, the council has provided a satisfactory explanation regarding why no further information is available. That being, aside from the disclosed upfront payment of £25 million, further charges will not be incurred until the plant is in operation; and that these charges will form part of the council's financial statements for 2019-2020.
29. The Commissioner is satisfied that the council undertook appropriate searches to identify all information held in scope of the request. The council also confirmed that no information has been destroyed or deleted. Furthermore the council explained its statutory requirement for

holding the information, when it is available, for financial management and budget allocation purposes.

30. Taking all of the above into account the Commissioner is satisfied that, on the balance of probabilities, no further information in-scope of the request is held by the council.

Right of appeal

31. 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@justice.gov.uk

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

32. 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.
33. 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
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