

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 July 2023

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 the Derby and Derbyshire Joint Waste Treatment Centre on Sinfin Lane. Derby City Council (the Council) is withholding some information under regulations 12(5)(b) and 12(5)(e) (the course of justice and confidentiality of commercial or industrial information exceptions).
2. The Commissioner's decision is that both exceptions are engaged and that the public interest favours maintaining both exceptions.
3. The Commissioner does not require any further steps as a result of this decision notice.

Request and response

4. On 24 November 2021 the complainant wrote to the Council and requested information in the following terms:

"1- please provide un redacted all documents provided to the council Scrutiny Committee which considered the council cabinet meeting which then took place on 10th Nov 2021 relating to the Derby and Derbyshire Joint Waste Treatment Centre on Sinfin Lane Derby relating to fixing and using the plant or disposing of waste elsewhere.

2- please provide un redacted a copy of any submission from the scrutiny Committee to the council cabinet in relation to the Derby and Derbyshire Joint Waste Treatment Centre proposal that was being considered by cabinet on 10th Nov 2021.

3- please provide in un redacted form all documents considered at the 10th Nov 2021 council cabinet meeting in relation to the Derby and Derbyshire Joint Waste Treatment Centre on Sinfin Lane Derby."

5. The Council responded on 22 February 2022. For part 2 of the request, the Council said that there had been no relevant recommendations from the Executive Scrutiny Board. Regarding parts 1 and 3, the Council disclosed some information but withheld other information under regulations 12(4)(e), 12(5)(b) and 12(5)(e) (the internal communications, course of justice and confidentiality of commercial or industrial information exceptions).
6. Following an internal review, the public authority wrote to the complainant on 10 May 2022 and maintained its position.
7. The withheld information is in two documents. One is a report titled Long Term Waste Management Project – Update (the report). The other is an appendix titled Derby City Council and Derbyshire County Council Joint Waste Project – Options Appraisal for the New Waste Treatment Facility (the appendix).

Scope of the case

8. The complainant contacted the Commissioner on 16 June 2022 to complain about the way their request for information had been handled.
9. The complainant wants disclosure of the withheld information, and complained about the Council's delay in responding to the request.
10. During the course of the Commissioner's investigation, the Council's position changed. The Council withdrew its reliance on regulation 12(4)(e) – applying regulation 12(5)(e) instead to the information previously withheld under regulation 12(4)(e) – and later decided to disclose a large amount of additional information across both the report and the appendix.

11. The Commissioner will therefore focus, in this decision notice, on the remaining withheld information in the report and the appendix.
12. In its revised disclosure of 6 July 2023, the Council has referenced regulations 12(4)(e), 12(5)(b) and 12(5)(e). However the Commissioner considers that the Council's reference to regulation 12(4)(e) on 6 July 2023 was an error. As noted above, the Council withdrew regulation 12(4)(e) during the Commissioner's investigation. Furthermore, the Council has now, in its revised disclosure, disclosed all of the information originally withheld under regulation 12(4)(e). Consequently the Commissioner's understanding is that the Council is applying regulations 12(5)(b) and 12(5)(e) only.
13. Based on the Council's submissions, and the revised disclosure that was recently sent to the complainant, the Commissioner's understanding is that there are now no instances where the Council is applying both of those exceptions to the same piece of information (originally there were several). The Council is applying the exceptions to different information.
14. The Commissioner will consider both exceptions, but first he will address whether the information is environmental.

Reasons for decision

Is the requested information environmental?

15. Regulation 2(1) of the EIR defines environmental information as being:
 - "... any information ... on—
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c) ...".
16. In this case the requested information is about a waste management project and a waste disposal facility, including an appraisal of different options considered. The Commissioner considers that the requested information falls under regulation 2(1)(c) and regulation 2(1)(e) of the EIR. The Commissioner has therefore assessed this case under the EIR.

Regulation 12(5)(b)

17. Regulation 12(5)(b) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
18. It is necessary to establish that disclosure **would** have an adverse effect. In this context, would means more probable than not (ie more than a 50% chance).
19. The exception, if engaged, is also subject to a public interest test.
20. The public authority must apply a presumption in favour of disclosure, both in engaging the exception and in carrying out the public interest test.
21. The Council is relying on the 'course of justice' element of the exception.

22. As the Commissioner's guidance¹ explains, the 'course of justice' element covers a wide range of information, including material covered by legal professional privilege and without prejudice communications.
23. The vast majority of the redactions under regulation 12(5)(b) are in the report; there are just two in the appendix.
24. Most of the redactions relate to without prejudice privilege, as the Council has clearly indicated to the complainant in redacted copies of the report and appendix that have been disclosed and a document explaining the exceptions applied.
25. Several pieces of information being withheld under without prejudice privilege are **additionally** being withheld under the litigation branch of legal professional privilege.
26. The Commissioner has carefully considered the withheld information, and the Council's submissions – which include comments that the Council provided confidentially to the Commissioner (so he is not able to reveal them here).
27. He accepts that in each instance, either without prejudice privilege or litigation privilege applies (or both, in four instances, as the Council has argued).
28. On without prejudice, the Council in its response to the complainant referenced the Commissioner's guidance, which explains that without prejudice rules exist as a matter of public policy to encourage attempts at informal resolution of legal disputes. The Council also commented that without prejudice privilege is fundamental to the administration of justice.
29. Regarding legal professional privilege, as the Upper Tribunal has stated, an adverse effect on the course of justice can result from the undermining of the general principles of legal professional privilege and of the administration of justice. The Upper Tribunal has accepted that it is not inevitable that the disclosure of privileged information would adversely affect the course of justice; but has suggested that there would need to be special or unusual factors in play for this not to be the case.

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-5-b-the-course-of-justice-and-inquiries-exception/>

30. Consequently, the Commissioner is satisfied that regulation 12(5)(b) is engaged. He will therefore go on to consider the public interest test.

The public interest test

31. In its response to the complainant, the Council acknowledged factors favouring disclosure, such as accountability and transparency; however, against disclosure, it argued that the principles of without prejudice privilege and legal professional privilege are fundamental to the administration of justice. It concluded that the public interest in withholding the information outweighs the public interest in disclosure.

32. The complainant has argued that disclosure would facilitate accountability and transparency relating to decisions "concerning extremely large amounts of public money". They said that the facility will not provide the level of service that tax payers were led to believe would be provided. The complainant seeks disclosure "so that the public can fully understand where we are with the project, its potential failings, risks and financial impacts ...".

33. The Commissioner considers that some weight must always be attached to the general principles of accountability and transparency. These can help to increase public understanding, trust and participation in the decisions taken by public authorities, including environmental decisions.

34. However, as the Commissioner's guidance explains, the public interest inherent in this exception will always be strong because the general principle of upholding the administration of justice is fundamental.

35. There is a strong inbuilt public interest in favour of maintaining the exception for without prejudice information, as this encourages informal settlement to resolve disputes.

36. For legal professional privilege, the strength of the public interest that favours maintaining the exception lies in safeguarding openness in all communications between client and lawyer, to ensure access to full and frank legal advice.

37. Furthermore, the public interest in favour of maintaining the exception will be much stronger in relation to 'live' issues. That point is relevant in this instance, where the request was made when the Council was in the initial stages of litigation (as shown eg by some of the additional information that the Council has now disclosed on the fourth page of the report, at paragraph 4.18).

38. Having considered the factors involved, the Commissioner is satisfied that the public interest favours maintaining the exception, rather than the matter being equally balanced. This means that the Commissioner's

decision, whilst informed by the 'presumption in favour of disclosure' under the EIR (regulation 12(2)), is that the exception provided by regulation 12(5)(b) was applied correctly to the complainant's request.

Regulation 12(5)(e)

39. 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.
40. As with regulation 12(5)(b), the public authority needs to establish that disclosure **would** have an adverse effect; the exception, if engaged, is subject to a public interest test; and the public authority must apply a presumption in favour of disclosure, both in engaging the exception and in carrying out the public interest test.
41. The vast majority of the redactions under regulation 12(5)(e) are in the appendix; there are just two in the report.
42. Many of the redactions are numbers only. Of those, many are costs relating to five of the six options considered for the waste treatment facility, however the Council has also redacted other numbers related to the modelling for the options.
43. In line with his guidance² on this exception, the Commissioner will consider the below four questions, or tests, to determine whether the exception is engaged:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality protecting a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
44. The Council has said that the information relates to the core commercial activity of the purchase of waste collection, management, treatment and disposal services. The Council has also said that some of the information

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/commercial-or-industrial-information-regulation-12-5-e/>

could be described as industrial where it relates eg to the treatment process at the facility. As the Commissioner's guidance explains, a commercial activity generally involves the sale or purchase of goods or services, and it lists procurement as an example; it also explains that 'industrial' is generally understood to describe the processing of raw materials. The Commissioner is satisfied that the withheld information is commercial or industrial.

45. He is also satisfied that the second test is met. In its submissions to the Commissioner, the Council referred to the common law of confidence and contractual obligation. The Commissioner read those submissions, some of which are confidential. He has also considered whether the withheld information has the necessary quality of confidence (it must not be trivial, nor in the public domain) and the reasonable expectations of the parties involved. Having done those things, he accepts that the information is subject to confidentiality provided by law.
46. To satisfy the third test, as the Commissioner's guidance explains, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. The Council needs to consider the sensitivity of the information at the date of the request and the nature of harm that would be caused by disclosure. The Council needs to establish that disclosure **would** cause harm (on the balance of probabilities – ie more probable than not). If a third party's interests are at stake, the Council needs to consult with them, unless it has prior knowledge of their views.
47. Based on the Council's correspondence of 15 May 2023, the Commissioner's understanding is that the legitimate economic interest that the Council is focusing on is 'protecting a commercial bargaining position'; and this applies to the Council and Derbyshire County Council.
48. The Council has confirmed that it consulted Derbyshire County Council.
49. Whilst the Council has also cited 'avoiding commercially significant reputation damage' (primarily in relation to third party consultants), during the Commissioner's investigation the Council removed many of the redactions relevant to that interest. Furthermore on 15 May 2023 the Council explained that the remaining ones **also** go towards protecting both the Council's and Derbyshire County Council's bargaining position.
50. The Council explained that there is a live procurement process for the award of a works and services contract, and expressions of interest have been invited.

51. In the below analysis, the Commissioner will therefore focus on the Council's 'protecting a commercial bargaining position' argument, but first he has some comments about the Council's 'avoiding commercially significant reputation damage' arguments, which do not persuade him.

Avoiding commercially significant reputation damage

52. It is not clear to the Commissioner whether the Council sought the views of the consultants on disclosure, or had prior knowledge of their concerns. The Commissioner conveyed that to the Council on 17 April 2023, but he received no clarification regarding that particular point.
53. As his guidance explains, it is not sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party.
54. The Commissioner notes some ambiguity from the Council regarding the likelihood of harm to the reputation of the consultants. The Council told the complainant that releasing 'snapshots' of information "may" damage the reputation of the consultants. In its submissions to the Commissioner, the Council has said that disclosure "could" (as well as "would" and "will") result in harm. However to engage the exception, the Council needs to establish that disclosure **would** cause harm.
55. Whilst the Council is concerned about disclosing the redacted information without further context or qualification, in general the Commissioner considers that the Council's submissions tend simply to assert, not demonstrate, the importance of that context or qualification.
56. The Commissioner also notes that on page 18 of its original submissions of 28 December 2022, when discussing public interest considerations, the Council appears to reference harm to its own reputation too:
- "... it is in the public interest that the trust between the Council and its consultants should be maintained and disclosing "snapshot" information which damages the professional reputation of the consultants **is likely to** make it more difficult for the Council to have an open and frank relationship with more effective provision of information and advice upon which the Council is able to rely, which would be against the public interest. Thus, disclosure **is likely to** undermine its relationships with these consultants and, reputationally, with others [emphasis added]".
57. However again, the Council has argued a level of likelihood ('would be likely to') that is simply insufficient to engage regulation 12(5)(e).

58. The Commissioner therefore considers that the Council has not demonstrated that the exception is engaged in respect of this interest of the consultants and the Council.

Protecting a commercial bargaining position

59. The Commissioner accepts that protecting a commercial bargaining position is a legitimate economic interest of the Council and Derbyshire County Council, in relation to the procurement process that the Council has highlighted. The key question is whether disclosure would harm that interest.
60. The Council has emphasised its desire to run a competitive procurement process, securing best value for the Council. It said that disclosure would reduce competition, and give an unfair advantage to bidders; and said that the same considerations apply to Derbyshire County Council.
61. Some of the Council's submissions were provided confidentially, so the Commissioner has not been able to repeat all of its comments here.
62. The Commissioner is prepared to accept that disclosure would harm the commercial bargaining position of the two councils in the procurement process, as outlined above. Therefore he is satisfied that the third test is met.
63. The Commissioner's guidance explains that once the first three tests are established, he considers it is inevitable that the fourth test will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information and the legitimate economic interests that the Council has identified.
64. Having determined that the exception is engaged for this interest of the two councils, the Commissioner will consider the public interest test.

Public interest test

65. The Council, in its submissions on the public interest test, argued that there is a public interest in protecting the Council's ability to run a competitive procurement, which provides best value for the Council and saves public money.
66. It acknowledged that disclosure would promote transparency and accountability, and that the matter in question involves the spending of public money.
67. It concluded that the factors in favour of maintaining the exception outweigh those in favour of disclosure:

"... the public interest is better served if confidentiality is preserved so that the Council's position in its future procurement is not prejudiced and it is able to protect public money. There are clear reasons why the disclosure of the redacted information would be likely to result in uncompetitive and narrow bids, which would clearly prejudice the Council's commercial position when purchasing these particular services ... Disclosure of the information would affect the Council's ability to protect public money and ultimately provide best quality and value services ...".

68. The complainant's arguments in favour of disclosure were summarised above (paragraph 32).
69. The Commissioner acknowledges there is always some public interest in disclosure, eg to promote transparency, accountability and greater public awareness and understanding of environmental matters.
70. He acknowledges the complainant's concerns about the amount of public money spent on the facility to date.
71. He also notes some journalistic material online indicating that the facility has been controversial.
72. However he considers that significant weight should be given to the public interest in protecting the Council's commercial bargaining position in the procurement process.
73. Having considered the factors involved, the Commissioner is satisfied that the public interest favours maintaining the exception, rather than the matter being equally balanced. This means that the Commissioner's decision, whilst informed by the 'presumption in favour of disclosure' under the EIR (regulation 12(2)), is that the exception provided by regulation 12(5)(e) was applied correctly to the complainant's request.

Procedural matters

74. The Council acknowledged in its internal review that it did not respond to the request within the statutory time for compliance. The response was due on 22 December 2021 but was not provided until 22 February 2022, due to the relevant department's workload. The Council's delay was a breach of regulations 5(2) and 14(2). Those regulations respectively provide that information shall be made available, and refusals shall be made, as soon as possible and within 20 working days of receiving the request.

Right of appeal

75. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

76. 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.
77. 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

Daniel Kennedy
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