

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 July 2023

Public Authority: London Borough of Lewisham Council

Address: Town Hall Chambers

Rushey Green

Catford

London

SE6 4RU

Decision (including any steps ordered)

1. The complainant requested information from the London Borough of Lewisham Council ("the Council") relating to the awarding of a contract for the expansion of a school. The Council provided some information within the scope of the request but withheld some of the requested information under regulation 12(5)(e) of the EIR (commercial confidentiality). The complainant does not believe the Council has disclosed all of the information it holds within the scope of the request.
2. The Commissioner's decision is that:
 - the Council is entitled to rely on regulation 12(5)(e) of the EIR to withhold, some, but not all of the information withheld on this basis, specifically, his decision is that the exception is not engaged for the names of the unsuccessful bidders.
 - on the balance of probabilities, the Council has failed to identify all of the information it holds within the scope of the request.
 - the Council breached regulation 5(2) of the EIR as it failed to respond to the request in full within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- Disclose the names of the unsuccessful bidders withheld under regulation 12(5)(e).
 - Issue a fresh response to the request, following searches aimed at identifying all information held within the scope of the request.
4. The Council 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 20 October 2022, the complainant wrote to the Council and requested information in the following terms:
- “Please publish all documents in relation to the Watergate School Expansion Contract Award that was agreed by Lewisham Council Mayor and Cabinet on 24th April 2019.”
6. The Council responded on 18 November 2022. It disclosed the relevant contract award report, but redacted some information within the report under regulation 12(5)(e) of the EIR (the confidentiality of commercial or industrial information). The redacted information related to both successful and unsuccessful bidders. The Council also stated that ultimately the decision was not implemented and the Council did not enter into the contract.
7. The complainant requested an internal review on 21 November 2022 on the grounds that they believed the redactions to be excessive and that they believed the sensitivity of the information would have diminished over time since the report was produced.
8. Following an internal review the Council wrote to the complainant on 19 December 2022. It upheld its original response.
9. Having been advised that the Commissioner had accepted this case for investigation, the Council subsequently issued a revised response to the complainant on 26 January 2023. It provided a new copy of the report with reduced redactions. It disclosed the name of the successful bidder, however it continued to withhold the pricing information relating to both the successful and unsuccessful bids and the names of the unsuccessful bidders.

Scope of the case

10. During the course of the Commissioner's investigation the Council identified further information within the scope of the request. The Council disclosed some of this information but withheld some of the other further information it had identified under regulation 12(5)(e) of the EIR.
11. Specifically the further information it disclosed comprises the tender documents, an appendix to the public report entitled "Appendix 2 – Tender Evaluation Matrix" (subject to some redactions under regulation 12(5)(e)) and the Mayor and Cabinet report September 2022 which the Council has stated is publicly available but was not referred to in its original response.
12. The additional information the Council identified as being within the scope of the request but considered exempt under regulation 12(5)(e) comprises some information within the document called "Appendix 2 – Tender Evaluation Matrix" and the tender submissions from all bidders. The information withheld within "Appendix 2 – Tender Evaluation Matrix" is the same information withheld within the contract award report - pricing information relating to both the successful and unsuccessful bids and the names of the unsuccessful bidders. The tender submissions from all bidders are withheld in their entirety.
13. The scope of this case will be to determine whether the Council is entitled to rely on regulation 12(5)(e) as a basis for refusing to provide the withheld information (pricing information relating to both the successful and unsuccessful bids, the names of the unsuccessful bidders and the tender submissions from all bidders). It will also consider whether the Council holds any further information within the scope of the request, beyond the information already disclosed and address the late disclosure of the information disclosed during the course of the Commissioner's investigation.

Reasons for decision

Regulation 12(5)(e) - Commercial confidentiality

14. Information can be withheld under regulation 12(5)(e) of the EIR if 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. In this case the withheld information comprises pricing information relating to both the successful and unsuccessful bids, the names of the unsuccessful bidders and the tender submissions from all bidders.
16. The Council argues that the information is commercial in nature as the information relates to commercial activity relating to the delivery of expansion works at a school by private contractors, including information submitted during the tendering process by bidders and information about the resulting contract. It also argues that the names of the companies in the context of a bid process is also commercial information as it reveals that the company submitted a bid for a project, a commercial activity.
17. The Council argues that the information is subject to confidentiality provided in law as:

“The information is not trivial or already in the public domain. The Council are subject to confidentiality obligations with regard to tendering processes. The confidentiality provisions protects the legitimate economic interests of the Council and other parties. There is a common law duty of confidence in relation to submissions received during the competitive tender process. At the point at which the bids were made, there would have been an expectation on the part of the bidders that their identities were not made public. The bids provided details of project proposals requiring significant financial investment, and the identity of the companies associated with each proposal is consequently not trivial in nature.”

18. The Commissioner has considered four tests. First, he is satisfied that the requested information is commercial in nature. Second, he is satisfied that the information is subject to confidentiality by law because it is not trivial and is not otherwise accessible and so has the necessary quality of confidence.
19. Third, the Commissioner has considered whether the confidentiality is provided to protect a legitimate economic interest. The Council argues that disclosure of the withheld information would prejudice the economic interests of both the Council and the bidders. The Council states:

“The confidentiality is protecting a legitimate economic interest. The report contains information about a tendering process along with the successful and unsuccessful bidders names and pricing information which is deemed financially sensitive. Releasing this information into the public domain would prejudice the Council’s ability to achieve best value for money in the interests of local tax payers in this and any future tendering processes. It would

also prejudice bidders' ability to compete competitively in the future if details of both successful and failed bids were to be made publicly available. The identity of bidders wasn't known to other bidders, therefore the release of names of the bidders would reduce the competition in a future procurement for these or similar works because financial information would be known and bids could be framed accordingly. In relation to bid documentation, if tenderers were able to see previous bids submitted by competitors during a similar procurement process, it is likely that the competitiveness of this selection process and the authority's ability to achieve best value would be hindered, thus harming the authority's commercial interest."

20. The Commissioner is satisfied that, with respect to the pricing information relating to both the successful and unsuccessful bids and the tender submissions from all bidders the confidentiality is provided to protect the legitimate interests of the Council and the bidders for the reasons stated by the Council.
21. The Commissioner, however, is not persuaded that disclosure of the names of the unsuccessful bidders would prejudice the economic interest of either the Council or the bidders. The arguments provided by the Council in relation to the withheld information relate primarily to the pricing information, rather than the names of the unsuccessful bidders. Although the Council has explained that the names of the unsuccessful bidders is information that all bidders were not aware of, he does not consider that disclosure of the names alone, would lead to reduced competition in the future. It is in a company's interests to bid for projects of this nature and the Commissioner does not accept that disclosure of the names of the unsuccessful bidders would prevent companies from submitting tenders in the future.
22. The Commissioner therefore finds that, with respect to the names of the unsuccessful bidders, the confidentiality is not provided to protect a legitimate economic interest. As the third test is not met for this information, the exception is not engaged with respect to this information. The Commissioner has therefore ordered disclosure of the names of the unsuccessful bidders at paragraph three of this notice. He has gone on to consider the fourth test for the pricing information relating to both the successful and unsuccessful bids and the tender submissions from all bidders.
23. With respect to the fourth test, the Commissioner is satisfied that, the confidentiality would inevitably be affected if the Council disclosed pricing information relating to both the successful and unsuccessful bids and the tender submissions from all bidders.

24. Since the four tests have been satisfied the Commissioner finds that regulation 12(5)(e) of the EIR is engaged for the pricing information relating to both the successful and unsuccessful bids and the tender submissions from all bidders as disclosing this information would adversely affect the Council's and the bidders' economic interests. He has gone on to consider the associated public interest test for this information.
25. A significant factor in assessing the public interest in this case is the fact that although a successful bidder was selected through the tendering process, this particular contract was not entered into and at the time of the request a future tendering process was planned for early 2023.
26. The Council acknowledges the public interest in openness and transparency with regard to awarding contracts but argues that the public interest in maintaining the exception outweighs that in disclosure. It states:

"...disclosure of the type of information included in tender submissions would ultimately make it harder for the Council to obtain works in future negotiations for this or similar projects and impact the competitiveness of bids received in relation to a future procurement of these works. Release of the bidders' identities may also limit the field for the re-procurement of the works or similar works and affect the competitiveness of future bids for these works because disclosure could result in plagiarism, a reduced number of bids (because for example bidders who felt they could not financially match up would not participate in a future procurement for these works)"
27. The Commissioner's view is that the fact that this contract was not actually entered in to significantly reduces the public interest in the disclosure of the pricing information as it is not information about how public money has been spent. In addition the fact that the Council would shortly be running another tendering exercise for the same contract adds significant weight to the argument that to disclose the previous tender submissions and the pricing for the bids would prejudice the Council's ability to conduct a competitive tendering exercise in order to achieve the best value for money for public funds. This would not be in the public interest.
28. The Commissioner also considers that the information that the Council has already disclosed goes a long way to meet the public interest in openness and transparency with regard to the awarding of contracts by the Council.

29. The Commissioner's decision is therefore that, at the time of the request, the public interest favoured maintaining the regulation 12(5)(e) exception.

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

30. Under regulation 5(1) of the EIR, a public authority must make environmental information available on request if it holds the information and it is not subject to an exception.
31. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request). For clarity, the Commissioner is not expected to prove categorically whether the information is held.
32. In this case, the complainant provided the following reasons as to why they believe further information may be held (before the disclosure of additional information during the course of the Commissioner's investigation):

"In summary, Lewisham Council have supplied a redacted report to the Mayor and Cabinet meeting and following a complaint they have upheld their own decision to redact much of the information. I note that no additional information has been supplied or any search undertaken. This request asks for all information in relation to this decision."

"Furthermore, I have asked to see the full appendices to the public report and this has not been provided."

"I note that all correspondence cannot have been published as no correspondence is included in response to this EIR request nor is any decision notice that must be produced following an Executive Decision in accordance with public law. Didn't Lewisham Council abide with these legal requirements?"

33. In the course of his investigation the Commissioner asked the Council to provide details of the searches it has carried out to ensure that all information within the scope of the request has been identified and to address the complainant's reasons as to why they believe further information may be held, as quoted in the paragraph above.

34. The Council has confirmed that there were only two appendices to the public report, appendix one was disclosed in its original response and appendix two was disclosed during the course of the Commissioner's investigation. It has also stated that, because the contract was not entered in to (despite having been awarded), no decision notice was produced by the Council. The Commissioner is satisfied that, on the balance of probabilities, all the appendices to the public report have been disclosed and that no decision notice is held.
35. The Council initially did not take the opportunity to provide a response to the Commissioner's questions about the searches it has carried out to ensure that all information within the scope of the request has been identified (including the correspondence that the complainant believes may be held), although it did state that it was satisfied that it had now identified all of the information within the scope of the request.
36. However, at a very late stage of the Commissioner's investigation the Council stated that, in addition to the information it disclosed and withheld under regulation 12(5)(e) during the course of the Commissioner's investigation, its searches had also identified a large volume of other information which may be in scope of the request. Specifically the Council stated that the Senior Programme Manager had carried out a search of their emails using the search term Watergate which had identified a large volume of emails that are potentially within scope. In addition, legal services had searched their files using the same search term and also found a large volume of information that is potentially within scope. Although the Council has identified this additional information it has not, to date, confirmed whether any of the information falls within the scope of the request. If any of the information identified is relevant to the request the Council should have either disclosed the information to the complainant or issued a valid refusal notice.
37. In light of the extremely poor handling of the request by the Council, as described in the paragraph above, the Commissioner is not satisfied that, on the balance of probabilities, the Council does not hold further information within the scope of the request.
38. The Commissioner has therefore ordered the Council to issue a fresh response to the request in accordance with the EIR, following searches aimed at identifying all information held within the scope of the request.

Regulation 5(2) - Time for compliance with request

39. Regulation 5(1) of the EIR states that:

“a public authority that holds environmental information shall make it available on request.”

40. Regulation 5(2) of the EIR states that:

“Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.”

41. From the evidence provided to the Commissioner in this case, it is clear that the Council did not deal with the request for information in accordance with the EIR. The Council disclosed further information within the scope of the request during the course of the Commissioner’s investigation. Specifically this information comprises the tender documents, an appendix to the public report entitled “Appendix 2 – Tender Evaluation Matrix” (other than some information within it withheld under regulation 12(5)(e)) and the Mayor and Cabinet report September 2022.

42. The Commissioner’s decision is that the Council breached regulation 5(2) by failing to respond to the request in full within 20 working days.

Right of appeal

43. 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

44. 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.
45. 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

Victoria James
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