

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 18 September 2023

Public Authority: Wolverhampton City Council
Address: Civic Centre
St Peter's Square
Wolverhampton
WV1 1SH

Decision (including any steps ordered)

1. The complainant requested information from Wolverhampton City Council ("the Council") relating to the use of Energy from Waste in the city. The Council withheld some of the requested information under regulation 12(4)(e) (internal communications) of the EIR and denied holding some of the information requested.
2. The Commissioner's decision is that:
 - the Council has failed to demonstrate that regulation 12(4)(e) is engaged for the information that it has withheld on this basis.
 - on the balance of probabilities, the Council holds information within the scope of part 4 of the request.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under regulation 12(4)(e), making appropriate redactions for any personal data.
 - Issue a fresh response to part 4 of the request following searches aimed at identifying all information held within the scope of this part of the request, which is all information held about how the Council may implement household food collection.

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 1 December 2022, the complainant wrote to the Council and requested information in the following terms:

"1. The 'Energy from Waste plant future options' offers report submitted to cabinet dated the 8th December 2021 makes reference to the current 25 year contract with Wolverhampton Waste Services (WWS), to operate and maintain the EFW plant, which expires on 11 February 2023. Please provide me with a copy of the current contract that is due to expire?

2. With reference to a tender notice CWC20191 Heat Network planning published on 25/5/2022 please provide me with a copy of the completed 'detailed techno-economic feasibility study' referred to in the notice?

3. Please provide me with all relevant officers reports, between 2020 to the present, reporting on any proposals and/or options for the future city centre district heating scheme using Energy from Waste? Please include any supporting documents / appendices to those reports .

4. What plans does the council have for mandatory household food collection due to come into force in 2023? Please could you provide me with the most recent officers report that addresses this matter? Please include any supporting documents / appendices to those reports."

6. The Council initially dealt with the request under FOIA. The Commissioner asked the Council to reconsider the request under the EIR and issue a fresh response to the complainant.
7. The Council provided a fresh response to the complainant on 31 May 2023. It withheld the information requested in parts 1 and 3 of the request under regulations 12(5)(e) and 12(4)(e) respectively. It stated that all of the information it holds within scope of part 2 of the request has already been provided. It denied holding the information requested in part 4 of the request, as the Council is "yet to receive further information regarding waste strategy for England".

Scope of the case

8. During the course of the Commissioner's investigation the Council disclosed the contract requested in part 1 of the request, which it had previously withheld under regulation 12(5)(e) of the EIR (confidentiality of commercial or industrial information), as it considered the passage of time had rendered the information within it less commercially sensitive than at the time of the request.
9. This decision notice covers:
 - whether the Council is entitled to rely on regulation 12(4)(e) of the EIR (internal communications) to withhold the information requested in part 3 of the request,
 - whether the Council is correct when it says that it does not hold any information within scope of part 4 of the request.

Reasons for decision

Regulation 12(4)(e) (internal communications)

10. Regulation 12(4)(e) of the EIR states that information is exempt from the duty to disclose if it involves 'the disclosure of internal communications'. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then the exception will be engaged. However, as with all EIR exceptions, this is a qualified exception. If the exception is engaged it is then necessary to carry out a public interest test. The information can only be withheld if the public interest in maintaining the exception outweighs the public interest in disclosing the information.
11. As is routine when carrying out an investigation in to a public authority's application of regulation 12(4)(e), the Commissioner asked the Council to provide a copy of the information it had withheld under regulation 12(4)(e). The reason for doing so was twofold. First, to allow him to determine whether all of the information withheld on this basis is, in fact, internal communications so as to determine whether the exception is engaged. Second, if the exception is engaged, in order to allow him to assess the public interest in the withheld information being disclosed and that in maintaining the exception.
12. Unfortunately, despite the Commissioner having requested a copy of the information withheld under regulation 12(4)(e) on five separate

occasions the Council has not provided a copy of the information it has withheld on this basis.

13. In response to the Commissioner's most recent request for this information the Council provided the following information about how it had applied the exception:

"Regarding the internal communications that the Council exempted under 12(4)(e) the Council relied on officers confirming that these documents were only internal communications (as this was the only element being asked for) and that no further searches were carried out centrally to either confirm or deny this."

"As the request clearly only asks for internal communications between officers it was felt that the application of this exemption was valid. As per our correspondence to yourself a Public Interest Test was also completed in support of this communication."

14. In a previous response to the Commissioner, having been asked to explain why it has concluded that the withheld information falls in the scope of the exception provided by regulation 12(4)(e) the Council also stated:

"I can confirm that the request only asked for internal communications and the Council carried out no searches for external communications."

15. The Commissioner does not agree with the Council's assertion that the wording of part 3 of the request means that only internal communications would be within scope of this part of the request. This part of the request was for "relevant officers reports". Whilst the information falling within the scope of this request may include internal communications, in the Commissioner's view there is nothing in the wording of this request that limits its scope only to internal communications.

16. Due to the Council's failure to provide a copy of the withheld information the Commissioner has been unable to determine whether complying with part 3 of the request would involve the disclosure of internal communications.

17. As the Council has failed to demonstrate that the exception is engaged the Commissioner's decision is that it is not engaged. He has therefore ordered disclosure of this information, making appropriate redactions for any personal data, at paragraph 3 of this notice.

Regulation 12(4)(a) (information not held)

18. Regulation 12(4)(a) of the EIR says that a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received.
19. In scenarios where there is some dispute between whether the public authority holds relevant information, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
20. The Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and he will consider any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any reason why it is inherently likely or unlikely that information is not held.
21. The wording of part 4 of the request was as follows:

"4. What plans does the council have for mandatory household food collection due to come into force in 2023? Please could you provide me with the most recent officers report that addresses this matter? Please include any supporting documents / appendices to those reports."
22. The Council stated in its fresh response of 31 May 2023 that it does not hold any information within scope of this part of the request.
23. The Commissioner asked the Council a number of questions to ascertain if any information was held. When doing so the Commissioner highlighted the wording of the first sentence of this part of the request, "What plans does the council have for mandatory household food collection due to come into force in 2023?" and asked the Council to confirm, having considered that this question would amount to a request for any recorded information held about introducing mandatory separate food waste collection, whether the Council's position is that no information within the scope of part 4 of the request is held.
24. In its response the Council stated, "Please note that the request specifically asks for officer's reports and Council plans" and "No Council plans and officer reports are currently held". However, it also provided a statement from the Head of Waste Management which listed a number of topics the Council is considering in relation to household food collection.
25. Given that the Council has confirmed it is considering a number of topics in relation to household food collection, the Commissioner is not

satisfied that, on the balance of probabilities, no information is held by the Council within the scope of part 4 of the request.

26. It appears that the Council may have interpreted the scope of the request in a narrow manner, considering only whether it holds formal reports or plans. The Commissioner's view is that, given the wording of the first sentence of this part of the request, any information held about how the Council may implement mandatory household food collection is in scope of part 4 of the request.
27. The Commissioner therefore requires the Council to issue a fresh response to part 4 of the request following searches aimed at identifying all information held within the scope of this part of the request. These searches should be designed to identify any information held about how the Council may implement mandatory household food collection.

Other matters

28. The Commissioner notes that, with respect to part 4 of the request, it is the Council's failure to reach a proper objective reading of the request that has necessitated the Commissioner ordering a step requiring the Council to carry out additional searches designed to identify all of the information within scope of this part of the request.
29. The Council's engagement with the Commissioner with regards to this investigation has been poor. As noted above, despite the Commissioner having requested a copy of the information withheld under regulation 12(4)(e) on five separate occasions the Council has not provided a copy of the information it has withheld on this basis. The Commissioner has decided to issue this decision notice rather than issue an information notice requiring the Council to provide his staff with the withheld information as he considers this to be the best use of his office's resources and the best outcome for the complainant.

Right of appeal

30. 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

31. 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.
32. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF