

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 25 January 2012

Public Authority: Transport for Greater Manchester
Address: 2 Piccadilly place
Manchester
M1 3BG

Decision

1. The complainant requested:

'The full costs for the construction of the tract to facilitate the Trans Pennine Trail between Didsbury tram station and Kings Way East Didsbury'.

2. The Commissioner finds that the information requested is environmental and therefore exempt under section 39 of the Freedom of Information Act 2000. The Commissioner's decision is that Transport for Greater Manchester (TfGM) should reconsider the request under the EIR and either disclose the information to the complainant under Regulation 5 or issue a refusal notice under Regulation 14

3. The Commissioner requires Transport for Greater Manchester (TfGM) to take the following steps to ensure compliance with the legislation.

- Reconsider the request under the EIR and either disclose the information to the complainant under Regulation 5 or issue a refusal notice under Regulation 14.

4. TfGM 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. In or about 2010 TfGM's external private contractor, M-Pact Thales Consortium (MPT), was awarded the contract to design, construct and maintain the Metrolink extension from Chorlton to East Didsbury¹. The necessary work for this extension has already started and includes the repositioning of the Trans Pennine Trail (TPT)² within the Metrolink corridor in Didsbury.

Request and response

6. On 3 May 2011 the complainant wrote to TfGM and requested information in the following terms:

'Please send me the following information: The full costs for the construction of the tract to facilitate the Trans Pennine Trail between Didsbury tram station and Kings Way East Didsbury.'
7. TfGM responded on 6 June 2011 by disclosing the total comparative estimated costs for locating the TPT at track level and at mid-point on the embankment.
8. On 15 June 2011 the complainant requested an internal review as he was dissatisfied with TfGM's response. In particular, he said that the total estimated comparative costs were not acceptable without a detailed breakdown.
9. TfGM responded on 19 July 2011 and stated that it was withholding the detailed breakdown of the comparative costs under section 43 of the Act as the information was commercially sensitive and disclosure would be prejudicial its contractor's (MPT) commercial interests. In particular, TfGM said that if this information was made public it would enable competitors to estimate what price its contractor would bid for similar projects and thereby put it at a disadvantage when tendering in such projects.

¹ See

http://www.thalesgroup.co/Press_Releases/Countries/United_Kingdom/2010/100806_UKPR_M-Pact_Thales_consortium_awarded_extension_works_on_Manchester_Metrolink_Project/

² For further information see: <http://www.transpenninetrail.org.uk/>

10. The complainant replied by email on 20 July 2011 and stated that he did not believe the exemption cited by TfGM (section 43) was appropriate. He said proper scrutiny of public contracts was a guiding principal of the Act and requested a more detailed explanation as to why disclosure of a detailed breakdown of the comparative costs would be prejudicial to MPT's commercial interests. The complainant suggested that the Commissioner would also require a reasonable demonstration of this to accept the exemption. The complainant has never received a response to this email.

Scope of the case

11. On 21 November 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled by TfGM. In particular, he stated his belief that TfGM's application of section 43 of the Act was incorrect.
12. The Commissioner has confined his investigation to TfGM's application of the Act to the requested information and in particular the exemption under section 43. The Commissioner has also considered if the information is environmental information and therefore should have been considered under the Environmental Information Regulations (EIR).

Chronology

13. On 6 January 2012 the Commissioner contacted TfGM by email and requested the withheld information. At the same time he expressed the view that this information was environmental therefore covered by the EIR as opposed to the Act. Accordingly, he invited TfGM to reconsider the complainant's request under the EIR and provided it with a hyperlink to the Information Commissioner's Office's (ICO) website to view Decision Notices in similar cases.
14. In his email dated 6 January 2012 the Commissioner also requested evidence from TfGM to support its statement that disclosure of the withheld information would prejudice the commercial interests of its contractor, MPT, under the Act or have an adverse affect on the confidentiality of commercial or industrial information under Regulation 12(5)(e) of the EIR. The Commissioner made the point that this evidence had already been requested by the complainant in his email dated 20 July 2011.
15. To assist TfGM in producing the further evidence requested the Commissioner provided it with hyperlinks to his Guidance on 'section 43:

commercial interests' and 'section 43: detriment to a third party'³ together with the ICO's specialist guidance and lines to take on section 43 of the Act⁴ and Regulation 12(5)(e) of the EIR⁵.

16. In his email dated 6 January 2012 the Commissioner also stated that TfGM had not produced any evidence in the form of a letter or other communication from its contractor (MPT) to establish that disclosure of the withheld information would prejudice the latter's commercial interests or adversely affect the confidentiality of its commercial or industrial information.
17. TfGM responded in an email dated 13 January 2012. It did not reconsider the request under the EIRs as suggested by the Commissioner or make any reference to them.
18. TfGM said that it had not sought the views of its contractor, MPT, as to why disclosure of the withheld information would prejudice MPT's commercial interests or adversely affect the confidentiality of commercial or industrial information. It said the reason for this was that pricing information was specifically listed as 'commercially sensitive' in the (Design Construct and Maintain) contract referred to in paragraph 5 above and would remain so for the duration of the contract. However, TfGM did state that it had discussed the withheld information with its Stakeholder Approvals Manager to discuss the likely prejudice to MPT's commercial interests on disclosure.
19. To support its decision to withhold the detailed breakdown of the comparative costings TfGM pointed out that this information was not simply item costs; it was a breakdown and unit rate per linear metre which could be used to identify MPT's management and overhead costs. It said that disclosure of this information could be used by MPT's competitors when bidding for future work which would damage its commercial position in the market place. In relation to this future work TfGM said that MPT might be a potential bidder for further extensions of the Metrolink, the tendering process for which would be likely to take place in 2012/13.

³ See

http://www.ico.gov.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information.aspx

⁴ See <http://www.ico.gov.uk/foikb/SectionsRegulations/FOIPolicySection43.htm>

⁵ See <http://www.ico.gov.uk/foikb/SectionsRegulations/FOIpolicyregulation125e.htm>

Analysis and reasons for the decision

Is the requested information environmental within the meaning of the EIR?

20. The first question the Commissioner considered was whether the requested information was 'environmental' within the meaning of the EIR.
21. Section 39 of the Act states that information is exempt information if the public authority holding it is obliged, by Regulations under section 74 of the Act, to make the information available to the public in accordance with those Regulations or would be so obliged but for any exemption under those Regulations. The Regulations under section 74 of the Act are the EIR. Information falls to be considered under the EIR if that information is environmental information. Environmental information is defined in Regulation 2 of the EIR.
22. Regulation 2(1) of the EIR deals with the interpretation of the Regulations and the definition of environmental information.
23. Regulation 2(1) states:

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form 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 elements of the environment referred to in (b) and (c);"

24. Regulation 5(1) of the EIR creates a duty on public authorities to make environmental information available upon request.
25. Regulation 12(2) of the EIR states that public authorities shall apply a presumption in favour of disclosure.
26. The Commissioner has seen the requested information and finds that it is 'environmental' within the meaning of Regulations 2(1)(a), 2(1)(b) and 2(1)(c) of the EIR in that it is information on measures (including administrative measures) plans and activities, and factors (e.g. noise) affecting or likely to affect the elements of the environment, namely, soil, land and landscape.
27. The Commissioner's conclusion is that, as the information is environmental it is exempt under section 39 of the Act and therefore should have been considered by TfGM under the EIR.

Other matters

28. The Commissioner also finds that TfGM breached Regulation 5(2) of the EIR by failing to respond to the complainant's request as soon as possible and in any event no later than 20 working days after the date of receipt.

Right of appeal

29. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

30. 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.

31. 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

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