

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

Date: 24 September 2020

Public Authority: London Borough of Merton
Address: Civic Centre
London Road
Morden
SM4 5DX

Decision (including any steps ordered)

1. The complainant has requested information on Schedule 5 (Payment Mechanism) of a particular 24 year contract between the London Borough of Merton ("the Council") and IdVerde.
2. The Council initially cited section 43 – Commercial interests, as its basis for withholding the requested information. Later relying on section 41 FOIA – Information provided in confidence. During the course of the complaint the Council disclosed redacted information.
3. The Commissioner's decision is that the information is environmental information within the meaning of regulation 2(1)(c) of the EIR. The Council can rely on regulation 12(5)(e) - Commercial confidentiality) as a basis for withholding the remainder of the information. However, the Council breached regulation 5(2) and regulation 14(2) as it did not make the redacted information available or refuse the request within 20 working days of the date of receipt of the request.
4. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Background

5. The complainant explained to the Commissioner his specific concerns regarding the provision of tennis courts in the borough which had been

“effectively free for residents to play on” prior to IdVerde securing the grounds maintenance contract and would now be subject to an hourly charge. The complainant outlined that the charges to be applied would severely impact on the use of the courts. His information request sought to understand specific details around the contractual revenue share agreement in the contract and to hold the Council accountable.

Request and response

6. On 6 June 2019 the complainant wrote to the Council and requested information in the following terms:

“Please provide an unredacted copy of schedule 5 of this contract.”

7. This request followed a series of requests which the complainant explained as follows:

“Before I begin I would just like to make the point that the Council chose to avoid talking directly to the community about the tennis charging changes and gave no channel for direct dialogue to itself other than through email or FOI requests. The Council chose to try to shelter behind Idverde and LTA by not appearing at the John Innes Park community meeting on 30 April 2019 therefore the Council should expect to receive a fair share of questions when it tries to implement a new active enforcement tennis charging policy. The Council should be fully accountable for the tennis charging and it cannot and should not try to hide behind any third parties as it signed off on the pricing policy in its own name.”

8. Following the Commissioner’s intervention, the Council responded to this request on 21 August 2019. It stated that a redacted copy of the contract is available on the South London Waste Partnership website¹ and is redacted in reliance of section 43(2) FOIA.
9. The Commissioner notes that Schedule 5 on the this website is totally redacted.
10. Following an internal review the Council wrote to the complainant on 19 September 2019. In the first instance it stated;

¹ <http://www.slwp.org.uk/what-we-do/grounds-maintenance/>

"...This suggests that you may be seeking a redacted copy of the schedule. In case that is your position and in an effort to be helpful in response to your request LBM would, on receipt of confirmation from you that you would like a redacted copy of Schedule 5, be willing to provide you with an appropriately redacted copy. Upon confirmation from you that you would like a redacted copy, LBM would re-seek the views of Id Verde and the London Borough of Croydon on the pricing information etc. contained in the schedule before providing an appropriately redacted copy to you."

11. The Council advised the Commissioner that it did not receive confirmation from the complainant and therefore proceeded to provide its review on the assumption that the complainant would only be satisfied with an unredacted copy. Based on this assumption the Council provided a review upholding the initial application of section 43(2) and in addition relied on section 41 FOIA.

Scope of the case

12. The complainant contacted the Commissioner 21 July 2019 to complain about the way his request for information had been handled.
13. Following the Commissioner's intervention the Council provided its initial response and internal review. Following the internal review the complainant remained dissatisfied; the Commissioner therefore substantively investigated.
14. During the course of the Commissioner's investigation the Council provided her with the withheld Schedule 5 and a redacted version which it was content to provide to the complainant. The Commissioner reverted questioning various redactions. The Council reviewed the material and made further adjustments and provided the Commissioner, and subsequently the complainant, with the requested information with fewer redactions.
15. The complainant remained dissatisfied with the information disclosed by the Council on 14 August 2020. He advised the Commissioner:

"This is a start but there are key redactions in this document which makes it difficult to better understand the incentivisation given under the contract and which I have been seeking for the better part of a year now.

It's very revealing how this document has been off limits for so long and its subsequent provision has emphasised how this Council has simply tried to obstruct my FOI request with no valid reasons. On one occasion

even informing me they did not provide schedule 5 as it was too complicated to be understood by the public.”

16. The Council requested:

“If the Commissioner concludes that the request should have been considered under the Environmental Information Regulations 2004 (“EIR”) we respectfully request, in the alternative, the Commissioner reads the Council’s arguments as to why the information should not be disclosed across to the equivalent exemptions in EIR. In this case we would seek to rely on the equivalent provision in Section 12(5)(e) of the EIR.”

17. The Commissioner determined that the information falls within the definition of environmental information. It is part of a contract and that contract clearly falls within the definition of environmental information. The Commissioner’s reasoning is set out in the main body of this notice.

18. The Commissioner therefore considers the scope of her investigation to be the Council’s final position on the redaction of the requested information relying on regulation 12(5)(e) as a basis for withholding the remainder of the information.

Reasons for decision

Is the requested information environmental information?

19. In considering this point the Commissioner has had regard for her own guidance.²

20. Regulation 2(1) of the EIR provides the following definition of environmental information:

“...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

² https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

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)."

21. As noted, in the circumstances of this case, the Commissioner has concluded that the withheld information in question is environmental information subject to the EIR. The information is on a measure likely to affect the state of the elements of the environment described above. It is an integral part of a contract for grounds maintenance to be undertaken by a specific contractor at a number of locations including within the boundaries of the Council.
22. She has also concluded that it is appropriate, in the circumstances of this case, to consider the Council's arguments in respect of the exception at regulation 12(5)(e).

Regulation 12(5)(e) – Commercial confidentiality

23. Regulation 12(5)(e) EIR states that:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect-

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;”

24. In considering the application of this exception the Commissioner considers that four criteria must be met:
- the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
25. In accordance with regulation 12(2) the public authority should apply a presumption in favour of disclosure. So, a public authority should only refuse to disclose the information if it considers the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception.

Is the information commercial or industrial in nature?

26. The first criteria to be considered is the nature of the information. For information to be commercial in nature, it must relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade and as such a commercial activity will generally involve the sale or purchase of goods or services, usually for profit.
27. The Council argues that the information is commercial in nature as it relates to a commercial activity, the IdVerde contract with the South London Waste Partnership. The Council explained the parties to the contract comprise the London Borough of Merton, who are “the client” under the contract; IdVerde the commercial contractor; the London Borough of Sutton, a party to the contract, and London Borough of Croydon, the lead Authority in relation to the contract. The requested information is “Schedule 5 Payment Mechanism” of this contract.
28. The Commissioner agrees that the information contained in Schedule 5 comprises commercial information including rates for items of work or key elements of bespoke formulae used for calculating costs.

Is the information subject to confidentiality provided by law?

29. The Commissioner considers that "*provided by law*" will include confidentiality imposed on any person by the common law of confidence, contractual obligation or statute.
30. For the common law duty of confidence to apply, the information must have the necessary quality of confidence, meaning the information should not be trivial in nature and should not already be in the public domain.
31. The Council explained its view that the pricing information is confidential information. It did not state a specific contractual obligation of confidentiality, however, it relies on the information having the required common law quality of confidence, in that it is not trivial and is not in the public domain.
32. The complainant referred the Commissioner to a public meeting attended by a representative of IdVerde. He explained:

"...Idverde has publicly mentioned the high level details of schedule 5 in a public meeting.... the party it is negotiating with has effectively already put the principles around clause 5 into the public domain."
33. The Council addressed this assertion in its submissions, advising the Commissioner that the information discussed at the public meeting was very broad and did not provide the detail contained in Schedule 5.
34. The Commissioner is satisfied that the redacted information has the necessary quality of confidence in accordance with the Common Law of Confidence. The Commissioner accepts that the information is not trivial and the content has not been placed in the public domain. She therefore considers that the information is subject to a duty of confidence provided by law.

Is the confidentiality provided to protect a legitimate interest?

35. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm would be caused by the disclosure.
36. In this case the Council explained:

"...the contract remains at a relatively early stage and the manner in which pricing is submitted, remains a matter for IDV as it reflects their experience of the particular requirements, i.e. their expertise. That expertise belongs to IDV and is a valuable asset to them and not

something that they would wish disclosed to their competitors. As such, schedule 5 has been specifically categorized within the contract as commercially sensitive information.

The information requested would be of value to any competitor of the present contractor in any future procurements and that includes procurements of a similar nature for, (for example) other local authorities that may well take place long before the present contract is re-tendered."

37. The Council also advised that it:

"... would suffer reputational damage if it released pricing information that the contractor and other interested parties, as indicated above, consider should be kept confidential and is specifically identified as commercially sensitive information in the contract. This in turn would make it more difficult to manage the material contract with IDV as well as potentially undermine the Council's negotiating position in the future on these and other commercial opportunities in terms of securing Best Value and being able to conduct public procurements in a way that delivers the most Economically Advantageous Tenders as required by PCR 2015. Other contractors would potentially be put off bidding for LBM contracts. It is important to both suppliers and customers that the confidential financial details relating to pricing are maintained in confidence."

38. Although the Commissioner understands that reputational damage may be attributed to disclosure of the information she does not consider that other contractors would be deterred from bidding for significant public sector contracts. Notwithstanding this she accepts that, on the balance of probabilities, harm would be caused to IdVerde by disclosure of the pricing and pricing structure which remain redacted from Schedule 5.

Would confidentiality be adversely affected by disclosure?

39. As the Commissioner considers the first three elements of the test to have been established, she is satisfied that disclosure into the public domain would adversely affect the confidential nature of the information by making it publicly available and would consequently harm the legitimate economic interests of IdVerde. The Commissioner also accepts that disclosure would adversely affect the expectation of confidentiality by undermining the trust each party has in the other to keep such information confidential.

40. She therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure of the requested information.

Public interest test

Public interest arguments in favour of disclosing the information

41. The Council summarised its position as follows:

“Promotes competition in procurement via transparency.

Promotes accountability for public money.”

42. The complainant explained his view on these points as follows:

“There is a public interest in encouraging competition for public sector contracts. Greater transparency about the tendering process and the negotiation of public sector contracts may encourage companies to take part in the process and help them improve their bids. This will increase competition and therefore help public authorities to get value for money. Transparency of tender information is therefore beneficial to the whole process and should not deter contractors from making bids for public authority contracts, particularly as the value of these contracts also provides a clear incentive to tender for the work.

Disclosure of commercial information should make Merton Council more accountable for how they spend public money. If people have a better understanding of how public money is spent, this may give them more confidence in the integrity of Merton Council and in its ability to effectively allocate public funds. Alternatively it may enable them to make more informed challenges to the spending of public money by Merton Council.”

Public interest arguments in favour of maintaining the exception

43. The Council provided the following arguments:

“The negative impact that disclosure would have on the market is contrary to the public interest because it undermines the Council’s ability to obtain best value where it cannot maintain confidentiality of commercially sensitive information.

Disclosure would also undermine the ability of the other parties (Sutton Council, Croydon Council) to negotiate best value contracts.

Disclosure would have a negative impact on IDV’s ability to be competitive because it would reveal commercially sensitive information about its pricing structure contrary to the public interest.”

The Commissioner’s view

44. The Commissioner acknowledges the complainant's concerns. She notes his comments and understands that he is exercised about the Council's actions. She also notes that the wider general public are impacted by the Council's actions. She considers that transparency of the Council's actions and the spending of public money carry significant weight when balancing the public interest. The Commissioner considers it reasonable for the residents of the Borough to attempt to understand the Council's change in policy and the reasons for that change resulting in charges which they find prohibitive. There is a clear expectation that public amenities such as tennis courts are available and maintained for the benefit of public enjoyment. Therefore, there is a clear public interest in understanding more about a contract for maintaining public amenities, particularly if there is controversy about its operation.
45. Notwithstanding this the Commissioner must weigh the benefits of the disclosure of the information against the public interest in maintaining the exception. The Commissioner has concluded that there are compelling reasons in the public interest to protect certain information that is obviously commercial such as pricing and accounting formulae used in an agreed contract. She considers that the strongest public interest argument in favour of maintaining the exception is to protect the ability of the Council to obtain best value when spending public money.
46. In the circumstances of this case she is persuaded that the overall public interest is best served by maintaining the exception. She is satisfied that the public interest favours maintaining the exception at regulation 12(5)(e).

Procedural matters

Regulation 2(1) – Interpretation

47. As set out above in paragraphs 19 – 21 the Commissioner's decision is that the requested information is environmental information within the meaning of regulation 2(1)(c) of the EIR. Therefore the request should have been handled under the EIR rather than the FOIA.

Regulation 14(2) – refusal to disclose information

48. Regulation 14(2) of the EIR states that if a request for environmental information is refused by a public authority, the refusal shall be made "*as soon as possible and no later than 20 working days after the date of receipt of the request*".
49. As the Council failed to issue a refusal notice within 20 working days of receiving the complainant's request, the Commissioner has found that the Council has breached regulation 14(2) of the EIR.

Regulation 5(2) – duty to make environmental information available on request

50. Regulation 5(2) provides 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.
51. The Council failed to provide the redacted information to the complainant within the statutory timeframe, therefore the Commissioner has found there to be a breach of regulation 5(2).

Right of appeal

52. 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

53. 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.
54. 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

Susan Hughes
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