

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

Date: 9 January 2023

Public Authority: London Borough of Southwark ("the Council")
Address: PO Box 64529
London
SE1P 5LX

Decision (including any steps ordered)

1. The complainant has requested information on a procurement exercise entitled "Local Site Operator for Air Quality Monitoring Stations ID: 496981".
2. The Commissioner's decision is that the request should have been considered under the EIR and the Council is entitled to withhold the requested information in reliance of EIR regulations 12(5)(d) - confidentiality of proceedings and 12(5)(b) - the course of justice.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 28 June 2021 the complainant wrote to the Council and requested information in the following terms:

"I would like to request all correspondences relating to the following procurement exercise titled: Local Site Operator for Air Quality Monitoring Stations ID: 496981, specifically:

All correspondences received through the proactis portal to and from the energy research group at Imperial college London, including details of any challenges of the award of contract. I would also like to receive all correspondences between the email accounts paul.newman@southwark.gov.uk, bill.legassick@southwark.gov.uk or any other council email address directly involved in the procurement of the contract and any representative of Imperial College London during the procurement exercise."

5. The Council responded on 27 July 2021 advising that it held information in the scope of the request but was withholding the information in reliance of the section 42 exemption –Legal professional privilege and the section 43(2) exemption – Commercial interests.
6. Following a request for internal review on 30 July 2021 the Council wrote to the complainant and provided its review on 4 October 2021 upholding its initial response.

Scope of the case

7. The complainant contacted the Commissioner on 12 October 2021 to complain about the way their request for information had been handled. They explained:

"I requested this information so that I can confirm that the process was fair and transparent, and served the interests of the public purse."

8. When the Commissioner contacted the Council for its submissions on this case he asked that it considered the information access regime which had been applied to the withheld information. He suggested that EIR regulations 12(5)(e) – commercial confidentiality and 12(5)(b) – the course of justice etc may be more appropriate. The Commissioner had not seen the withheld information at this time.
9. The Council provided its first brief submissions and explained:

"We have reviewed the content of these requests and consider that they do not fall under the definition of 'environmental information' as set out in Regulation 2 of EIR 2004."

10. The Commissioner found it necessary to revert to the Council with further questions. The Council provided further submissions maintaining its position that the applicable regime was the FOIA. At this time the Council determined that a third FOIA exemption applied to the majority of the withheld information, section 41 – Information provided in confidence. The equivalent exception in the EIR is regulation 12(5)(d).
11. Having seen the withheld information the Commissioner considers that the scope of his investigation is to consider the appropriate information access regime and the exemptions cited by the Council alongside the applicable EIR exceptions.

Reasons for decision

Is the information 'environmental information'?

12. Regulation 2(1) of the EIR defines environmental information as any information in any 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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)”

13. The Commissioner considers that the phrase ‘any information...on’ should be interpreted broadly. In this case he considers that the majority of the information falls within regulation 2(1)(c) because the information relates to activities and measures which impact on the elements in (a). The Council disagrees explaining:

“The information requested was specifically asking for correspondence about a procurement exercise.... Whilst contractual activities conducted after such a contract is awarded may interact, protect or affect the state of the elements, the procurement exercise itself does not as it is a business activity.”

14. The Commissioner disagrees with the Council’s interpretation as the content of the withheld information comprises information which relates to the environment by affecting the state of the elements, namely air and atmosphere. The Council did not provide submissions on the EIR, only focussing on the three FOIA exemptions. In the particular circumstances of this case the Commissioner has considered the Council’s submissions on the FOIA exemptions and made his own consideration of the exceptions cited above.

Regulation 12(5)(d) – confidentiality of proceedings

15. Regulation 12(5)(d) EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
16. In order for the exception to be engaged the Commissioner considers it necessary for three conditions to be met.
17. Firstly, the confidentiality referred to by a public authority must specifically relate to the confidentiality of proceedings. In his guidance ‘Confidentiality of proceedings (regulation 12(5)(d))¹’, the Commissioner

¹ https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf

interprets 'proceedings' as possessing a certain level of formality. They will include, but are not limited to: formal meetings to consider matters that are within the authority's jurisdiction; situations where an authority is exercising its statutory decision making powers; and legal proceedings. In each of these cases the proceedings are a means to formally consider an issue and reach a decision.

18. The Commissioner considers that a procurement exercise for local site operators concerning air quality monitoring has the necessary formality to constitute proceedings for the purposes of regulation 12(5)(d).
19. Second, this confidentiality must be provided by law. The confidentiality may be provided in statute or derived from common law. If there is no specific restriction on disclosure in statute, the confidentiality of the proceedings may also be 'provided by law' where they are protected by a common law duty of confidence. This would apply, for example, where the proceedings involve negotiations with another party, or information obtained from another party. The information thus obtained must have the quality of confidence; this means it must not be in the public domain already, must be of importance to the confider and not trivial. There must also be an expectation that it would not be disclosed.
20. The Commissioner considers that the withheld information in this case has the quality of confidence as it is not trivial, is not in the public domain and was communicated in circumstances importing an obligation of confidence. The Commissioner is unable to provide any further details on the content of the information he has examined due to the content of that information.
21. The third condition requires the Commissioner to determine whether disclosure would have an adverse effect on the confidentiality. The Commissioner's guidance explains:

"Adversely affect' means there must be an identifiable harm to or negative impact on the interest identified in the exception. Furthermore, the threshold for establishing adverse effect is a high one, since it is necessary to establish that disclosure would have an adverse effect. 'Would' means that it is more probable than not, ie a more than 50% chance that the adverse effect would occur if the information were disclosed."
22. The Council explained that disclosure of the requested information would be an unauthorised use of information provided in confidence resulting in a detrimental impact on the confiding party, on its relationship with the Council as well as with other organisations.

23. On this basis, the Commissioner has decided that disclosure would have an adverse effect on the confidentiality of proceedings. Regulation 12(5)(d) is therefore engaged.

The public interest

24. Regulation 12(1)(b) requires that where an exception is engaged the Commissioner must go on to consider the balance of the public interest. In doing so he must take into account the EIR's express presumption in favour of disclosure.
25. The Council acknowledged the importance of transparency and accountability of public authorities and considers that in regard to this case it fulfils that duty by publishing a significant quantity of information regarding the procurement process. It directed the Commissioner to the procurement portal, London Tenders Portal² and specifically Open data-Southwark Council.³ It considers that the two portals provide information of interest to the general public rather than information of specific interest to the complainant.
26. The Council considers that the public interest in disclosure is outweighed by the Council needing to be recognised as a trusted organisation in which third parties providing confidential information may be reassured and have confidence that any such information is not made public.
27. The Commissioner notes the complainant's comments, as set out in paragraph 7, however he does not agree that disclosure of the requested information provides the complainant or the world at large with relevant information on the spending of public money or management of the public purse.
28. The Commissioner accepts that there will always be a general public interest in protecting confidential information. Breaching an obligation of confidence undermines the relationship of trust between confider and confidant. The grounds on which confidences can be breached are therefore limited. Where the exception is engaged the Commissioner

² <https://www.londontenders.org/>

³ <https://www.southwark.gov.uk/council-and-democracy/open-data?chapter=4>

accepts that there will always be some inherent public interest in maintaining it.

29. The Commissioner agrees with the complainant that the Council's procurement exercise should be fair and transparent. However, the information requested in this case specifically concerns one organisation and named individuals' correspondence not the procurement exercise in general. The Commissioner considers that the URLs indicated by the Council in paragraph 25 do provide transparency on its contracts. He notes the detail provided on the successful contract in relation to the procurement exercise stated in the request is in the public domain.⁴ The Commissioner has seen the withheld information and has determined that the majority of the withheld information engages regulation 12(5)(d) and the public interest favours maintaining the exception.

Regulation 12(5)(b) – the course of justice

30. Regulation 12(5)(b) 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-

(b) 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."

31. The Commissioner considers this exception is fairly broad and covers a wide range of judicial or quasi-judicial processes. It can be applied where information is considered exempt because it is subject to legal professional privilege ("LPP").
32. The information withheld comprises communications between the Council's legal adviser and their client, (the council), for the dominant purpose of providing legal advice. It therefore attracts legal advice privilege.

⁴ <https://procontract.due-north.com/ContractsRegister/ViewContractDetails?contractId=828d11ad-cf5b-eb11-8106-005056b64545&p=2241eb95-058a-e511-80f7-000c29c9ba21>

33. The Commissioner's established view is that disclosure of information subject to LPP, particularly legal advice which remains live and relevant, will have an adverse effect on the course of justice.
34. Having regard to the Council's arguments, the nature of the withheld information and the subject matter of this request, the Commissioner is satisfied that disclosure of the requested information would have an adverse effect on the course of justice and, therefore, finds that the exception at Regulation 12(5)(b) is engaged.
35. Regulation 12(5)(b) is a qualified exception, and the Commissioner has therefore considered the public interest test required by regulation 12(1)(b) to determine whether it favours the disclosure of the information, or favours the exception being maintained.

The public interest

36. The Council explained the following points in favour of disclosure of the information:

"Maintaining the spirit of transparency that FOIA promotes, which may also increase public confidence in the council;

Accountability of the council as a public authority for quality decision making and ensuring that decisions have been made on the basis of good quality legal advice;

Understanding of local government processes in decision making."

37. In favour of maintaining the exception the Council provided the Commissioner with the following reasoning:

"A general expectation that communication between council officers and their legal advisers is confidential. Disclosing information provided in a legal capacity to a third party could breach the confidentiality status of legally privileged communications with in-house lawyers.

- Safeguarding openness in all communications between the council officers and their legal adviser to enable frank and full advice to be received which is fundamental to the administration of justice.
- Preventing inhibitions of council officers and legal advisers asking for and giving advice in the future for fear of their communications being released under FOIA.
- Lack of compelling and specific justification for the release of the information to be of interest to members of the general public.

- Unrestricted disclosure, under FOIA, of legally privileged information would result in the loss of legal privilege.”
38. The Council concluded that the balance of the public interest favoured maintaining the exception.
 39. As covered in paragraph 26 above the Commissioner considers that the complainant is focussing on a personal interest rather than the public interest.
 40. LPP is a fundamental principle of justice, and it is the Commissioner’s well-established view that the preservation of that principle carries a very strong public interest. The principle exists to protect the right of clients to seek and obtain advice from their legal advisers so that they can take fully informed decisions to protect their legal rights.
 41. To equal or outweigh the strong public interest in protecting the principle of LPP the Commissioner looks for strong opposing factors such as circumstances where a substantial number of people are affected by a decision or there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. In the circumstances of this case the Commissioner is not satisfied that any of these factors are present to the extent that the strong public interest in protecting the principle of LPP is outweighed.
 42. The Commissioner’s decision is therefore that the public interest favours maintaining the exception.

Regulation 12(5)(e) – commercial confidentiality

43. Regulation 12(5)(e) of the EIR 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”.
44. The Commissioner has considered the information provided by the Council which it has withheld in reliance of FOIA section 43(2) - commercial interests and which therefore the Commissioner would have considered under the exception provided by EIR regulation 12(5)(e).
45. The Commissioner considers that the information identified by the Council falls outside the scope of the request. Consequently he has not made a determination on whether the exception applies.

Regulation 11 - Representations and reconsideration

46. Regulation 11(4) of the EIR provides that where a request for review is received:

“A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the receipt of the representations.”

47. The complainant requested an internal review of the Council’s decision on 30 July 2021. The Council provided the outcome of the review on 4 October 2021.

48. The Commissioner has therefore determined that the Council did not comply with the requirements of regulation 11(4) of the EIR.

Right of appeal

49. 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

50. 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.
51. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF