

Strategy and Challenge

Mr Tim Davies
What Do They Know? Website

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Please ask for Teresa Wilmshurst

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Our ref: 5367968

Your ref:

Date: 09 June 2017

Dear Mr Davies

Request ref 5367968

Dear

Response

I would like to apologise for the delay in responding, please now find below the council's response to the remainder of your request.

In our correspondence of 20 April 2017 we advised the time limit was being extended under FoIA to permit the consideration of the public interest test. During the course of this assessment we have concluded that the information in fact falls under the provisions of the Environmental Information Regulations (EIR). Whilst the extension of time is also permitted under these regulations we apologise for any confusion this may have caused.

We have concluded that the Environmental Information Regulations apply to this report as the construction and operation of the Energy from Waste (EfW) facility is clearly a measure that is likely to affect the state of elements of the environment, either directly or through one or more of the factors identified in paragraph (b) of the statutory definition. The construction and operation of a EfW facility therefore represent activities that are capable of having a significant impact on the environment.

The various financial arrangements put in place to enable the plant to be built and put into operation form a central part of the project. The fact that they may reflect financing techniques that may be applied to other projects or commercial activities does not alter the fact that they form an essential feature of the package of measures devised by the council to bring this particular project to fruition.

I am pleased to provide a copy of the report. A small amount of information has been removed under EIR regulation 13(2)(a)(ii) as it is considered to be personal information. As you are not the data subject, release of this information would constitute a breach of principle 1 of the Data Protection Act. Principle 1 states that personal data shall be processed (used) fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met; in this case none of the conditions in Schedule 2 have been met.

You will also note that further information has been removed from your copy; this is financial detail that the council have concluded is commercially sensitive and therefore withheld under regulation 12(5)(e) of the EIRs.

The relevant part of EIR regulation 12 reads:

“(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if-
(a) an exception to disclosure applies under paragraphs (4) or (5); and
(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
(2) A public authority shall apply a presumption in favour of disclosure.
(3) ...
(4) ...
(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –
(a) ...
... (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”

To satisfy the exception we have considered the following:

(i) The information has to be commercial or industrial in nature

The information relates to financial performance and viability. That information remains live: it is relatively recent and relates to current and future financial data and commercially sensitive timescales and assumptions.

The report relates to the council’s commercial activity, i.e. the purchase of services for a large public sector infrastructure project. The information in this case relates to the Energy from Waste contract and therefore the council has concluded that the information is commercial in nature.

(ii) The information has to be subject to a duty of confidence provided by law

We consider the information has the necessary quality of confidence, as it is not trivial information nor would this type of information usually be placed into the public domain, although the council has published the majority of the contract in an aid to provide relevant information to the community.

Information in question was produced and provided to the council under terms of a contract, which included specific terms on confidentiality. Those terms are also referred to within the report.

Information was shared within the council under the common law of confidence. Confidentiality of information is included in the council's code of conduct which all employees are required to comply with.

Although the information was discussed with councillors, this was done under the provisions of paragraph 3 of Part 1 to schedule 12A of the Local Government Act 1972.

(iii) The confidentiality has to be required to protect an economic interest

In a normal commercial environment this type of documentation would normally be kept confidential, even if the broad effect of the borrowing and on-lending would be apparent from public records.

This information would reveal the Council's commercial approach, strategy and appetite for risk. Its disclosure would be likely to prejudice the Council's commercial interests in future procurements. In effect, release would put the council in a position of "showing its hand"; that disclosure would place the council at a disadvantage when trying to negotiate competitively.

(iv) That economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of information"

This information would also be likely to damage the commercial interests of UBB, by unfairly providing its competitors and those with whom it may seek to negotiate in future with valuable insights into UBB's commercial approach which would negatively impact on their ability to retain or improve their market position.

Release of information about the council's future finances would inhibit their commercial bargaining position in the context of existing or future negotiations.

Public Interest Test

Regulation 12(1)(b) provides in effect that an exception in regulation 12(5) can only be relied on if the public interest in maintaining the exception outweighs that in disclosure of the information in question.

Arguments in favour of disclosure

- There is a public interest in the disclosure in the interests both of transparency and accountability.
- The information relates to a very large public sector infrastructure project which will have consequences over many years. The contract itself is a PFI contract involving the expenditure of a great deal of public money over many years.
- Public concerns have been expressed about value for money and the EfW technology chosen by the council, which those against it say may involve harmful emissions and toxic waste left over from the scrubbing process.

Arguments in favour of withholding

- The substantial harm identified carries significant weight in favour of maintaining the exception.
- There is a public interest in preventing other companies in the waste management business from having access to the figures. Not only would this be contrary to the general public interest in maintaining commercial confidences, it would provide competitors with an unfair commercial advantage and would discourage commercial organisations from sharing information with public authorities in the future.
- Disclosure of the particular information under consideration in this case would not make any significant contribution to public knowledge on those issues, particularly in light of the information that had already been put into the public domain; the incremental contribution to public knowledge represented by the redacted information is negligible.
- Release would not inform the public of anything relevant to the reasons why the EfW facility was selected (matters that have, in any event, already been aired).
- Public authorities need legitimate space to negotiate and to thoroughly discuss various options in relation to financially and environmentally significant proposals such as those outlined in this case.

It is considered that the greater public interest therefore lies in not providing the information at this time. In coming to that conclusion, the public interest in providing the information has been carefully weighed against any prejudice to the public interest that might arise from withholding the information; in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

This response therefore acts as a refusal notice under regulation 14 of the EIR.

Right of Appeal

If you are unhappy with my response, you can complain or ask for a review of your request by writing to us within 40 working days of receiving this response. The full procedure is on our website at <http://www.gloucestershire.gov.uk/foi>. This should be addressed to:

Shire Hall, Westgate Street, Gloucester, GL1 2TG or
xxxxxxxxxxxxxxxx@xxxxxxxxxxxxxxxx.xx

We would like to hear your views on our service. If you'd like to tell us how we did; you can complete our feedback form online at <http://www.gloucestershire.gov.uk/foifedback>

I will now close your request as of this date.

Yours sincerely

Teresa Wilmshurst