



Department
for Environment
Food & Rural Affairs

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Mr Roland Gilmore
request-268298-755391c6@whatdotheyknow.com

Our ref: RFI 7518
22 September 2015

Dear Mr Gilmore,

INTERNAL REVIEW: THAMES TIDEWAY TUNNEL, UK GOVERNMENT “PRE-FUNDED RISK RESERVE”

Thank you for your email of 16 June 2015, which we have treated as a request for an internal review of Defra’s decision to withhold information on the terms and extent of the UK Government's "Pre-Funded Risk Reserve" supporting the Thames Tideway Tunnel project. We have dealt with your internal review request under the Freedom of Information Act 2000 (FOIA).

Your case has been reviewed by the Information Rights Team within Defra. We have considered the points you raised and have concluded that the initial handling of the request for information was correct.

At the time of your initial request, the procurement was being conducted. This was under the Utilities Contracts Regulations 2006 and Thames Water Utilities Ltd (TWUL), the organisation conducting the procurement, was under an obligation in the Regulations to protect the confidentiality of information provided by bidders. As the procurement was still live, TWUL could not release the details you requested about the procurement.

Defra is subject to a non-disclosure agreement with TWUL in relation to confidential information. We therefore consider that the exemptions in section 43(2) and section 41(1) were correctly applied at the time your request was received. We set out a fuller explanation of our decision in Annex A below.

Since your internal review request was received TWUL issued a press release (dated 13 July) announcing details of the Preferred Bidder for the project, including that twelve parties were invited to tender, which led to two bids being received in the final ‘revise and confirm’ round. Under our duty to advise and assist in pursuance of Section 16 of the FOIA, you may wish to be aware that this can be viewed here:



INVESTORS
IN PEOPLE

<http://www.thamestidewaytunnel.co.uk/news/media-centre/investors-lined-up-to-finance-super-sewer>.

On 24 August, TWUL issued a further press notice announcing that Bazalgette Tunnel Limited had been awarded the contract to finance and build the Tunnel, and that Ofwat had awarded that company a licence to operate as a new regulated utilities business, separate from TWUL. This can be viewed here:

<http://www.thamestidewaytunnel.co.uk/news/media-centre/green-light-for-£42bn-london-super-sewer>

On 7 September copies of the Government Support Package contracts signed with Bazalgette Tunnel Limited and the Liaison Agreement were published, and are available here:

<https://www.gov.uk/government/publications/thames-tideway-tunnel-government-support-package-contract-documents>

Under our duty to advise and assist in pursuance of Section 16 of the FOIA, we also understand that more information relating to the procurement will be made available by Thames Water on its website in due course, now that the procurement has been completed with the Licence Award, as well as when the contract award notice is published by the Official Journal of the European Union.

We hope that this letter and annex answers your complaint satisfactorily. However, if you remain dissatisfied, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF. Please also see - <http://www.ico.gov.uk/complaints.aspx>

Yours sincerely,

Nick Teall

Nick Teall
Head of Information Rights Team
informationrequests@defra.gsi.gov.uk

Annex A

Original Request

Your request was received on 16 May 2015 and requested the terms and extent of the UK Government's "Pre-Funded Risk Reserve" supporting the Thames Tideway Tunnel project, including confirmation of the following:-

1. the number of tenders received;
2. the names of those who submitted a tender;
3. the names of those who submitted a compliant tender;
4. the tender totals; and
5. who from Defra was present at the tender opening?

We replied withholding information for questions 1-4 on the grounds that the FOIA exemptions in section 43(2) ("commercial interests") and section 41(1) ("information provided in confidence") applied and the public interest lay in maintaining these exemptions. Question 5 was answered.

Regulatory Regime

As it constitutes details about the procedures of a tendering process, the information that you have requested is not 'environmental information' as defined in regulation 2(1) of the EIRs. Your request therefore falls under the FOIA.

Chronology

16 May 2015	Defra received your request for information
15 June 2015	Defra responded to your request for information
16 June 2015	Defra received your request for internal review

Timeliness of request

We have considered whether Defra complied with the requirement to respond to a requester 'promptly and in any event not later the twentieth working day following the date of receipt'. Defra received your request for information on 16 May 2015 and replied to you on 15 June 2015, which is the twentieth working day following receipt of your request. Therefore, Defra has complied with section 10 of the FOIA.

Application of exemptions

Section 43(2) of the FOIA

Section 43(2) of the FOIA exempts any information from disclosure if this would, or would be likely to, prejudice the commercial interests of any person or business (including Defra). We have consulted Thames Water Utilities Limited on this matter and are satisfied that the disclosure of the information requested would prejudice both their commercial interests and those of the Secretary of State. We are therefore satisfied that this exemption is engaged.

Section 43(2) is a qualified exemption and, as such, we have considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. We recognise that there is a public interest in disclosure of information concerning the procurement of the Thames Tideway Tunnel Infrastructure

Provider as this would further the public's understanding of the project and the thinking behind the proposed delivery model. We also note the concerns you raise about there being sufficient bidders to achieve competitive tension, particularly given that the tendering process concerns a project of wider public importance.

On the other hand, there is a strong public interest in withholding the information because of these commercial interests involved. Thames Water Utilities Ltd (TWUL) is conducting this procurement under the Utilities Contracts Regulations 2006, which includes an obligation on the procuring authority to protect the confidentiality of bidders. Revealing information on this procurement while it remains live other than as required by these Regulations would harm the commercial interests of both TWUL and the government. This is because the tendering process is intended to achieve an end result of lowest possible costs and ensuring value for money for Thames Water customers and the release of information would be likely to negatively impact on this outcome. We also note that further information about the procurement process will be made available at its conclusion.

Section 41(1) of the FOIA

Section 41(1) of the FOIA provides that information is exempt information if it was obtained from another person and the disclosure of such information by the public authority holding it would constitute a breach of confidence actionable by that or any other person. Defra is subject to a non-disclosure agreement with TWUL in relation to confidential information which it has shared with Defra about this procurement. This non-disclosure agreement reflects the statutory obligation on TWUL under the Utilities Contracts Regulations 2006 to protect the confidentiality of information provided by bidders. We are satisfied that the information being requested is confidential in nature and its disclosure would constitute an actionable breach of confidence.

Section 41 is an absolute exemption. However, in deciding whether the exemption applies we have considered whether a public interest defence to any action for a breach of confidence might apply. Given that this information relates to a live procurement and concerns a project of wider public importance there is a strong public interest in keeping the information confidential and, as such, we have reached the firm conclusion that this exemption applies.