



**EA/2019/0113**

**DERBY CITY COUNCIL**

**APPELLANT**

and

**THE INFORMATION COMMISSIONER**

**FIRST RESPONDENT**

and

**SIMON BACON**

**SECOND RESPONDENT**

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**DECISION**

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**Panel: Brian Kennedy QC Chair, Anne Chafer and Paul Taylor.**

**Introduction:**

**[1]** This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”), the appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice dated 5 March 2019 (reference FER0795038), which is a matter of public record.

**[2]** The Tribunal Judge and lay members sat to consider this case on 17 December 2019.

## **Factual Background to this Appeal:**

[3] Full details of the background to this appeal, the request for information under the Environment Information Regulations, and the Commissioner's decision are set out in the Decision Notice. The appeal concerns the question of whether the Commissioner was correct to determine that the Council had failed to show how the exception for commercial confidentiality applied to the requested information.

## **CHRONOLOGY**

7 Aug 2018	Request for information pertaining to extra fees charged by a contractor for recycling
4 Sept 2018	Council provides some information but refuses to disclose internal documents and emails, and correspondence between the Council and the contractor, citing reg.12(5)(3) commercial confidentiality
5 Oct 2018	Internal review upholds original refusal
30 Oct 2018	Complaint to the Commissioner

## **RELEVANT LEGISLATION**

### ***Environmental Information Regulations 2004***

#### **12. Exceptions to the duty to disclose environmental information**

- (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) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.
- (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –
  - (a) it does not hold that information when an applicant's request is received;
  - (b) the request for information is manifestly unreasonable;
  - (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

- (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
  - (e) the request involves the disclosure of internal communications.
- (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) international relations, defence, national security or public safety;
  - (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;
  - (c) intellectual property rights;
  - (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
  - (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
  - (f) the interests of the person who provided the information where that person –
    - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
    - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
    - (iii) has not consented to its disclosure; or
  - (g) the protection of the environment to which the information relates.

## COMMISSIONER'S DECISION NOTICE

[4] The information is environmental information under reg.2 of the EIR as it refers to waste and the measures taken to deal with waste. The requested information related to “*financial figures and negotiated amounts*” and as it related to the contractor’s provision of services to the Council, the Commissioner was satisfied that the information was commercial in nature, and that the circumstances in which it was received and held by the Council suggested that it was subject to confidentiality provided by law.

[5] The Commissioner then moved to consider the question of harm to a legitimate economic interest, as confirmed by the Tribunal in *Elmbridge Borough Council v ICO and Gladedale Group Ltd (EA/2010/0106)*. It must be shown on the balance of probabilities that harm would be caused. The Commissioner criticised the Council for providing “*no detail whatsoever*” about the specific effects of this disclosure or how they

would cause actual harm to the contractor or itself. She noted that an argument could be made about potential benefits to competitors but stated that this “*generic category of information.... [would] not in itself [be] something that would automatically result in adverse effects by being disclosed*”. The lack of specificity in the Council’s contentions, the failure to link any alleged harm to any specific part of the requested information, and the lack of evidence it presented to the Commissioner led her to conclude that the exception was not engaged.

## **GROUND OF APPEAL**

[6] The Appellant Council added reliance on regs.12 (4)(d) (unfinished material), (e) (internal communications) and 12(5)(b) (adverse impact on the course of justice), as well as noting that there would need to be redactions of any material under reg.13 (personal data). It explained that this request arose out of a decision taken by the Chinese government in December 2017 to accept a significantly reduced volume of recycling. This had cost impacts on the contractor, who approached the Council in January 2018 seeking a variation of its contract. The Council sought advice from its in-house legal team (thus engaging legal professional privilege and reg.12 (5)(b)), debated the proposal internally (engaging reg.12 (4)(e)) and engaged in negotiations with the contractor during which it gave explicit assurances that the negotiations would remain confidential. The requested information also contained a number of drafts of the final Report (which has been published), and so constitutes unfinished material under reg.12 (4)(d).

### **Ground 1 – Contractor’s Commercial Interests**

[7] Appended to the Council’s submissions was a statement from the contractor outlining the difficulties that disclosure would bring. The Council explained how the UK market for recycling contracts is highly competitive, with no one operator in a dominant position. Publicising cost structures, especially in regards to how the business intends to absorb the additional cost impacts of the Chinese announcement, will unfairly benefit the contractor’s competitors not just in regards to tendering with public authorities but also with its arrangements with the recycling facilities. The Council cited *Brighton and Hove City Council v Keenan and ICO (EA/2016/0119)* to support its contention that the risks of such “asymmetrical disclosure” should be self-evident in situations involving the release of the pricing of public sector tender arrangements.

## **Ground II – Council’s Commercial Interests**

[8] There were two threats to the Council’s commercial interests identified: firstly, that the contractor’s competitors would use the information to distort their bids so as to offer worse value for money to the Council; and secondly, that companies would shrink from the potential release of negotiating information and focus their bids instead on other Council areas to the detriment of Derby City Council.

## **Ground III – Public Interest**

[9] The Council conceded that there was a public interest in transparency and the ability to scrutinise public spending. However, there is no allegation of misapplication of public funds, and the Council argued that the information itself would not enhance the public understanding of the recycling tendering process. Transparency is better served through the publication of the Report to Cabinet and minutes of Cabinet meetings, both of which discuss the proposed contract variation and the various options open to it.

[10] It was not disputed that the information is confidential, and the Council argued that public interest lies in maintaining this confidentiality so as not to distort the market through asymmetrical disclosure of information.

## **COMMISSIONER’S RESPONSE**

[11] The Commissioner began by noting that the case presented by the Council to the Tribunal was markedly different to the case presented to her. She also noted that she had no power to amend her Decision Notice (following the decision of *ICO v Malnick and ACOBA (GIA/447/2017)*). However, given the Council’s clarified submissions, the Commissioner was satisfied that exception at reg.12 (5)(e) was engaged for the reasons that the Council argued, and that it was significant information. She also accepted that there was a public interest in preventing the distortion of the marketplace of recycling tender contracts.

[12] The Commissioner also accepted that a number of documents in the requested material, were indeed drafts of the published final Report, and so attract the exception at 12(4)(d). While accepting the need for a ‘safe space’ for the development of ideas in public authorities, the Commissioner did note that there is little prejudice in disclosing drafts of documents already in the public domain after the decision has been taken.

That being said, having reviewed the documents she did not see a specific public interest argument justifying the overturning of the exception.

**[13]** As for the documents identified as being internal documents, the Commissioner noted that two in particular had been shared with the contractor. This took them outwith the exception, however, as for the rest of the identified documents, the Commissioner was satisfied that the others attracted the protection of the exception at 12(4)(e). The Council, before the date of the hearing of this appeal, accepted that documents were indeed shared outside the organisation, and agreed to release them to the Requester. It was also conceded that the emails seeking legal advice attracted legal professional privilege (12(5)(b)), and ought not to be disclosed. Finally that disclosure of personal data relating to junior staff and employees of Biffa ought to be redacted in compliance with regulation 13 given that those persons had no expectation of disclosure.

## **REQUESTER'S RESPONSE**

**[14]** The Requester (Second Respondent) queried why the Council had only elaborated on its arguments after the Commissioner had made her Decision. He explained the background to his request, arguing in particular that the Council had a bad record in managing public projects, and that recycling in the city had been removed from many thousands of properties, leading to a decline in recycling. As for the contractor, the Second Respondent stated, that it had been successfully prosecuted by the Environment Agency for exporting nappies, laminate flooring and coat hangers as "mixed paper" in breach of the Transfrontier Shipment of Waste Regulations 2007.

**[15]** The Requester (Second Respondent) stated that the commercial harm is overstated, as much of the information will be discernible from the Council's published accounts. He also remarked that many of the arguments were unsustainable given that a complex joint waste management project was ordered to be disclosed in its unredacted form by the Commissioner in 2016. The public interest lies in holding public authorities to account for their management of contracts and projects, and the Council ought not to be allowed to hide their poor track record in these 'safe spaces'.

## TRIBUNAL'S DECISION

[16] The Tribunal welcomes the on-going cooperation between the Council and the respondents, even as the appeal submissions were making their way to the Tribunal. The disclosure of the additional document is in our view appropriate, and we can see that where the Commissioner identified two documents in the withheld material, one is the duplicate of the other.

[17] We also agree with the Commissioner's assertion that she is not able to amend her Decision Notice. The Upper Tribunal decided in *Information Commissioner v Malnick and ACOBA* [2018] AACR 29 at [95] that:

*...in FOIA Parliament has provided a bespoke statutory scheme comprising initial decision-making by the public authority, followed by a complaint to a regulator and then a right of appeal to an independent tribunal, and has clearly prescribed the consequence of a successful appeal. As section 58(1) provides, "the tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner". In a nutshell, Parliament could have said that, if overturned, the decision notice would be a nullity, or that the tribunal should remit the case to the Commissioner, but it did not.*

There is no power for this Tribunal to remit the decision to the Commissioner upon the receipt of new information.

[18] The concerns raised by the Requester (Second Respondent) are valid ones. However, having viewed the requested material we are satisfied that it does not shed any light on the concerns raised by the Requester, namely the Council's temporary removal of recycling services, and road and waste contracts running over budget.

[19] We agree with the Commissioner's submissions that the Council's revised arguments disclose a much stronger defence of its refusal. We do not accept that disclosures in this area automatically attract the protection of reg.12 (5)(e) as commercial interests; this is evident in the disclosure of another contract to the Requester at DN FER0617848. The Council's original submissions to the Commissioner were much deficient, and it should not need to be said that public authorities ought to provide strong arguments supported by relevant evidence. We cite

in particular Upper Tribunal Judge Jacobs's decision in *Birkett v Department for the Environment, Food and Rural Affairs* [2012] AACR 32 at [50] (emphasis added):

*"It may be helpful to explain how I see the role of the Commissioner in the section 50 process. The Commissioner is under a duty to consider whether the request has been dealt with in accordance with Part 1. That duty must be performed in respect of the information available, and the arguments presented, to the Commissioner. The consideration is limited by the terms of the request for information. Within those limits, it must cover the position of the complainant, the public authority and any third parties who may be affected. As to the complainant, the starting point will be the terms of the application under section 50(1). As the complainant will not have seen the information, the Commissioner must always consider any issues that the complainant would not have been able to identify without seeing that information. Beyond that, **the extent to which the Commissioner considers issues not raised in the application will depend on the competence that the complainant appears to have. As to the public authorities, the starting point will be the section 17 notice. They may also suggest that different or other exemptions may apply. Public authorities will generally be able to look after their own interests. However, the Commissioner may need to consider points in favour of an inexperienced public authority.**"*

[20] That is not to say, of course, that these sorts of relationship **cannot** attract the protection of the exemption. The evidence provided by the Council shows that the material contains particularly sensitive information about the finances and arrangements of the contractor that could be damaging to it if released. It also satisfied both the Commissioner and the Tribunal that the commercial interests of the Council would be damaged by virtue of the distortion of the Council's tendering process that would be occasioned by releasing specific details of the current arrangement and, in particular, how it plans to deal with the changing overseas arrangements.

[21] The appeal is therefore allowed in respect of all the closed material, with the exception of documents 4 and 8, which have already been disclosed to the Requester. All of the remaining material attracts, variously, the exceptions at reg.12 (4)(d) and (e) and 12(5)(d) and (e), and the public interest lies in maintaining those exceptions.



Regulation 13 also applies in relation to the limited amount of personal data within the closed materials given the reasonable expectation of privacy held by those individuals. We can find no reason to suggest that prejudice to their rights and freedoms is warranted by the legitimate interests of the public at large. Consequently we see no grounds on which to disturb this expectation. No further directions are required.

Brian Kennedy QC

06 January 2020

Promulgation date: 08 January 2020