

Access to Public Information Response

May 11th 2015

REQUEST UNDER THE CODE OF PRACTICE FOR ACCESS TO PUBLIC INFORMATION

Request sent on May 11th 2015:

I'd like to submit a request under the information code for Public Services to release the latest estimated costings for an in-vessel composter.

This follows the announcement in the States that it was not pursuing a facility to process food waste on island because it does not represent best value for money. It has refused to release the estimate on grounds of commercial sensitivity – although it has released an earlier estimate when the original strategy was debated.

The code states that the States will publish 'any facts and relevant analysis which the Department considers important in framing major policy proposals and decisions' – I would argue that this information very much falls under this section. Food waste collections were a major part of the waste strategy, as acknowledged by the department in its 2012 report, which will be funded by the public through charges.

There is reference in the code to commercial confidentiality as a reason for not publishing. I think two factors are relevant to counter that.

One, this can be overridden if there is a public interest in making the information available, in this case given more than a decade of public debate on the shape of the waste strategy, how the strategy has changed and capital cost estimates varied, I think that barrier is crossed.

In any event, how can this costing be commercially sensitive now as the department is not pursuing building the facility and will not be contracting anyone to do so? We are not asking for a detailed breakdown of the costs either, but a headline figure. What we do know, is by not publicly releasing the figure there is no way for the public to judge whether the strategy is value for money. How, for example, can comparisons be made if it did decide to export food waste? Or scrutiny given to its original estimates when the States backed the strategy?

In looking for guidance on the release of commercially sensitive information, as it is something often relied on departments when not releasing information but with no definition of what it actually means, I refer to the UK ombudsman opinion published on 2 February.

It states that during negotiation the executive should be guided by the public interest and is entitled to take any measure it deems fit to ensure that negotiations would not be prejudiced by untimely disclosure.

That period of negotiation in this case has passed – there will be no facility, no-one will be contracted.

It then goes on to say:

‘Once an agreement is finalised, it should, in principle, be made available to Parliament within a reasonable time and submitted to public scrutiny. Non-disclosure should be an exception and strictly regulated by law, regulation or protocol. These agreements generally involve the expenditure or commitment of public funds and often entail long term binding commitments that could involve successive administrations. The underlying constitutional principle should clearly be that the electorate, through their representatives in Parliament, have the right to know what agreements that affect their lives have been concluded by the Executive, entrusted by them to administer public affairs. At that stage exceptions allowing absolute non-disclosure need to be restrictively interpreted. Non-disclosure can only be justified on the grounds of national interest. It has to be adequately proved that substantial harm would result to the national interest if the document is published and that non-disclosure to avoid such prejudice is in the national interest.’

This places a very high barrier on non-disclosure for contracts that have been signed, let alone an estimate that will not be followed through.

The ombudsman also states that: ‘care should therefore be taken when negotiating agreements of this nature to ensure that the other contracting party is aware of the Executive’s obligation to respect the right to Freedom of Information and of the limitations of that right.’

As part of this request I’d like to know if the group PSD is in talks with have been informed about the role of the information code and when.

States of Guernsey response on June 12th 2015:

In response to a previous enquiry, the Department stated that all estimates provided by the bidder group to date remained commercially confidential, while the negotiations are ongoing and the current procurement process results in a formal bid being submitted. The argument put forward that estimates for the IVC specifically might no longer be considered commercially confidential, given that element of the proposed infrastructure is not being progressed, is accepted as having merit. It is also accepted that this estimate is material to the decision that was made not to pursue this option, and there is therefore a reasonable expectation that the information should be disclosed. There is however an issue remaining regarding timing.

The Department is currently engaged in a second, live procurement, for the export of waste, for which invitations to tender are expected to be issued in July. It has also announced that it is exploring options for the export of food waste, which if deemed feasible will most likely give rise to a third tendering process. A decision on whether to progress the latter could be made in the next month or two, and therefore the resulting tender process could also be imminent. The publication of estimates for on-island treatment could, conceivably,

influence bids which prospective tenderers may submit for either tender, and any subsequent negotiations. The Department has not quantified that risk, but while there is potential for risk, that has to be considered serious given the value of the contracts involved. The likelihood that all key financial estimates will be published in due course, and in any event will form part of the comprehensive business case Public Services has to provide before any major capital investment, undermines the public interest argument for disclosure now.

It is accepted that disclosure may be OF public interest, but it is not considered IN the public interest at this time. The “period of negotiation” in respect of an on-island IVC may well have concluded, however these other, connected procurements could very well “be prejudiced by untimely disclosure”.

The tender processes and feasibility assessments detailed above are consistent with and in accordance with existing directions of the States. Once these processes are complete, the Department fully expects the cost information considered in making key decisions, and which form the basis of the final infrastructure and service proposals, will and should be open to detailed examination. That will be both through the consideration of detailed businesses cases, and wider scrutiny.

On the basis of all the above, the request is currently denied, primarily under exception 2.3 of the Code of Practice on Access to Public Information, namely:-

Effective management and operations of the public service

- Information whose disclosure could lead to improper gain or advantage or would prejudice:
 - the competitive position of a Department or other public body or authority
 - negotiations or the effective conduct of personnel management or [of] commercial or contractual activities.
- Information whose disclosure would prejudice the commercial interests of the States.

The above exception is NOT considered to apply indefinitely and the Department is happy to consider a similar request in due course. Such enquiries are welcome, whether informally or formally under the Access to Public Information Code of Practice.

The question has also been posed whether the bidder group has been informed of the role of the information code. The Department is unclear of what need there is to inform private sector companies of the code, which places no direct obligation on them. The Policy on the Use of Confidentiality in Contracts and Agreements does not apply in this instance as no contract or agreement has been made.

States Works, which is part of the bidder group, is aware of the Access to Public Information Code of Practice, and any requests for information under that are dealt with by the Department.