

Freedom of Information Act 2000 (Section 50) and the Environmental Information Regulations 2004

Decision Notice

Date: 5 February 2008

Public Authority: East Riding of Yorkshire Council
Address: County Hall
Cross Street
Beverley
East Riding of Yorkshire
U17 9BA

Summary

The Complainant requested information on a contract signed by the public authority with a third party waste management company. He requested the price currently payable to the contractor for every tonne of waste dealt with – otherwise known as the “gate fee”. The council claimed that the information was exempt from disclosure under the exception in regulation 12(5)(e) of the Environmental Information Regulations 2004. The Commissioner has considered this argument and his decision is that the exception is not applicable. As the decision is finely balanced the Commissioner also considered, on the alternative assumption that regulation 12(5)(e) does apply, whether the public interest in disclosing this information is outweighed by the public interest in maintaining the exception. His decision is that it is not.

The Commissioner's Role

1. The Environmental Information Regulations (the “Regulations”) were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the Regulations shall be enforced by the Information Commissioner (the “Commissioner”). In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 (the “Act”) are imported into the Regulations.

The Request

2. The complainant wrote to the East Riding of Yorkshire Council on 9 February 2005 requesting information on the current gate fee paid by the council to a contractor which carries out integrated waste management services on behalf East Riding of Yorkshire Council and Hull City Council. The Commissioner

- understands that the gate fee is the cost charged to the councils for each tonne of waste the contractor deals with under the contract.
3. The complainant wrote again on 7 March 2005 asking the council to respond to his request. The council replied on 9 March 2005. In that letter it stated that it was unable to provide a response within the time period stipulated by the Act. It stated that it would respond by 31 March 2005. However, on 10 March 2005 the council wrote to the complainant again, stating that it held the information but that it was exempt from disclosure under section 41 of the Freedom of Information Act 2000 (confidentiality).
 4. On 12 March 2005 the complainant requested that the council review its decision. On the 14 March 2005 the complainant wrote again, asking the council to explain in greater detail why the information was exempt from disclosure as he did not feel that this had been explained in the previous refusal notice.
 5. The council acknowledged receipt of the complaint on 15 March 2005 stating that it would reply within 10 working days. The complainant wrote back stating that the delay was unacceptable. The council wrote back on 17 March 2005 apologising for the delay and stated it would respond as soon as it could.
 6. The complainant wrote back to the council on 17 March 2005, stating that he had received advice that the information may be available under the regulations. He therefore requested it under the regulations.
 7. The council responded on 29 March 2005 stating that it had reviewed the decision and that section 41 of the Act did not apply. It had decided however that section 43 (prejudice to commercial interests) of the Act did.
 8. The complainant wrote back to the council on 30 March 2005 stating that he would complain to the Commissioner's Office. He also pointed out to the council that it had not responded to his email of 14 March 2005.
 9. On 1 April 2005 the council responded to the complainant stating that as he had requested the information under the regulations they were in the process of reviewing how they dealt with such requests.
 10. On 25 April 2005 the council responded to the complainant. It stated that the information was excepted from disclosure under regulation 12(5)(b)(adverse effect to the course of justice). However it clarified that its decision was that the information was commercially confidential. The Commissioner therefore understands that the council intended to claim the exception in regulation 12(5)(e).
 11. The complainant responded on 27 April 2005 asking if he also needed to invoke the internal complaints procedure of the council under the regulations. He stated that if this was required he wished to do this. The council responded later that day stating that it would carry out a review.

12. On 13 May 2005 the complainant wrote to the council stating that he thought the period for responding to the request for a review was now over. The council responded on 19 May 2005 stating that it had 40 working days to consider the review but would seek to expedite its decision.
13. The council responded on 1 June 2005 stating that the information was exempt from disclosure under regulation 12(5)(b). However it again clarified that its decision was that the information was commercially confidential and related to a legitimate economic interest (which would mean regulation 12(5)(e) was the relevant exception.)

The Investigation

Scope of the case

14. On 13 June 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information he had requested should have been disclosed to him.

Chronology

15. The Commissioner wrote to the council on 17 July 2006 stating that he had received the request, but that it need not take any further action until it was contacted by the case officer who had been allocated the case.
16. The case officer contacted the council on 11 October 2006 asking for information on the gate fee together with any submission the council wished to make in support of its claim to regulation 12(5)(b). In that letter the case officer specifically asked the council to explain:

“how a disclosure of the relevant information would have an adverse effect upon any party, and to consider the public interest in disclosing the information against that of maintaining the exception.”
17. The council responded on 4 December 2005 providing a copy of the information together with clarification of its claim that the information was exempt from disclosure under regulation 12(5)(e) rather than regulation 12(5)(b).

Analysis

Exemption

Regulation 12(5)(e)

18. The council refused the request for information on the basis that regulation 12(5)(e) applies. The Commissioner's decision is that this information falls within the definition of environmental information provided in Regulation 2(c) which includes within its scope information such as 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 the Regulations, as well as measures or activities designed to protect those elements. It also falls within the scope of Regulation 2(b) in that it relates to waste. Regulation 12(5)(e) allows commercial or economic information which meets the criteria for either a statutory or a common law duty of confidentiality to remain confidential if that duty is owed in order to protect the legitimate economic interests of any party.
19. The tests to be applied in regulation 12(5)(e) are therefore:
- I. is the information commercial or industrial information?
 - II. is the information subject to a duty of confidence which is provided by law?
 - III. is confidentiality required to protect legitimate economic interests?
 - IV. Would the confidentiality required to protect a legitimate economic interest be adversely affected by disclosure?
20. The council argues that the contractor enters into its contracts on the basis that the pricing structure is confidential and that a disclosure of the fee would allow competitors and, in particular, less reputable businesses to deliberately undercut the contractor's bids on big tenders. The council therefore argues that an actionable breach of confidence would arise if the gate fee is disclosed, and that disclosure would cause commercial damage to the legitimate economic interests of the contractor.

Is the information commercial or industrial in nature?

21. The Commissioner is satisfied that the gate fee is commercial information. It is the price charged by the contractor for services rendered as part of the integrated waste management contract which the contractor entered into with the Councils.
22. The Commissioner must therefore ascertain whether a) a duty of confidence is owed on the price paid, and b) whether that duty of confidence is in place to protect any parties' legitimate economic interests and c) whether those economic interests would be adversely affected by a disclosure of the information.

Is the information subject to a duty of confidence?

23. The Commissioner does not accept that a confidentiality clause or a general implication of a duty of confidence will, in itself, mean that all information caught by the clause should be, or will be considered confidential. To accept such a proposition would essentially give public authorities the opportunity to contract out of their obligations under the Act and the Regulations. The Commissioner will therefore look behind any specific stipulation or implied duty of confidence to the nature of the information concerned and consider whether the duty should stand for each particular section or topic.
24. When considering this complaint he has borne in mind that Regulation 12(2)(a) states that a public authority should apply a presumption in favour of disclosure when considering a request for environmental information. Hence, when considering a complaint containing environmental information the Commissioner applies the presumption that the requested information should be disclosed. The Commissioner will therefore only agree that information is exempt from disclosure where a public authority has provided clear evidence to the effect that an exception applies, and that the public interest in maintaining that exception outweighs the public interest in disclosing the information.
25. For a duty of confidence to be owed under the common law it is necessary for certain criteria to be met. The key elements for this are:
- The information must have been imparted in circumstances which create an obligation of confidence.
 - The information must have the necessary 'quality' of confidence.

Was the information imparted in circumstances which created an obligation of confidence?

26. The Commissioner accepts that there is an inherent duty of confidentiality when tenders are submitted to councils in procurement exercises. This is now specifically provided for in The Public Contracts Regulations 2006 (Public Procurement, England And Wales, Public Procurement Northern Ireland) (Statutory Instrument 2006 No. 5), Although these regulations were not in force at the time the contract was signed other legislation was in place which provided similar obligations).
27. In this case there is no evidence to suggest that the contractor initially specified that all of the information it supplied to the council should be treated in confidence. There is also no specific confidentiality clause in the contract other than between third parties and the contractor. However, the Commissioner accepts that commercial information provided for the purposes of a tendering exercise is normally supplied under an obligation of confidence. He is therefore satisfied that the information supplied by the contractor was imparted in circumstances which created an obligation of confidence.
28. The Commissioner's decision is that the information was provided in circumstances which gave rise to an obligation of confidence.

Does the information have the necessary 'quality' of confidence

29. It is firstly noted that the contract was signed by the parties on 7 October 1999. Between that time and the time of the request however variation orders amended the price payable per tonne. The request for information was made by the complainant on 9 February 2005 and it is the gate fee figure at that time to which the Commissioner's decision applies. In *Derry City Council v The Information Commissioner* (case EA/2006/0014) the Information Tribunal stated that a duty of confidence would be retained, regardless of the amount of time which may have passed, until the information in question had "either passed into the public domain or had ceased to have commercial significance".
30. There are therefore 2 aspects to consider
1. does the information have the necessary quality of confidence?
 2. does the information retain its commercial significance?
31. In order to ascertain whether the information has the necessary quality of confidence The Commissioner considers that it can be helpful to ask:
- a) whether the information is trivial, and
 - b) whether the information is available from other sources?

Is the information trivial?

32. Information will not be considered confidential if it is trivial. In this case the contract involves a major procurement of waste management services by the council. It includes information that the contractor states could be used by its competitors to their own advantage, and to the disadvantage of the contractor. The contractor argues that the gate fee would give its competitors a potential advantage when tendering for other contracts in the future as the prices they use could be undercut. Accordingly, the Commissioner is satisfied that the information is not trivial. However he still needs to consider whether the information retains its commercial sensitivity.

Is the information already available by other means?

33. If the information is already available by other means then confidentiality cannot apply. Similarly if it is already available any arguments to the effect that disclosure would be detrimental to commercial or economic interests are negated, as disclosure has already occurred.
34. The Commissioner notes that there is already a great deal of general information on the waste management services being provided in the public domain. A lot of this information is also included within the contract. Information is available from various sources, including the websites of the contractor and the councils, and through the public consultation process when planning applications are submitted. Further information is available through the waste management licences or Pollution Prevention and Control (PPC) Permits required by statute

which are published by the Environment Agency. This information also includes details on tonnages handled at the contractor's sites. The councils have also published a great deal of the information, including many of the schedules to the contract on their websites.

35. Where information has been disclosed in this way a duty of confidentiality will not apply. Regulation 12(5)(e) will not therefore be applicable.
36. However certain elements of the contract, including the gate fee, are still considered confidential, and the parties have submitted arguments to show why they have sought to exempt this information from disclosure.
37. The base argument for the maintenance of the duty of confidence of the information is that disclosure would cause an adverse effect to the contractors or the councils' economic interests.

Does the information retain its commercial significance – is confidentiality necessary to protect a legitimate economic interest?

38. The council argues that confidentiality is required in order to enable the contractor to tender for other waste management contracts in the future without being at a competitive disadvantage, and to manage its operations as a private commercial venture with a duty to its employees and shareholders. It provides arguments in support of this view by stating that disclosing this information would allow competitors to learn about the price charged by the contractor, thereby having an adverse affect upon its ability to develop a competitive advantage over its business rivals when tendering for contracts in the future.
39. There is also an argument that disclosure would detrimentally affect the negotiating position of the contractor in its negotiations with third parties; i.e. if the third party knows the gate fee being charged on this contract they may seek to negotiate their own rates down to that level. Alternatively, third parties in existing contractual agreements with the contractor may be aggrieved if they find out that they are being charged more than the council for the services being provided. The potential is therefore there for the contractor to find its relationships with third party clients damaged by the disclosure of this information.
40. In considering these arguments the Commissioner has referred to a number of similar cases in other jurisdictions which also dealt with requests for pricing information. These include the Scottish Information Commissioner's decisions in cases 034/2006 & 180/2006, and the Irish Commissioner's decision in case 98049, 98056 & 98057. Although there are differences in legislation between the different regimes the Commissioner is satisfied that many of the considerations put forward by the Commissioners in these cases are relevant to this case. He also considers that the decision of the Information Tribunal in the Derry City Council case is relevant to this issue.
41. The Commissioner has considered whether the disclosure of the current gate fee would undermine any competitive advantage the contractor may have; specifically whether disclosure would provide the opportunity for competitors to outbid the

contractor in future tendering exercises with other public authorities. The question the Commissioner considered is whether knowledge of the gate fee in this contract would allow competitors to understand the methodology and strategies of the contractor in submitting the prices they did for the tender, and use this information to outbid or undermine the contractor in future tendering exercises.

42. The contract in question involves providing an integrated waste management plan for the areas governed by the councils. The gate fee charged by the contractor could take into account a number of different factors, many of which will be stipulated by the contracting councils or may be dictated by the geographical features of the area of land to be covered. The cost of providing services, (and thereby the cost to be passed on to the council together with an associated profit margin), may therefore be dependent upon many factors. These could include:

- The geographical characteristics of the areas where services are planned, (e.g. urban/rural, costs of property purchase and development requirements).
- The distance travelled by waste before it can ultimately be disposed of and how best to manage this.
- The percentage of waste being dealt with in particular ways, (e.g. incineration, landfill, recycling, composting), for instance contracts are likely to have to include any specific requirements laid down by the procuring council (e.g. a stipulation that 50% of waste must be recycled rather than incinerated or sent to landfill).
- The ability of the contractor to be able to recoup costs through the sale of bi-products from the waste management process (such as aggregates, energy from “energy from waste” processes or compost from organic waste).
- The size of the contract in question, (e.g. larger, longer contracts could benefit from economies of scale)
- The likely growth or reduction in the tonnages of waste over the period of the contract.
- The length of term of the contract, (e.g. longer term contracts may allow for a greater degree of substantive development by the contractor – sites may be purchased and developed rather than leased, and costs may be recovered over the length of the contract rather than over a shorter period, thereby allowing smaller annual costs over the period.
- Any requirements under The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) for staff currently on waste management duties, i.e. the likely costs of transferring employee contracts.
- The number and type of sites required to cover the geographical area where services are to be provided, This may be dependent upon the amounts and types of waste typically produced within the area covered by the contract. For example, the percentage or tonnages of potentially hazardous waste which will require specialised disposal treatment may be higher in some areas dependent upon previous usage of the land.
- The demographics and predicted population growth/decline in those areas.
- The likely sites for development and the existing sites suitable for takeover.

- Whether an upfront fee is paid outside of the normal price per tonne payments, e.g. an initial instalment paying some of the costs of the construction/development of particular facilities.
43. The above is a non-exhaustive list of factors which might be taken into account by a tendering company when considering the price to charge. Although the Commissioner has not asked the contractor for his specific approach to calculating a gate fee, individual factors such as those highlighted above could add extra cost to providing a service and may therefore have been taken into account when considering the tender price. Alternatively, a much simpler or different method of calculation may have been used. It is the skill of the company in recognising how elements such as these need to be weighted, and through this seeking to reduce to a minimum any associated costs which will allow them to maximise the profit level they attach to the final tendering price whilst still providing a competitive quote. The Commissioner's point is that many different factors *may* be taken into account when considering the price to include in a tender, and that these considerations would not be evident from the disclosure of the pricing information in this contract. In addition it is noted that the gate fee alone may not specifically be the total cost to the council for the contractor carrying out its services. It may for instance agree to pay for some of the construction or land rental costs on plants or sites being developed by the contractor.
44. For each individual contract factors such as those mentioned above are likely to vary with the circumstances of the case. Although the overall method of contract operation will be similar, the differing importance/costs of the factors for each individual tender are therefore likely to mean that a significantly different calculation will need to be carried out by a contractor for each individual tender. The contractor must then try to arrive at a price that maximises its profit whilst being the most competitive bid for the contract. It is this choice of factors and the associated balancing exercise which will make the contractor's bid ultimately successful or not.
45. The Commissioner therefore considers that it is unlikely that the competitive advantage of the contractor would be unduly prejudiced by a disclosure of the pricing information alone. Any parties competing with the contractor for other tenders would need to evaluate the various factors before a final tender price could be decided, much like the contractor would have to do. It is therefore extremely unlikely that a gate fee for one contract can be directly compared to another in a different area with different circumstances. Even in circumstances where the gate fee is the same or similar this would not provide any information on the actual amount of profit which is being generated by the contractor per tonne of waste dealt with for a particular contract.
46. The Commissioner also considers that a disclosure of this information in this situation does not equate to a decision to disclose this sort of information in all cases. There are particular circumstances in the disclosure of the gate fee in this instance that are unlikely to be duplicated in the vast majority of requests for pricing information in other situations. The different factors that could be taken into account when coming to a price is the most important factor in this decision.

The council's arguments are therefore weakened by the fact that a decision to disclose in this instance does not provide a precedent for all future requests for pricing information in other contracts generally.

47. With regard to the arguments put forward in paragraph 39 above, (detriment to the contractor in its negotiations with private companies), the Commissioner has considered the arguments put forward by the Irish Commissioner in case 98049, 98056 & 98057. In this case the Irish Commissioner recognised a slight possibility that detriment could occur, however he found in favour of a disclosure of the information on the grounds of public interest. In his decision, he stated that he did not feel that the argument should be accorded 'significant' weight on the basis that the information was historical and related to a single transaction. He also felt that it would disclose nothing about the policy adopted by the tenderers or how they arrived at the quoted price. The Irish Commissioner also took into account the fact that no evidence had been put forward that the prejudice he had foreseen was likely to occur. He had simply recognised the 'possibility' that it could occur.
48. In the Derry City Council case the Information Tribunal recognised the potential for prejudice to commercial interests in spite of the fact that the majority of the information was in the public domain and that the contract was signed 6 years previously. Nevertheless it also found in favour of disclosure on the basis of the public interest.
49. The Commissioner has considered these arguments. He sees a great deal of difference between this contract and private contracts which the contractor may enter into. In addition, many of the considerations provided in paragraphs 39 to 41 above are likely to differ in private contracts to an even greater extent than they would in the case of other public procurement exercises. The contractor could easily point to economies of scale, and the different circumstances and variables in each case as a means to override any negotiation strategy which sought to rely upon the prices charged in this contract. Accordingly, the Commissioner's decision is that disclosure of this information at this time would be unlikely to prejudice the contractor's negotiations with private companies.
50. The Commissioner notes in particular the fact that the disclosure of this information would not provide competitors with an idea of the profit and costs of providing the service. He has considered various factors that might, or might not be considered by the contractor when looking at these figures, and notes that the actual methods of calculation will not be evident from the disclosure of the gate fee. At the time of the request the contract had 19 years left to run and there is therefore no likelihood of any immediate competition for this contract. Given the different sets of circumstances likely in each particular tender it is unlikely that this information would be of particular use to competitors other than as a very general guide of the price of the contract in this instance. The Commissioner also notes that the council has stated that it is already accountable as it produces annual accounts which disclose the total amount it pays to the contractor for the contract per annum. Given this fact, and given the fact that details of tonnages handled by the contractor are disclosed under waste management licences or Pollution Prevention and Control (PPC) permits via the Environment Agency, a disclosure of the "unit price" or price per tonne would not greatly add to the information

already in the public domain. The Commissioner's view is that disclosing the gate fee would not therefore put a great deal more information into the public domain than that which already exists.

51. The Commissioner has also considered whether contractors may lose business confidence in the council if information they have submitted in confidence is disclosed. It is the Commissioner's view that contractors would take into account the fact that they are contracting with a public authority and recognise that such a contract would be subject to a greater degree of scrutiny than one with another private business. Similarly it would be clear that the council would be under a duty to be as open and transparent as possible in its dealings given its duty to taxpayers and the local community.
52. In view of all the above conclusions, the Commissioner's decision is that regulation 12(5)(e) is not applicable to information on the current gate fee.
53. Although he has found that in these particular circumstances there is no likely adverse effect as regards the contractor's future negotiations with private companies, he is aware that the previous decisions highlighted above have taken account of the possibility of this occurring. He also recognises that the arguments on this point are finely balanced. His decision in this case is based primarily upon the potential differences in costs likely to be inherent in providing different levels of service in different contracts and the fact that this may materially affect the prices appropriate to different contracts. He also does not consider that a negotiation with a private company will be the same as that with a public authority seeking to offer a contract for service for an entire county.
54. Nonetheless the Commissioner does recognise the fact that there is likely to be some overlap in functions, due primarily to the similarity of the actual services being provided, (i.e. waste management and disposal). Although his decision is that the exception in regulation 12(5)(e) is not applicable, he considers that there is merit in considering the public interest arguments in this instance. He has therefore considered the public interest arguments in relation to disclosing the gate fee on the alternative assumption that regulation 12(5)(e) does apply.

Public interest arguments

55. The Commissioner has therefore considered the public interest arguments on the hypothetical basis that a disclosure of the gate fee would cause an adverse effect to the confidentiality of commercial information, where such confidentiality has been provided by law to protect a legitimate economic interest.
56. The central argument submitted by the contractor is that less reputable competitors may cut corners in order to achieve a lower, more competitive price. Offers from companies of this nature may not put as much weight on matters such as environmental compliance or the quality of services they provide. The contractor suggests that less experienced companies may also seek to win contracts without the necessary experience to be able to effectively provide services, potentially to the detriment of the local community.

57. The contractor argues that if this downward pressure was brought to bear on the delivery of services it would need to re-evaluate its own price in future tenders in order to compete with the lower tenders. It argues however that this pressure could put at risk the high quality of services it and other reputable contractors provide, resulting in a slippage of standards, and potential detriment to the services they provide to the general public.
58. As a result of pressure on pricing, together with the potential for commercially sensitive information being disclosed the contractor argues that it would need to question the value of entering into such contracts with public authorities in the future. It states that disclosure could therefore have the effect of lowering the number of competitors willing to tender for such contracts, ultimately forcing prices up for councils seeking to procure services.
59. A further argument to consider is whether a disclosure of the price would dissuade contractors from providing tenders to councils that significantly undercut the previously accepted price. This would have a negative effect upon open competition and could have the effect of increasing the costs for services payable by the council.
60. The council has also submitted an argument that a disclosure of commercially sensitive information could lead to such information being withheld from it by contractors in the future.
61. The Commissioner does not accept that a disclosure of the gate fee payable by the council would allow less ethical contractors to undermine future tenders. Councils accepting such tenders will be under a duty to ensure that companies they contract with are suitable, that processes for the supervision of the service requirements are inbuilt into the contract, and that appropriate standards of service are maintained by the contractor.
62. Similarly the Commissioner does not accept an argument that the contractor may not tender for such contracts in the future. Whilst this is entirely the choice of the contractor, the Commissioner notes the Irish Commissioner's decision in case 98049, 98056 & 98057. It pointed out that in Canada, a duty for public bodies to disclose precisely this sort of information was introduced in the 1990's. The Public Works and Government Services Canada (PWGSC) is responsible for procuring services and goods for over 100 government agencies and departments. Its document "General Conditions - Standing Offers - Good or Services", published on 15 August 2006 contains the following clause in its standard acquisition clauses and conditions for public procurement contracts:

"2005 08 (2006-08-15) Disclosure of Information

The Offer or agrees to the disclosure of its standing offer unit prices or rates by Canada, and further agrees that it will have no right to claim against Canada, the identified user, their employees, agents or servants, or any of them, in relation to such disclosure."

63. The Commissioner therefore considers that this long running programme of disclosure is strong evidence to the effect that a disclosure of limited pricing information in this instance will not result in an overall reduction in private businesses willing to contract with the council.
64. In addition, the Commissioner considers that contracts of this nature may be highly lucrative for the successful contractors and it is therefore unlikely that they would willingly exclude themselves from tenders simply on the basis of a potential disclosure of unit price information. They may consider doing so if there was a serious risk that disclosure would seriously disrupt their future business through, for instance, disclosing their commercial or trade secrets. However this is precisely the harm the exceptions in the regulations seek to protect against.
65. The Commissioner further considered the argument put forward that a disclosure would allow competitors to analyse and use this information to their own advantage. Although he considers this argument holds little weight where only a limited disclosure is made he has considered the public interest arguments if this was in fact the case. It is his view that even if the parties believe that the exception is engaged by this information the public interest arguments would still rest with the disclosure of pricing information.
66. In the event that the disclosure of pricing information would allow competitors of the contractor to seek to undermine its tenders in contracts of a similar nature the following would apply. The Commissioner considers that the contractor in this instance would also then be able to benefit from the disclosure of gate fee information in other contracts, thereby levelling the playing field and weakening its argument that competitors would gain an unfair advantage to some extent. It would have information on prices accepted by other councils in other tenders and would be able to take all of this information into account when tendering for similar contracts in the future. In this way tenders would become more competitive and would be based on fuller information.
67. The Commissioner has considered the general nature of the information. The central public interest in disclosure lies in creating greater transparency and accountability in the spending of public money and in the financial decisions the council has made. Disclosure of the specific gate fee paid by the council would be conducive to greater scrutiny of the agreement made by the council on the community's behalf. The agreement is long running, and involves the spending of significant amounts of tax payer's money. Waste management is a core function of local authorities, and where such functions are contracted out to the private sector there is a significant public interest in allowing the public access to relevant information in order that they may scrutinise the details of the agreement and hold the council accountable. The council stated to the complainant that the total amount it pays to the contractor is available when each year's accounts are made available for public inspection. Whilst the Commissioner accepts that this does provide a degree of accountability, there is still no element of scrutiny as to what is actually being paid for each tonne, an indicator which can give the average person in the street a clearer understanding of the actual cost of dealing with his or her household waste.

68. In addition, the total cost shown in the annual accounts may have been affected by a number of factors such as the hours particular facilities have been opened for, or pre-agreed payments for the construction or development of facilities. Comparing the annual rise or fall of the gate fee would provide a much greater degree of clarity as to the basic cost per unit price increase year by year.
69. If the Commissioner were to accept the argument that tender prices were comparable, he notes that a wider disclosure of this information may allow other councils to make a better judgement of "best value" when considering tenders for similar contracts in the future. A disclosure of this sort of information would allow councils to consider contracts in place in counties with similar circumstances to their own, and consider whether the prices being tendered to them are appropriate for their particular circumstances. At the least, this would put councils in a better position to ask informed questions of prospective contractors about their proposed pricing structures. This would create greater levels of competition for tenders raised in the future, which would in turn increase the likelihood of councils, and thereby the tax payer, getting best value for money.
70. The contractor has stated that there is a possibility that inexperienced companies may tender for contracts, resulting in a reduction of the quality of services the community receives. The Commissioner has considered and refuted this argument. However a disclosure of this sort of information on a wider scale would allow inexperienced contractors to have an understanding of the range of prices regularly tendered by experienced providers. There is a positive public interest in giving contractors the opportunity to consider tendering with greater knowledge of the current prices being accepted, thereby increasing 'realistic' competition for contracts in the future. The increased competition this would create would therefore increase the opportunity for councils to achieve best value from the tendering process to the benefit of the communities they serve.
71. There is strong public interest in allowing access to such information if the results are that tenders become more competitive and transparent. There is also a strong argument in allowing this sort of information to be disclosed in order that other councils may compare and question tenders put forward to them which are substantially out of the range of contracts in counties with similar circumstances. At the least it would allow councils to seek clarification of the differences in pricing between tenders/contracts prior to agreeing a contract. In this way councils may increase their ability to obtain best value from the contracts they enter into.
72. The Commissioner therefore considers that the greater weight of the public interest rests in allowing greater scrutiny of the basic unit costs of a major contract which requires the performance of a core function of the council by private commercial enterprise, at public expense.

Conclusions

73. The Commissioner has concluded that the public authority did not deal with the request for information in accordance with the Regulations in that it did not provide information to the complainant which he was entitled to receive.
74. The Commissioner has considered the likelihood that disclosure would be detrimental to the commercial and economic interests of the contractor and the council. His decision is that this would not be the case. However he has also considered the argument put forward by the contractor that disclosing this information could increase the likelihood that the contractor may face greater competition in other procurement exercises. He considers that such an outcome would in fact be in the public interest, and that that the balance of public interest arguments in this case favour disclosure of the information requested. His conclusions therefore are:
- Disclosing pricing information would not provide commercially sensitive information to a contractor's rivals.
 - Disclosing this information would merely show the pricing levels that a contractor has set on the basic unit price of a particular contract, which may only be indirectly comparable to other contracts because of the different factors which could affect costs in different contracts.
 - There is no immediate likelihood of competition for this specific contract as the contract still has 19 years left to run.
 - The council is unlikely to have to seek further tenders on this contract for the same period of time.
 - Adverse effect to relevant commercial interests is unlikely to result from disclosure given that this sort of information is commonly disclosed in other jurisdictions.

The Decision

75. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Regulations in that Regulation 12(5)(e) was not applicable to the requested information. The council did not provide information to the complainant that he was entitled to receive.

Steps Required

76. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

The council must disclose the requested information to the complainant.

77. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

78. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
79. It is noted that the complainant requested further information on the reasons behind the refusal of his request in his email dated 14 March 2005. The council did not provide a response to this. In the Commissioner's view the council did not provide adequate reasons for its decision not to disclose the information to the complainant in the refusal notice. The Commissioner recognises that this request would have been one of the first received by the Council and that the Act and the Regulations have now been in force for just over three years. The Commissioner would therefore expect to see a greater elaboration on the factors it has considered and the reasons for not disclosing the information in future refusal notices.

Failure to comply

80. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

81. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 5th day of February 2008

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

LEGAL ANNEXE

Duty to make available environmental information on request

5.

(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to a standardised procedure used.

(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Exceptions to the duty to disclose environmental information

12.

(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.

(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 -

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).