

Environmental Information Regulations 2004 **Decision Notice**

Date: 16 November 2010

Public Authority: Islington Council
Address: 60 Highbury New Park
London
N5 2DJ

Summary

The complainant requested the names and addresses of Islington Council's (the council's) pre-paid waste sack clients under the Environmental Information Regulations 2004 (EIR). The council responded by withholding the information under Regulation 12(5)(e) of the EIR on the grounds that it was commercially sensitive due to its very nature and the way the council's commercial waste was managed by a private third party. Subsequently the council suggested that it did not hold the information. However, following the intervention of the Commissioner, the council agreed that the requested information was held but maintained its original position that it was entitled to withhold it under Regulation 12(5)(e) of the EIR. The Commissioner concludes that the 12(5)(e) exception is engaged apart from the first part of the clients' postcodes. For the remaining information the public interest test favours the requested information being withheld. The Commissioner requires the council to disclose the first part of the clients' postcodes. The Commissioner also finds that the council breached Regulation 5(2) of the EIR by failing to respond to the complainant's request within twenty working days.

The Commissioner's Role

1. The Environmental Information Regulations (EIR) 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 EIR 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 EIR.

Background

2. Under section 34 of the Environmental Protection Act 1990 (the EPA) every business that produces commercial waste is under a duty of care to ensure that it is managed and disposed off responsibly. Under section 45(1)(b) of the EPA every waste collection authority (such as the council in this case) is under a duty to collect commercial waste where requested to do so. (Commercial waste is defined by section 75(7) of the EPA.) Under section 45(4) of the EPA every waste collection authority is under a duty to charge for the collection and disposal of commercial waste unless it considers it inappropriate to do so.

The Request

3. On 25 January 2009 the complainant sent an email to the council in which he said:

'This is an information request under the Environmental Information Regulations. The request concerns the council's commercial waste service. In particular, I would like the names and addresses of all its pre-paid waste sack clients'.

4. After being prompted by the complainant the council eventually responded on 1 April 2009 stating that it was withholding the information under Regulation 12(5)(e) of the EIR on the grounds that it was commercially sensitive due to its very nature and the way the council's commercial waste was managed by a private third party.
5. On 5 April 2009 the complainant requested an internal review regarding the council's decision to apply Regulation 12(5)(e) of the EIR.
6. The council responded on 7 May 2009 stating that having carefully considered the nature of its contract with its private third party partner (Enterprise Islington Limited) it was of the view that the information requested was not subject to the EIR because neither Regulation 3(2)(a) or 3(2)(b) applied.

The Investigation

Scope of the case

7. On 14 June 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. Specifically he asked the Commissioner to consider the council's application of Regulation 12(5)(e) of the EIR and its decision to withhold the requested information.

Chronology

8. On 3 July 2009 the Commissioner requested the withheld information from the council and received two brief acknowledgements on 31 August and 18 September 2009.
9. On 1 October 2009 the council wrote to the Commissioner again; this time in more detail. It apologised for the delay in making its initial response (which was due to the information request being caught by its email spam filter) and for the fact that its internal review was inadequate (by not escalating the matter to a more senior member of staff and by failing to consider the exception in sufficient detail). The council then went on to provide detailed arguments as to why it believed Regulation 12(5)(e) of the EIR was engaged.
10. On 17 December 2009 the Commissioner reiterated his request for the withheld information and asked the council for further information regarding its application of Regulation 12(5)(e) and its contractual relationship with Enterprise Islington Limited .
11. Following a reminder the council responded in detail on 26 February 2010. It said it was not prepared to disclose the requested information to the Commissioner as it was being withheld under the EIR.

Findings of fact

12. The council provides a waste collection and disposal service for its commercial customers in partnership with its private waste contractor, Enterprise Islington Limited, with whom it entered into a 15 year contract in 1998 for commercial waste management. The contract has an annual value of £16 million which includes street cleaning¹. The list of commercial clients is managed by the council who are responsible

¹ http://www.islington.gov.uk/council/selling_council/councilcontracts.asp

for the service standards and satisfaction levels of its customers. The council derives income from delivering the service and has stated to the Commissioner that its pre-paid waste sack clients form 30% of the total business market for the borough. Details of the council's commercial waste and recycling service² together with the contact details for Enterprise Islington Limited are on its website³. Prices for the pre-paid waste sacks are available on request from Enterprise Islington Limited but are not displayed on the council's website.

Analysis

Is the requested information covered by the Act or the EIR?

13. Section 39 of the Act states that information is exempt information if the public authority holding it is obliged, by regulations under section 74 of the Act, to make the information available to the public in accordance with those regulations or would be so obliged but for any exemption under those regulations. The regulations under section 74 of the Act are the EIR. Information falls to be considered under the EIR if that information is environmental information. Environmental information is defined in Regulation 2 of the EIR.
14. A full version of Regulation 2(1) of the EIR which deals with the interpretation of the Regulations and the definition of environmental information is set out in full in the attached legal annex.
15. The Commissioner's view is that the requested information (consisting of the council's pre-paid waste sack clients) is environmental within the meaning of the EIR as it is information on (i.e. concerning or about) the measure of waste collection as specified in Regulation 2(1)(c), which is a measure affecting or likely to effect the elements of the environment under 2(1)(a) of the EIR (in particular land and landscape) via the factor of 'waste' in 2(1)(b).
16. In view of this the Commissioner believes that the 'measure' of waste collection is a measure or activity which affects or is likely to affect the 'elements of the environment', namely soil (in terms of landfill) land (streets) and landscape (rubbish tips) and 'factors' such as 'waste' as well being a measure or activity designed to protect those elements.

² <http://www.islington.gov.uk/Environment/sustainability/RubbishAndRecycling/Rubbish/businesswaste/default.asp>

³ <http://www.islington.gov.uk/Environment/RubbishAndRecycling/Rubbish/businesswaste/default.asp>

17. The information is clearly on a measure that is likely to affect the environment. The names and addresses of the council's pre-paid waste sack clients effectively reveal the identity and geographical location of the businesses within its area that use a specific waste collection and disposal service. This is information about the measure or activity.
18. The Commissioner also believes that the requested information is environmental by virtue of Regulation 2(1)(b) as it is information on (i.e. concerning or about) the factor of waste which is likely to affect the elements of the environment.
19. The Commissioner has therefore concluded that the requested information is covered by the EIR which is in line with four of his previous decisions on this subject; Hammersmith and Fulham Council FS50255081, Ealing Council FS50255080, Westminster City Council FER0276297 and Camden Council FS5025077. The council also accepts that the information is covered by the EIR.

Exceptions

Presumption in favour of disclosure

20. Regulation 12(2) of the EIR requires the public authority to assume a presumption in favour of disclosure. Public authorities should therefore consider information from the initial point of view that it should be disclosed.

Regulation 12(5)(e) of the EIR

21. The council has refused the request for information on the basis that Regulation 12(5)(e) applies. This allows commercial or industrial information which is held under either a statutory or a common law duty of confidentiality to remain confidential if that duty is required in order to protect the legitimate economic interests of any party. The relevant parts of the Regulations are provided in the legal annex to this decision.
22. The matters to be considered in Regulation 12(5)(e) are therefore:
 - i) Is the information commercial or industrial in nature?
 - ii) Is the information subject to a duty of confidence which is provided by law?
 - iii) Is confidentiality required to protect a legitimate economic interest?
 - iv) Would the confidentiality required to protect a legitimate economic interest be adversely affected by disclosure?

v) Does the public interest in maintaining the exception outweigh the public interest in disclosing the information taking into account the presumption in favour of disclosure?

Is the information commercial or industrial in nature?

23. The exception in Regulation 12(5)(e) only protects the confidentiality of commercial or industrial information.
24. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade, and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. It should be remembered that not all financial information is necessarily commercial information. For example, a lot of information about a public authority's finances or resources will not be commercial information.
25. The Commissioner's view is that "industrial" in this context can be taken to refer to any business activity or commercial enterprise, and is unlikely to expand the scope of the exception to encompass non-commercial information. However, he will consider arguments that non-commercial information is nevertheless industrial information on the facts of a particular case.
26. In the present case the Commissioner believes that the withheld information, which comprises of the names and addresses of the council's pre-paid waste sack customers, is commercial information for both the council and the businesses concerned. It is essentially a list of customers of the council and it is information relating to the running of the businesses in question. Although the meanings are not defined, looking at various other legal definitions, broadly speaking 'industrial' information is information relating to the processes adopted and commercial information relates to the running of the business. The Commissioner believes that the definition of commercial information is broad and would therefore cover the type of information in this case. This is also the view held by the council.

Is the information subject to a duty of confidence which is provided by law?

27. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.

Common law of confidence

28. When considering whether the common law of confidence applies, the Commissioner's approach will be similar in some respects to the test under section 41 of the Act, although there are also some key differences. The key issues the Commissioner will consider when looking at common law confidences under this heading are:

- Does the information have the necessary quality of confidence? This will involve confirming that the information is not trivial and is not in the public domain.
- Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and/or any standard practice regarding the status of information. A useful test is likely to be to consider whether a reasonable person would have considered that the information had been shared in confidence.

29. However, in contrast to the Commissioner's approach under section 41 of FOIA, there is no need to consider here whether there would be an unauthorised disclosure to the detriment of the confider. This is because there is no need to establish an actionable breach of confidence for the purposes of this exception. This approach is also supported by the fact that the element of detriment (or adverse effect) will need to be considered. See below for more detail.

Contractual obligations of confidence

30. For the purposes of this exception, the Commissioner will also accept obligations of confidence imposed by contract. If the public authority can establish that there is a binding confidentiality clause covering the requested information, there is no need to consider the common law test of confidence.

Statute

31. Although regulation 5(6) disapplies any statutory bars on disclosure for the purposes of the EIR, a statutory bar will still mean that confidentiality is provided by law for the purposes of this exception. However, the other limbs of the exception – and the public interest test – will still need to be satisfied.

32. The Commissioner finds that there is no evidence in this case that any confidentiality was provided by statute. Accordingly, he will consider

whether any confidentiality was provided by common law and/or contract by considering the above tests.

Common law of confidence

Does the information have the necessary quality of confidence?

33. Information will have the necessary quality of confidence if it is not trivial and is not in the public domain.

Is the information trivial?

34. In this case the Commissioner believes that the council's customer pre-paid waste sack list would be considered to be important to the council, its waste contractor (Enterprise Islington Limited) and its customers. This is also a view held by the council which has argued that the identity of those who enter into its trade waste and recycling removal contracts is essential to the provision of its trade waste and recycling collection service and its contractors' (Enterprise Islington Limited) ability to perform its contractual obligations. Furthermore, the council has argued that as a definitive list of those businesses that use its trade waste collection service it is far from trivial as it is a ready made aid to competitors who might wish to target those users.
35. The Commissioner has therefore concluded that the requested information is not trivial.

Is the information in the public domain?

36. Information will not have the necessary quality of confidence if it is already in the public domain. See the case of *Coco v Clark* when Megarry J stated that 'however confidential the circumstances of communication, there can be no breach of confidence in revealing something to others which is already common knowledge'. See also the Information Tribunal's decision of *S v the Information Commissioner and the General Register Office EA/2006/0030*.
37. In the present case it could be argued that the information on the identity of which businesses use the council's pre-paid waste sack business is already in the public domain. The Commissioner notes that the waste sacks used by businesses are different to those used by domestic customers in that they are a different colour (grey/clear not black) and specifically marked as 'commercial waste' in red ink. Furthermore, the Commissioner notes that the collection days, times and frequency are different to those for domestic customers. Also the council's waste is collected by Enterprise liveried refuse lorries. It

therefore follows that the colour and design of the sacks, the collection days, times and frequency and the type of collection lorry used would give a member of the public a clear visual image of the identity of which business use the council's pre-paid waste sack services.

38. The council does not accept that the requested information (in the list format in which it is held) is already in the public domain. However, it does agree that that given sufficient time and effort it would be theoretically possible for someone to prepare a rough list of the council's commercial clients by carrying out a detailed daily street survey and consulting a business directory.
39. On balance the Commissioner has concluded that the requested information in the list format in which it is held by the council is not in the public domain.

Was the information shared in circumstances importing an obligation of confidence?

40. In this case, some of the requested information was provided to the council by its business customers and then subsequently by the council to Enterprise Islington Limited when it entered into a 15 year waste management contract in 1998. This information was therefore shared twice. Since the contract was signed any new business customers would have contacted Enterprise Islington Limited direct. However, as part of the contractual obligations Enterprise Islington Limited are required to share details of new business customers with the council.

Information shared by the business customer and Enterprise Islington Limited.

41. When a business customer enters into a contract with Enterprise Islington Limited for the collection/recycling of its rubbish it provides various details including its name and address which are recorded in a standard 'Commercial Waste Service Agreement and Contract'. The terms of this agreement do not include a confidentiality clause. At the same time as entering into the contract the business customer would also be required under section 34 of the Environmental Protection Act 1990 to complete and sign an annual waste transfer note (AWTN) giving details of the type and amount of waste emanating from its premises⁴. The standard AWTN gives details of the customer's name and address but does not contain a confidentiality clause.

⁴ See 'What businesses must do with their waste'
<http://www.islington.gov.uk/Environment/sustainability/RubbishAndRecycling/Rubbish/businesswaste/>

42. The council has not provided the Commissioner with any evidence (either in the form of statements from its business customers or contractual clauses or letters) establishing that the information provided to Enterprise Islington Limited by its commercial customers is shared on the understanding that it will be treated in confidence. The council has pointed out that businesses are under a legal duty to have formal arrangements for the collection and disposal of their commercial waste. They do not have to use the council's services and are at liberty to compare prices before entering into a contract with a particular provider. However, having entered into a contract with a service provider the council believes that business customers should be confident that the information they provide should remain confidential.
43. The Commissioner takes the view that the council has provided insufficient evidence to establish that the circumstances under which its business customers share information with Enterprise Islington Limited import an obligation of confidence. The collection and recycling of waste is a visible and public operation and the identity of businesses using the council's services would be apparent to anyone carrying out a street survey.

Information shared by the council with Enterprise Islington Limited.

44. The council provided Enterprise Islington Limited with details of its business customers when it entered into the 15 year waste management contract in 1998 to enable Enterprise Islington Limited to collect and where appropriate recycle their commercial waste. This contract includes a confidentiality clause which states that 'all information relating to Collection Agreements and customers shall remain confidential and shall not be shared with any other party without the written approval of the Authorised Officer and the Contractor'. The council has therefore concluded that its contract with Enterprise Islington Limited imposes obligations of confidentiality on both parties.
45. The Commissioner accepts from the foregoing that the circumstances under which the council shared information with Enterprise Islington Limited are sufficient to import an obligation of confidence.

Information shared by Enterprise Islington Limited with the council.

46. The information provided by new business customers to Enterprise Islington Limited is shared with the council in view of the terms of its contract as described above. The Commissioner has concluded that these circumstances are sufficient to impose an obligation of confidence.

Contractual obligations of confidence

47. The Commissioner also accepts in view of his comments in paragraphs 44 to 46 above that the circumstances and contractual terms under which information is provided by the council to Islington Enterprise Limited and by Enterprise Islington Limited to the council are sufficient to create an obligation of confidence.
48. The Commissioner therefore concludes that the requested information is subject to a duty of confidence which is provided by law in view of the contractual relationship between the council and Enterprise Islington Limited.

Is confidentiality required to protect a legitimate economic interest?

49. The Commissioner considers that, to satisfy this element of the test, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. This will require a consideration of the sensitivity of the information and the nature of any harm that would be caused by disclosure.
50. Broader arguments that the confidentiality provision was originally intended to protect legitimate economic interests at the time it was imposed will not be sufficient. The Commissioner considers that, taking into account the duty in paragraph 4.2 of the European Directive⁵ to interpret exceptions in a restrictive way, the wording "*where such confidentiality **is** provided to protect a legitimate economic interest*" (as opposed to "*was provided*") indicates that the confidentiality of this information must be objectively required at the time of the request in order to protect a relevant interest.
51. It is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish (on the balance of probabilities) that some harm would be caused by disclosure.
52. In support of his approach, the Commissioner notes that the implementation guide for the Aarhus Convention⁶ (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance:

⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

⁶ <http://www.unece.org/env/pp/acig.pdf>

“Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors.”

53. In the present case the Commissioner believes that the confidentiality is designed to protect the legitimate economic interests of the council which provided the names and addresses of its business customers to Enterprise Islington Limited when the waste management contract was signed in 1998. Furthermore, the council believes that the confidentiality is also designed to protect the legitimate economic interests of Enterprise Islington Limited who share the information with them in respect of both the new and existing business customers.
54. The council has the potential to receive income from Enterprise Islington Limited the amount of which is dependent upon the number of business customers that use its service and the profit generated. The council believes that disclosure of the identity of its business customers will have an adverse impact on its economic interests by reducing its income, diminishing its market share, making it easier for its competitors to target its customers with marketing initiatives, reducing its ability to provide a comprehensive service and maintain standards and reducing its economies of scale.
55. While the council accepts that competitors may approach its existing business customers to seek their custom by either cold calling or random mail shots, it believes that disclosure of its actual customer list would allow competitors to specifically target its customers and undercut the cost of its collection services. The council also believes that publication of its customer list would give competitors an unfair advantage through specific marketing initiatives and campaigns to poach their customers which would have a destabilising effect on its service. Obviously, a loss of customers would equate with a loss of income; not only for the council but also Enterprise Islington Limited as their income is determined by the number of commercial customers they contract with for the collection and disposal of their waste.
56. The council has pointed out that commercial or trade waste services can be a valuable source of income generation in an area in which councils are in direct competition with the private sector. Furthermore, it has pointed out that all councils are now chasing every penny of income by whatever means. The Commissioner accepts this was a relevant factor at the time the request was made. The council believes that not only should it be protecting the income it receives from existing commercial services but also seeking to gain additional income through the legitimate expansion of its service portfolio and market share. The council currently does this as part of its joint venture with

Enterprise Islington Limited which uses its best endeavours to retain existing customers and attract new ones in Islington.

57. The council also accepts that its business customers may terminate their agreements with it at any time and for any reason by giving three months notice in writing providing they comply with section 34 of the Environmental Protection Act 1999. However, it believes that by publishing a list of its business customers would give competitors an unfair advantage by allowing them to target specific customers with a view to securing their business.
58. The council also believes that any loss of customers by the publication of its business list will result in a negative impact on its ability to provide a high quality waste collection and disposal service and maintain existing standards. The council has argued that in the event of its commercial waste and recycling market share being lost to the private sector, the degree of control it exercises (particularly in relation to reducing landfill) will be eroded and the income from providing the same level of service will reduce accordingly. The council has pointed out that it is directed by the North London Waste Authority⁷ to dispose of commercial waste at designated authorised waste disposal outlets. It believes that the management of waste in this way is helpful for a number of reasons not least because it ensures that it is disposed of properly. The 'gate fee' for disposal is included in the cost of the service made by Enterprise Islington Limited. This fee is not negotiable and reflects the elements of disposal to landfill. The council has also pointed out that it is trying to reduce waste to landfill by offering potential and existing commercial clients advice on how to achieve this by using a range of waste recycling options.
59. The council has stated that one of its top priorities is to keep Islington clean and tidy by providing frequent waste collections by a fleet of reliable and environmentally friendly vehicles and by taking enforcement action against the businesses that leave waste on the streets. The council has informed the Commissioner that the majority of its business waste collections are made between 17:00 and 06:30 seven days per week with some customers receiving multiple daily collections. A small number of collections are made across the borough between 06:30 and 17:00 daily. The council has also advised that Enterprise Islington Limited has a comprehensive fleet of well maintained collection vehicles with 'back-up' vehicles in the event of breakdowns. The council has also invested in four new collection vehicles that run on 'green' fuel and which allow for three different types of waste to be collected at the same time. According to the

⁷ <http://www.nlwa.gov.uk/>

- council's website the new three compartment vehicles are fuelled by bio-diesel which has been recovered and refined from cooking oil from local restaurants⁸. The council believes that the new vehicles will help improve the borough's environment because it will reduce the time that waste is placed out for collection and also the number of vehicles needed to collect the waste and recycling. This will also help reduce the cost to participating businesses by providing a more efficient service whilst delivering an environmentally sustainable model for the future. This fits in with the council's green procurement and sustainable transport strategies. The council has informed the Commissioner that it has major problems with commercial waste that is left out for collection for private organisations that operate vehicles across several boroughs. If these vehicles are delayed or break down the consequential effect is that waste is left out for collection is on the street for longer than necessary. A further key element is the council's ability to take enforcement action, where evidence can be obtained to show who might be responsible for littering, fly tipping and leaving waste out for collection either on the wrong day or, in the case of trade waste, either over-producing or leaving waste out of collection for which no valid collection contract exists.
60. The council has pointed out that it operates the enforcement service using directly employed staff. Through this enforcement function the council is able to provide a more integrated and effective service to its residents and the business community. The council has suggested that by striving to increase its market share of the commercial waste and recycling market, it will retain greater overall control of the street scene and the cost effectiveness of providing these services will be enhanced.
61. The council has alluded to a reduction of its economies of scale should it lose business customers to the private sector. Its contract with Enterprise Islington Limited provides for a comprehensive waste collection and recycling service for its domestic and business customers. The council has argued that any loss of its business customers would mean that it would cost more for providing the same level of service to its remaining customers.
62. The Commissioner has concluded that the economic interest which the confidentiality is required to protect is that of the council as a result of its contract with Enterprise Islington Limited to provide a comprehensive waste collection and recycling service. Disclosure of the information would adversely affect the legitimate economic interests of the Council.

⁸ According to Enterprise these vehicles reduce the particulate smoke in exhaust fumes by 60% and reduces the carbon footprint of the contract with the council

63. However, the Commissioner finds that disclosure of the first part of the postcodes of the Council's pre paid waste sacks would not adversely affect the legitimate economic interests of the council. No significant commercial detriment would occur from this high level disclosure as it would only give competitors a general overview of the geographical spread. For this limited information the exception is not engaged.

Would the confidentiality required to protect a legitimate economic interest be adversely affected by disclosure?

64. Although this is a necessary element of the exception in Regulation 12(5)(e) of the EIR, the Commissioner believes that once the first three elements (listed above)⁹ are established it is inevitable that this limb will be satisfied.
65. On balance the Commissioner believes that the council's legitimate economic interest which the confidentiality under contract is deemed to protect would be adversely affected by disclosure of its list of business customers, apart from the postcode information mentioned above.

Does the public interest in maintaining the exception outweigh the public interest in disclosing the information taking into account the presumption in favour of disclosure?

66. The Commissioner has considered below the public interest arguments for and against disclosure of the requested information, excluding the postcode information referred to above.

Public interest arguments in favour of disclosing the requested information

67. There is a clear public interest in the council being open, transparent and accountable regarding the operation of its comprehensive waste collection and recycling service to enable and enhance the public understanding of and participation in the public debate of the issues of the day.
68. The council believes that it is already open and transparent regarding its commercial waste collection and recycling services by publishing details on its website¹⁰. The council believes that this published

⁹ i) Is the information commercial or industrial in nature?
ii) Is the information subject to a duty of confidence which is provided by law?
iii) Is confidentiality required to protect a legitimate economic interest?

¹⁰ <http://www.islington.gov.uk/environment/rubbishandrecycling/rubbish/businesswaste/>

information is sufficient to assist the public in the understanding of its waste collection and recycling services including those of its commercial customers.

69. There is a public interest in allowing individuals to understand decisions made by local authorities in relation to its waste management and recycling services. However, there is little evidence in the present case to suggest that the publication of the council's list of business customers will assist the public's understanding of its decision making process. Business customers have a statutory duty of care under the Environmental Protection Act 1990 to ensure that any waste they produce is handled safely and within the law. However, businesses are free to choose which organisation (either the council or a private contractor) they use to collect and dispose of their waste.
70. There is also a public interest in private businesses being able to benefit from being offered cheaper waste collection services than the council currently provides.
71. The complainant believes that an increase in competition between the council and commercial waste collection companies would have a positive and beneficial effect on the overall quality of waste management services. However, the council believes that there should be a level playing field for competing for new customers and considers it would be put at an unfair advantage by having to disclose its customer list without its commercial competitors having to do likewise. The council has pointed out that a loss of business clients as a result of perceived unfair competition would adversely affect its ability to provide a comprehensive waste collection and disposal service. The council already discloses details of its commercial waste services which it believes should ensure adequate competition with its commercial counterparts.
72. The collection and recycling of commercial waste is a visible and necessary public service. The disclosure of the council's list of business customers (for pre-paid waste sacks) would confirm the identity and location of those businesses and give an indication as to the waste they produce for collection and disposal. The complainant has pointed out that different waste disposal services would operate different collection, storage and ultimately disposal regimes (with consequentially different environmental impacts). Furthermore, he argues that different businesses would produce different types of waste and feed these into the disposal service, directly impacting on the environment to an extent determined by the specific disposal process used. This would provide the public with a 'greater awareness of environmental matters' which is the purpose of the European Directive 2003/4/EC (at

paragraph 1) and therefore the EIR. However, the council's list would only reveal its own commercial customers not those who utilise the services of its competitors.

73. There is a public interest in promoting fair competition in what is acknowledged as a highly competitive market. The council believes that it has achieved this by entering into a 15 year waste collection and recycling contract with Enterprise Islington Limited in 1998. Fair competition means that public and private organisations should (so far as is practicable) operate on a level playing field and have parity of opportunity. Private waste companies are not subject to the same level of transparency as the council which already publishes details of its commercial waste and recycling service on its website. The council therefore believes that additional transparency by disclosure of its customer list, resulting in a potential loss of business, would not be in the public interest. Such disclosure would afford private competitors the advantage to directly target the council's customers by undercutting their prices and reducing its market share. In terms of disclosure promoting fair competition, the Commissioner has not given this argument significant weight.

Public interest arguments in favour of maintaining the exception and withholding the requested information

74. There is a strong public interest in providing and maintaining high quality and environmentally efficient public services to both local residents and businesses at cost effective and competitive prices. The council achieves this by contracting with Enterprise Islington Limited to provide a comprehensive waste collection and recycling service. The council believes that by using a single contractor to carry out its different functions assists it in minimising enforcement requirements and in reducing costs. In other words the loss of commercial waste customers would adversely affect the council's ability to maintain and improve levels of service and adversely affect the environmental conditions in the Borough. The council maintain there is little public interest in disclosing a commercially sensitive customer list which might result in a reduction of the quality of and an increase in the cost of or loss of income from its waste collection and recycling service.
75. There is a strong public interest in reducing the environmental impact of waste collection by proving frequent collections, the use of environmentally efficient and friendly vehicles and reducing the amount of waste going to landfill by recycling more. The council is already taking steps to do this by its investment in four new three compartment vehicles fuelled by bio-diesel which has been recovered and refined from cooking oil from local restaurants. These new vehicles

will help improve the borough's environment by reducing carbon dioxide emissions, the time that waste is placed out for collection and also the number of vehicles needed to collect the waste and recycling. The council also offers advice and recycling options to its existing (and potential) customers to help reduce the amount of waste going to landfill. The council in partnership with Enterprise Islington Limited has advised that it is expanding its commercial waste collection service to include a recycling element. The cost of this element is supported by its commercial waste. Accordingly, the council believes that disclosure of the requested information and any poaching of its customers by its competitors would have a destabilising effect on its waste service and its ability to provide business recycling.

76. The Commissioner recognises that there is a strong public interest in confidences being maintained particularly where they are incorporated into confidentiality clauses in commercial contracts. This is the case with the council's contractual agreement with Enterprise Islington Limited. Confidentiality is particularly important where disclosure of the requested information would adversely affect the legitimate economic interests of the council.
77. There is a public interest in preventing additional costs to council tax payers or a loss of income to the council (or its waste contractor). The council has argued that in the event of its commercial waste and recycling market share being lost to the private sector the costs of providing the same level of service will increase.
78. There is a public interest in maintaining the cleanliness of the local environment which the council believes would be harder to achieve were it to lose market share due to the disclosure of its commercial customer list and the fragmentation of waste collections. Furthermore, the council has suggested that its ability to take enforcement action where cleanliness breaches occur would be adversely affected where its market share was reduced. For example, where evidence was produced to show the identity of business customers responsible for littering, fly tipping, leaving waste out for collection on the wrong day, over-producing waste, or leaving out waste for collection where no valid collection contract existed.

Balance of the public interest arguments

79. The names and addresses of the council's pre-paid waste sack customers have been provided to Enterprise Islington Limited in confidence to enable it to provide a contractually binding comprehensive waste collection and recycling service. This contract was awarded to Enterprise Islington Limited in 1998 for 15 years. The

cost and quality of the council's comprehensive service is dependent upon economies of scale. These would be hampered should it lose market share to the private sector which the Commissioner is persuaded would be likely to happen if the requested information was disclosed. The Commissioner therefore believes that the public interest in the council being transparent for its decision making and offering a cost effective and comprehensive waste collection and recycling service in a competitive market place is significantly met by the information it currently publishes on its website. The Commissioner is not convinced that disclosure of its pre-paid waste sack clients will enhance the public's understanding of the way it operates and improves the waste collection and recycling services it provides.

80. The Commissioner has therefore concluded that on balance the public interests test lies in favour of the exception in Regulation 12(5)(e) being maintained and the requested information being withheld.

Procedural Requirements

Regulation 5: duty to make information available on request

81. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request.
82. The complainant submitted his request for information on 25 January 2009. The Council did not provide a response until 1 April 2009. As the information was not provided within 20 working days, the Commissioner finds that the council breached Regulation 5(2).

The Decision

83. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the EIR apart from the first part of the clients' postcodes.

Steps Required

84. The Commissioner requires the council to disclose the first part of the clients' postcodes.

Right of Appeal

85. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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

Dated the 16th day of November 2010

Signed

**Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Environmental Information Regulations 2004

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) 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 (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

Regulation 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 in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

Regulation 12(2) A public authority shall apply a presumption in favour of disclosure.

Regulation 12(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.