

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

Decision Notice

Date: 19 April 2010

Public Authority: City of Westminster Council
Address: 101 Orchardson Street
London
NW8 8EA

Summary

The complainant requested the names and addresses of the City of Westminster Council's (the council's) top 1,000 pre-paid bag clients under the Environmental Information Regulations 2004 (EIR). The council initially responded by withholding the information under Regulation 12(5)(e) of the EIR. However, following the internal review it responded by stating that it had incorrectly applied the EIR and the relevant legislation was the Freedom of Information Act 2000 (the Act). Accordingly, the council considered the request under the Act and withheld the information under section 43(2) stating that its disclosure could prejudice its commercial interests. The Commissioner invited the council to reconsider the request under the EIR but the council maintained that the information requested was not environmental and reiterated its reliance on section 43(2) of the Act. The Commissioner finds that the information requested is environmental and therefore exempt under section 39 of the Act. Accordingly, the request should have been dealt with under the EIR. The Commissioner therefore requires the council to reconsider the request under the EIR and to either disclose the information to the complainant in accordance with Regulation 5 or issue a refusal notice under Regulation 14.

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 of 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 inappropriate to do so.

The Request

3. On 13 October 2008 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 its top 1,000 pre-paid bag clients (the pre-paid bag service is detailed at <http://www.westminster.gov.uk/services/environment/rubbishwasteandrecycling/rubbishandwaste/commercialwaste/prepaid-bags/>)'

4. The council responded in an email dated 11 December 2008 in which it stated that it was withholding the requested information under Regulation 12(5)(e) of the EIR. It said that its commercial interests needed to be protected and that disclosure would have an adverse affect on its ability to provide a viable commercial waste service.
5. The complainant requested an internal review in an email dated 7 March 2009.
6. The council responded in a letter dated 29 July 2009 in which it stated that the information was covered by the Act (rather than the EIR) and was exempt under section 43(2).

The Investigation

Scope of the case

7. On 29 October 2009 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 the council's application of the Act and its decision to withhold the requested information.
8. It is accepted that the council's 'top' 1,000 pre-paid bag clients are its biggest clients by reference to the number of bags supplied.

Chronology

9. On 23 December 2009 the Commissioner sent an email to the council requesting the withheld information, inviting it to reconsider its position under the EIR and raising a number of questions in relation to its commercial pre-paid waste sack operation.
10. In his email dated 23 December 2009 the Commissioner suggested that the requested information was covered by the EIR on the basis that the names and addresses of its pre-paid waste sack clients was information on the measure of waste collection, which is a measure affecting or likely to affect 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) of the EIR.
11. On 7 January 2010 the Commissioner sent a further email to the council in which he reiterated his view that the requested information was environmental in that it was information on (in other words concerning or about) the measure of waste collection and that this measure was one affecting or likely to affect the state of the elements of the environment.
12. The council responded in a letter dated 9 February 2010 with a copy of the withheld information and reiterated its view that it was not environmental within the meaning of the EIR. Accordingly, it said it wished to maintain its reliance on section 43(2) of the Act to withhold the requested information.
13. However, despite its belief that the requested information was exempt from disclosure under the Act the council nonetheless confirmed in a subsequent communication to the Commissioner dated 15 February 2010 that it was prepared to disclose the first part of the postcode and

the number of businesses within that postcode area for its top 1,000 pre-paid waste sack clients.

Findings of fact

14. The council has confirmed that it currently collects domestic, commercial and clinical waste and uses red council branded bags for commercial customers. The council publishes its charges for its pre-paid bags on its website¹. From September 2010 the council will use the contractor Veolia to collect all its waste.

Analysis

Substantive Procedural Matters

Freedom of Information Act 2000 or the Environmental Information Regulations

15. The first matter for the Commissioner to decide is whether the information requested by the complainant is covered by the Act or the EIR. 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.
16. 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.
17. The complainant's belief is that the information is environmental and therefore covered by the EIR. He believes that knowing which businesses within an area use a particular waste disposal service is clearly environmental information. In particular, he has pointed out to the Commissioner 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

1

<http://www.westminster.gov.uk/services/environment/rubbishwasteandrecycling/rubbishandwaste/commercialwaste/prepaid-bags/>

and feed these into the disposal service, directly impacting on the environment to an extent determined by the specific disposal process used. He believes that the type of information being requested (i.e. what waste is being produced and how it is being disposed of) is precisely the sort of information the EIR were intended to make public and there is no remoteness between this information and the environment to justify treating the request as being covered by the Act. He also made reference to the Commissioner's decision in Brighton and Hove Council FER0073984 where it was decided that a waste management contract was environmental information within the meaning of the EIR.

18. The council on the other hand does not believe that the information is environmental because it does not meet the criteria of environmental information contained in Regulations 2(a) – (f) of the EIR.
19. In its letter to the Commissioner dated 9 February 2010 the council expanded on its arguments as to why it believed the information requested was not covered by the EIR. It said that while it accepted the information revealed the identity and geographic location of the business clients within its area it did not reveal anything about the type of waste left on the land by these businesses. It therefore concluded that the information was not about measures affecting the environment and therefore did not meet the definition of environmental information in the EIR. The council also made reference to Guidance on the EIR issued by DEFRA and specifically that the requested information should be considered in terms of its proximity/remoteness to the environmental factors defined within the legislation. It said that for the requested information to meet the definition within the EIR it would have to be added to other information first. It therefore concluded that the information by itself was too remote from the final information to fall within the scope of the EIR.
20. The Commissioner's view is that the requested information (consisting of the names and addresses of the council's 1,000 top 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, which is a measure affecting or likely to affect the elements of the environmental under 2(1)(a) of the EIR (in particular land and landscape) via the factor of 'waste' in 2(1)(b).
21. In view of this the Commissioner believes that such information is a 'measure' and/or an 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 as measures or activities designed to protect those elements.

22. The names and addresses of the council's 1,000 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 in turns has an affect on the environment by revealing the type of waste left on land (e.g. food if produced by a restaurant, clinical waste if produced by a health organisation or paper if produced by an office), the location of such waste (e.g. on a main road in the City centre), the day (and possibly length of time) on or for which it is left out for collection, the way in which it is stored (e.g. the type of bag), the identity of the waste management organisation (e.g. the council or private contractor and whether licensed and registered with the Environmental Agency) and the method of collection (e.g. lorry), processing, disposal and recycling (e.g. different waste disposal organisations (including the council or its appointed agent) will deal with waste differently. The Commissioner does not believe a narrow approach should be taken to the definition of environmental information, so as to exclude names of organisations that are using a service that has an impact on the environment. Although the circumstances are to some extent different he believes this approach is supported by the approach of the Information Tribunal to the names of mobile phone operators in the decision *Ofcom v Information Commissioner EA/2006/078*.
23. 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.

The Decision

24. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with Regulations 14(2) and 14(3) of the EIR.

Steps Required

25. The Commissioner requires the council to take the following steps to ensure compliance with the Act.
26. The council must deal with the matter under the EIR and either disclose the requested information to the complainant in accordance with Regulation 5 or provide him with a valid refusal notice in accordance with the requirements of Regulation 14.

27. The council must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

28. 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

29. 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

30. 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.
31. 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 19th day of April 2010

Signed

**Steve Wood
Head of Policy Delivery**

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

Legal Annex

Freedom of Information Act 2000

Section 39(1) provides that –

“Information is exempt information if the public authority holding it-

- (a) is obliged by regulations under section 74 to make the information available to the public in accordance with the regulations, or
- (b) would be so obliged but for any exemption contained in the regulations.”

Section 39(2) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

Section 39(3) provides that –

“Subsection (1)(a) does not limit the generality of section 21(1).”

Environmental Information Regulations 2004

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“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 –

- (g) 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;
- (h) 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);
- (i) 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;
- (j) reports on the implementation of environmental legislation;

- (k) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (l) 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);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

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

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and

- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and “working day” has the same meaning as in section 10(6) of the Act.

Regulation 5 - Duty to make available environmental information on request

Regulation 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.

Regulation 5(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.

Regulation 5(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.

Regulation 5(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.

Regulation 5(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 the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 12 - Exceptions to the duty to disclose environmental information

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
- (b) in all 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(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.

Regulation 12(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
- (d) the request relates to material which is still in course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

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 –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;

- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
 - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from the Regulations to disclose it; and
 - (iii) has not consented to its disclosure; or
- (g) the protection of the environment to which the information relates.

Regulation 12(6) For the purpose of paragraph (1), a public authority may respond to a request by neither confirming or denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

Regulation 12(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

Regulation 12(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

Regulation 12(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).

Regulation 12(10) For the purpose of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

Regulation 12(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.