

Environmental Information Regulations 2004 **Decision Notice**

Date: 16 December 2010

Public Authority: City of London Council
Address: PO Box 270
Guidhall
London
EC2P 2EJ

Summary

The complainant requested the names and addresses of the City of London Council's (the council's) pre-paid waste sack clients under the Environmental Information Regulations 2004 (EIR). The council responded by stating the EIR were not applicable and withheld the information under section 43(2) of the Freedom of Information Act 2000 (the Act) on the grounds that disclosure would significantly prejudice its commercial interests. However, following the intervention of the Commissioner, when he expressed the view that the requested information was covered by the EIR, the council said it would withhold it under Regulation 12(5)(e) and Regulation 13 in respect of the personal data of sole traders. 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. As the Commissioner concluded that Regulation 12(5)(e) was engaged in respect of withheld information it was not necessary for him to consider Regulation 13.

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) and the associated Environmental Protection (Duty of Care) Regulations 1991 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. The council responded on 9 February 2009 stating that it did not believe that the information requested was covered by the EIR withheld it under section 43(2) of the Act on the grounds that disclosure would significantly prejudice its commercial interests.
5. On 7 March 2009 the complainant requested an internal review regarding the council's decision to apply section 43(2) of the Act.
6. The council responded on 24 March 2009 reiterating its belief that the requested information was covered by the Act and upheld its decision to withhold it under section 43(2) on the grounds that disclosure would prejudice its commercial interests. However, it added that if the Act was not applicable it would withhold the information under Regulations 12(5)(e) and 12(5)(f) of the EIR.

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 section 43(2) of the Act 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 a brief acknowledgement on 7 July 2009.
9. On 3 August 2009 the council sent the Commissioner a database print out of all the businesses that used its commercial waste collection services.
10. On 12 December 2009 the Commissioner asked the council to clarify whether the database print out sent was for the pre-paid waste sack clients only (which was the information requested) or all of the business customers. He also expressed the view that the requested information was covered by the EIR and invited the council to reconsider its position under these regulations.
11. The council responded on 4 January 2010 and requested relevant decisions from the Commissioner and the Information Tribunal to support the view that the requested information was covered by the EIR. The Commissioner provided this information together with his further arguments in support of his view on 7 January 2010.
12. The council responded in detail on 29 January 2010. It provided a database of its pre-paid waste sack clients as the earlier database contained details of all of its commercial waste customers including those which use bins. It also provided further and more detailed arguments as to why the requested information was exempt under section 43(2) of the Act or in the alternative exempt under Regulations 12(5)(e) and 13 of the EIR. The council has since confirmed to the Commissioner that, in the light of recent Decision Notices issued in similar cases¹ it is prepared to disclose the first three characters of 'its pre-paid waste sack clients' postcodes where they begin with EC and

¹ Islington Council FER0255082.

the first part contains 4 characters. It said that to release any information beyond this would, in the light of the small geographical area of the City and the nature of highly specific postcodes within this high density area, be extremely likely to allow a third party to identify the City's commercial pre-paid waste sack clients from that information.

Findings of fact

13. The council provides a waste collection, recycling and street cleaning service for its residential and commercial customers in conjunction with its private waste contractor, MRS Environmental Services Limited with whom it has had a relationship since about 1998. The contract was extended in 2003 following a rigorous public procurement procedure and is due to expire in 2011. The service provides for the integrated collection of waste from commercial bin and pre-paid sack clients with the private contractor undertaking multiple rounds as and when needed on all routes, both day and night, seven days a week, to ensure the prompt collection of waste. The same type of refuse vehicles are used for both domestic and commercial waste collections which are identically marked with the City of London livery. The waste service is provided on a cost neutral basis in competition with at least 20 private sector waste collection companies². According to the council its market share of the commercial waste collection service in the City is 27%. About 90% of the waste collected by or on behalf of the council by MRS Environmental Services Limited is produced by its business customers. See page 16 of the Municipal Waste Strategy for the City of London 2008 - 2020.³ Details of the council's commercial waste activities⁴ including, its pre-paid waste sack service are set out on its website⁵. These include an order form and a price list⁶ for the various pre-paid bags. The Council is also required to provide relevant information regarding waste management to Government. Regular

² The council is aware of these private companies as they use its waste transfer station to dispose of their waste. There may be other private companies operating in the City that use other waste transfer stations.

³ http://217.154.230.218/NR/rdonlyres/8C808FF8-BAD7-4B45-B715-C903206743BF/0/HS_CS_CityofLondonInformationLeaflet.pdf

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http://www.cityoflondon.gov.uk/Corporation/LGNL_Services/Business/Commercial_waste_and_recycling/Commercial_waste-collection.htm

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http://www.cityoflondon.gov.uk/Corporation/LGNL_Services/Business/Commercial_waste_and_recycling/Commercial+waste+and+recycling+services.htm

⁶ http://www.cityoflondon.gov.uk/NR/rdonlyres/4097C9B9-E462-4726-870A-82C294B34982/0/SUS_RC_pricelist.pdf

information regarding the waste/recycling the council collects is regularly entered on to the DEFRA website at www.wastedataflow.org⁷. This information is then formulated into quarterly reports, which are available to the public as MS Excel downloads from the website⁸

Analysis

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

14. 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.
15. 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.
16. 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).
17. 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.
18. 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.

⁷ <http://www.wastedataflow.org/>

⁸ <http://www.defra.gov.uk/evidence/statistics/environment/wastats/archive/mwb200809a.xls>

19. 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.
20. The Commissioner has therefore concluded that the requested information is covered by the EIR which is in line with five of his previous decisions on this subject; Hammersmith and Fulham Council FS50255081, Ealing Council FS50255080, Westminster City Council FER0276297, Camden Council FS5025077 and Islington Council FER0255082.

Exceptions

Presumption in favour of disclosure

21. 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

22. 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.
23. 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?
 - vi)

Is the information commercial or industrial in nature?

24. The exception in Regulation 12(5)(e) only protects the confidentiality of commercial or industrial information.
25. 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.
26. 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.
27. 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 view is not disputed by the council.

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

28. 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

29. 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.
30. 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

31. 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

32. 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.
33. 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?

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

Is the information trivial?

35. 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 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. Furthermore, the council has argued that as a definitive list of those businesses that use its trade waste collection service would allow its competitors to adopt a more concentrated and focussed approach to target its customers with a view to securing their business.
36. The Commissioner has therefore concluded that the requested information is not trivial.

Is the information in the public domain?

37. 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*.
38. 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 (i.e. commercial waste sacks are red whereas domestic ones are white with a red stripe). 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 City of London 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.

39. The council does not accept that the requested information (in the list format in which it is held) is already in the public domain. It accepts that some information might be apparent from a visual survey. However, the council has pointed out that this would not be possible where a building had multiple occupancy or where waste was collected from a common waste collection area or point. Furthermore, some waste collection points are in mixed domestic and commercial settings. However, the council does recognise that given sufficient time and effort it would be theoretically possible for someone to prepare a rough list of its commercial clients by carrying out a detailed daily street survey and consulting a business directory. The council has argued that such a list would not be in a collated format or easily accessible, particularly because of the multiple occupancy of some buildings. Furthermore, the council has pointed out that
40. 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 with the council in circumstances importing an obligation of confidence?

41. The council has argued that the circumstances under which the information was provided to it by its business customers were sufficient to import an obligation of confidence. It has pointed out that a business customer is required by statute under section 34 of Environmental Protection Act and the Environmental Protection (Duty of Care) Regulation 1991 to complete a Waste Transfer Note to include the name and address of the transferor and the transferee. The Regulations give waste regulation authorities (e.g. The Environment Agency) and waste collection authorities (e.g. a local council) the power to require a person to produce a copy of the Waste Transfer Note. The council has argued that as the disclosure of this information is controlled by law, the implication is that it is not made freely available. Furthermore, the council has argued that although it doesn't enter into formal contracts, its customers would nonetheless expect to be treated in the same way as if the service was provided privately and would therefore expect their relationship with the council to be confidential. In support of this argument the council cited the case of Secretary of State for the Home Department v British Union for the

Abolition of Vivisection and another⁹ where information which was subject to statutory protection against its use without consent was held to have been provided with an expectation of confidentiality.

42. The Commissioner accepts that a business client is obliged by statute (under section 34 of the Environmental Protection Act 1990) to complete a Waste Transfer Note including his name and address and produce a copy when required to do so by either a waste regulation authority or a waste collection authority. However, he does not accept that that constitutes sufficient circumstances to create an obligation of confidence by the council. In the Secretary of State case disclosure of the information was provided by the confider was protected by statute. The Commissioner has therefore distinguished this case as the information provided to the council by its business customers is not protected by statute.
43. When a business customer enters into a contract with the council for the purchase of pre-paid waste sacks it provides various details including its type of business, the type and amount of waste, the collection days together with its name and address. This information is recorded in a Waste Transfer Note¹⁰ which is a statutory requirement under the Environmental Protection Act 1990. A sample copy of this document may be found on the council's website¹¹. This document does not contain a confidentiality clause or make any express reference to the information having been provided in confidence or on a confidential basis. There is no additional requirement for the business customer to complete a written contract with terms and conditions.
44. The council has not provided the Commissioner with any documentary evidence (either in the form of statements from its business customers or contractual clauses or letters) establishing that the information provided to it by its business 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. Furthermore, the council believes

⁹ [Secretary of State for the Home Department v British Union for the Abolition of Vivisection and another \[2008\] EWCA Civ 870; \[2008\] WLR \(D\) 273](#)

¹⁰ http://www.cityoflondon.gov.uk/NR/rdonlyres/FC84DE4D-D6A6-49B4-B11B-15E07F035157/0/SUS_RC_prepaidsackandtapesWTN.pdf

¹¹ http://www.cityoflondon.gov.uk/NR/rdonlyres/971EA169-07E4-4E8C-B1AD-0E986AC14510/0/SUS_RC_SAMPLE.pdf

that its commercial waste customers should not be treated differently to those customers of a private waste collection service regarding the confidentiality of their information.

45. On balance 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 it imports an obligation of confidence. The collection and recycling of waste is a visible and public operation and the identity of most of the businesses using the council's services would be apparent to anyone carrying out a visual street survey.

Information shared by the council with MRS Environmental Services Limited.

46. The council provides MRS Environmental Services Limited with details of its business customers to enable MRS Environmental Services Limited to collect and where appropriate recycle their commercial waste. This contract was made in 1998 and extended in or about 2003 to 2011. The council has pointed out that as a matter of commercial practice it is understood by both parties to the contract that any information it passes to MRS Environmental Services Limited is done so in confidence and for the purpose of delivering the contract. The council has stated that MRS Environmental Services Limited would be aware that the information should not be disclosed to third parties (except where required for waste transfer purposes) and also that any disclosure of customer information would undermine the ongoing financial viability of the contract. Accordingly, MRS Environmental Services Limited would understand the confidential nature and commercial sensitivity of the customers' details. The council has therefore concluded that its contract with MRS Environmental Services Limited imposes obligations of confidentiality on both parties.
47. The Commissioner accepts from the foregoing that the circumstances under which the council shares information with MRS Environmental Services Limited is sufficient to import an obligation of confidence.

Contractual obligations of confidence

48. The Commissioner also accepts in view of the comments in paragraphs 45 to 46 above that the circumstances under which information is provided by the council to MRS Environmental Services Limited is sufficient to imply an obligation of confidence into the contract under common law.

49. The Commissioner therefore concludes that the requested information is subject to a duty of confidence which is implied by common law in view of the contractual and commercial relationship between the council and MRS Environmental Services Limited.

Is confidentiality required to protect a legitimate economic interest?

50. 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.
51. 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 Directive¹² 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.
52. 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.
53. In support of his approach, the Commissioner notes that the implementation guide for the Aarhus Convention¹³ (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance:
- “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.”*
54. In the present case the Commissioner believes that the confidentiality is designed to protect the legitimate economic interests of the council which provides the names and addresses of its business customers to MRS Environmental Services Limited to allow it to collect and recycle their waste.

¹² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

¹³ <http://www.unece.org/env/pp/acig.pdf>

55. The council's commercial waste service is operated on a cost neutral basis. In the event of customers being lost due to a concentrated and focussed approach by competitors using the council's current list, the waste service would no longer be self-funding. This would mean that the council would have to choose to make up the shortfall from other budgets, discontinue the service in its current form or increase prices. The council does not believe that any of these options are desirable. Making up the shortfall from other budgets would mean finding funding from other departments such as Highways and Cleaning; alternatively another part of the Environmental Services Department which might mean a reduction in the services offered to residential households or future spend on street cleaning. If the council discontinued the service in its current form this would result in a loss of jobs and the under utilisation and/or disposal of expensive equipment at a loss. This in turn would result in a loss of economies of scale. The final option of increasing prices of the pre-paid waste sacks and bins in an attempt to raise revenue would create a real danger of the council's service being priced out of the market.
56. While the council accepts that competitors may approach its existing business customers to seek their custom by visiting, cold calling or random mail shots, it believes that disclosure of its actual customer list would allow competitors to specifically target its customers in a concentrated and focussed way and undercut the cost of its waste services the details of which are already published on its website. 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. This would make it more difficult for the council to compete in the highly competitive waste collection market by operating on a level playing field. The council is also concerned that concentrated and focussed targeting of its current business customers by competitors might result in possible harassment. The council believes that this would affect its good relationship with its customers and thereby damage business confidence. This in turn could impact on the council's ability to generate new business. Obviously, a loss of customers would equate with a loss of revenue; not only for the council but also MRS Environmental Services Limited without an equal and corresponding saving in variable costs as they would still have to offer the service to existing domestic and commercial customers.
57. The council has pointed out that commercial or trade waste services can be a valuable source of revenue 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 revenue it receives from existing commercial services but also seeking to gain additional income through the legitimate expansion of its service portfolio and market share.
58. The council also accepts that its business customers may terminate their agreements with it at any time and for any reason without having to give any notice 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 by undercutting the council's prices which are already in the public domain.
59. 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 to its existing domestic and business customers and maintain its existing standards. The council has argued that in the event of its commercial waste and recycling market share being lost to the private sector, it would lose the economies of scale it currently enjoys because its domestic and commercial waste services have been tendered together.
60. The council has stated that it will maintain its high level of street cleaning and will continue to take enforcement action against fly-tippers if the source of the waste can be identified¹⁴.
61. The council has pointed out that a loss of its business customers as a result of concentrated targeting by its competitors would result in a reduction of economies of scale because the domestic and business services have been tendered together.
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 MRS Environmental Services Limited to provide a comprehensive waste collection and recycling service. Disclosure of the information would adversely affect the legitimate economic interests of 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

¹⁴ http://217.154.230.218/NR/rdonlyres/8C808FF8-BAD7-4B45-B715-C903206743BF/0/HS_CS_CityofLondonInformationLeaflet.pdf

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)¹⁵ 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 significant information on its website¹⁶. This information includes its

¹⁵ 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?

¹⁶

http://www.cityoflondon.gov.uk/Corporation/LGNL_Services/Business/Commercial_waste_and_recycling/Commercial_waste-collection.htm

prices¹⁷. The council believes that this published information is sufficient to assist the public in the understanding of its waste collection and recycling services including those of its commercial customers. The council has also pointed out that the amount and type of waste it produces¹⁸ and the fact that the service is provided on a cost neutral basis is also in the public domain.

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. The council believes that the requested information does not in any way relate to the decision making process in relation to waste management. 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. The council already publishes details of its prices on its website to enable existing and potential customers to make informed decisions as to which organisation they use.
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 to its domestic and commercial customers. The council has referred to the Commissioner's decision in the case of the Post Office (FS50088494)¹⁹ in which he acknowledged it was a relevant consideration that disclosure could potentially impact on the commercial interests of a public authority and also result in a significant risk of competitors gaining business at the expense of a public authority. (See paragraphs

¹⁷ http://www.cityoflondon.gov.uk/NR/rdonlyres/4097C9B9-E462-4726-870A-82C294B34982/0/SUS_RC_pricelist.pdf

¹⁸ <http://www.defra.gov.uk/evidence/statistics/environment/wastats/archive/mwb200809a.xls>

¹⁹ http://www.ico.gov.uk/upload/documents/decisionnotices/2007/decision_notice_fs50088494.pdf

28, 31 and 32). In this particular case the Post Office was providing a service in direct competition with the private sector. The council already discloses details of its commercial waste services including prices 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 and extending a contract with MRS Environmental Services Limited following a rigorous public procurement procedure. Fair competition means that public and private organisations should (as 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 MRS Environmental Services 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 its area. 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 revenue 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 vehicles and reducing the amount of waste going to landfill by recycling more²⁰&²¹. The council has pointed out that any measure such as recycling that reduces the amount of waste that is in landfill will reduce the carbon dioxide emissions associated with waste management activities.²² Accordingly, it is quite possible that disclosure of the requested information and any poaching of the council's 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 implied into commercial contracts by common law. This is the case with the council's contractual agreement with MRS Environmental Services 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

²⁰ http://www.cityoflondon.gov.uk/Corporation/LGNL_Services/Business/Commercial_waste_and_recycling/

²¹ http://217.154.230.218/NR/rdonlyres/8C808FF8-BAD7-4B45-B715-C903206743BF/0/HS_CS_CityofLondonInformationLeaflet.pdf

²² http://217.154.230.218/NR/rdonlyres/8C808FF8-BAD7-4B45-B715-C903206743BF/0/HS_CS_CityofLondonInformationLeaflet.pdf

were it to lose market share due to the disclosure of its commercial customer list and the fragmentation of waste collections.

Balance of the public interest arguments

79. The names and addresses of the council's pre-paid waste sack customers have been provided to MRS Environmental Services Limited in confidence to enable it to provide a contractually binding comprehensive waste collection and recycling service. This contract was awarded to MRS Environmental Services Limited in or about 1998 and extended in or about 2003 to 2010. 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.
81. 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.

Regulation 13 of the EIR

82. In its letter to the Commissioner dated 29 January 2010 the council stated that although not mentioned in its correspondence with the complainant it would also wish to rely on Regulation 13 of the EIR in respect of names of the sole traders. It said that this information constituted the sole traders' personal data and disclosure would be inconsistent with the purpose for which it was provided. As the Commissioner has already decided that Regulation 12(5)(e) is engaged in respect the withheld information it was not necessary for him to consider Regulation 13.

Steps Required

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

Right of Appeal

84. 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 December 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.