

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 June 2021

Public Authority: London Borough of Southwark
Address: PO Box 64529
London
SE1P 5LX

Decision (including any steps ordered)

1. The complainant has requested information on charges for waste collection at particular apartments in the London Borough of Southwark. The London Borough of Southwark ("the Council") is the freeholder of the building making service charges to leaseholders.
2. The Commissioner's decision is that on the balance of probabilities the Council does not hold recorded information within the scope of the request, as confirmed by the complainant during the Commissioner's investigation.
3. The Commissioner does not require the public authority to take any steps.

Background

4. The complainant's requests concern a particular apartment block for which the Council is freeholder of the building. The Commissioner notes that the freeholder is often referred to as 'the landlord' although as an owner of an apartment within a block, a property owner has a *freeholder* rather than *landlord*. The Council is landlord for those in the building who are tenants rather than owners. Nevertheless there are obligations to the freeholder or the landlord by the occupants. There is a tenant management organisation ('TMO') which is the managing agent for the estate, responsible for providing the services specified in the management agreement.
5. The TMO is responsible for the care and upkeep of the estate and may choose to purchase the bins and maintain them. The Council advised

that this is not a popular option as it can be more expensive than bin hire from the Council. Bin hire is paid for through the Housing Revenue Account¹('HRA') and charged back to homeowners through the service charge. The Council, as the Waste Collection Authority, is responsible for managing waste under the provisions of S46 of the Environmental Protection Act 1990.

6. The Council and the complainant have been corresponding since 2018 on the subject of waste collection. The complainant considers that she and other residents are being charged twice for waste collection, as part of council tax and also service charges.
7. The Council has tried to explain the process and charges for waste collection on numerous occasions. During these explanations the complainant considers that the Council has:

"...made a large number of false claims that the bins are 'owned' by LBS but they couldn't produce any purchase order, they claimed that they are hired but there is no hiring contract or any form of agreement, Lba[sic] also claimed that the bins are 'managed' by LBS but couldn't provide any 'managing contract or any form of agreement' nor any form of invoice nor any form of payment,"

Request and response

8. On 17 January 2020 the complainant wrote to the Council and requested information in the following terms:

"I want to see on the Veolia's contract:

- the pricing list where the cost of the 40 bins in Devon mansions come from and how it is derived from the contract price list.
- what cost information from Veolia contract is provided to Council tax to ensure that the same bins hire cost is not charged again under Council

¹ The HRA reflects the statutory requirement under Section 74 of the Local Government and Housing Act 1989 to account separately for local authority housing provision. It is a ring-fenced account, containing solely the costs arising from the provision and management of the council's housing stock, offset by tenant rents and service charges, homeowner service charges and other income. The HRA forms a specific part of the council's accounts.

tax. The Council tax won't know what to charge on waste collection unless the cost is provided to them from the contract cost schedule."

9. The Council responded on 10 February 2020. In regard to the first point it stated that there is no pricing list for the provision of bins within the contract, as this is not a separately chargeable service under the terms of the contract. With regard to the second point the Council explained:

"This is not correct. Veolia do not provide any information to the Council tax department, cost related or otherwise. The hire of communal bins is outside the range of services funded through council tax, and waste services expenditure charged to the council for council tax purposes, have already had the income from hire charges and other fees deducted."

10. On 13 February 2020 the complainant wrote to the Council as follows:

"I want to put on the records:

1. for 2 years and 3 months Since 9th Nov 2018 the Service Charge, Waste Management, Council Tax and Access info had denied me access to Veolia contract waste management/ collections

2. In spite several FOI's and communication with the respective departments which demonstrated that:

a. There is no "Hire" contract for the Paladin Bins neither any operational framework

b. There is no PO nor any "LBS Management" for the Paladin Bins neither any operational framework

c. There is no reconciliation of the charges under the misleading header "bin hire" to the end to end waste collection service.

d. Veolia provide end to end waste collection service which is provided under Council Tax waste collection

e. Veolia own the bins, manage them, repair and replace them when necessary under the end to end waste collection service under Council tax

f. "The hire of communal bins is outside the range of services funded through council tax, and waste services expenditure charged to the council for council tax purposes, have already had the income from hire charges and other fees deducted." statement made by [name redacted] has no documentation to back it up and contradicts all the other FOIs and emails from officers that under Council Tax Veolia provide an end to end waste collection service

g. The bin I refer to is in 3.5m from the Veolia waste collection vehicle so no extra charges should be applied yet, in spite all the above disclosure LBS keeps circulating the misleading statement that the bins are "hired" which is legally, contractually, linguistically and semantically not true."

11. On 25 February 2020 the complainant wrote again to the Council regarding her dissatisfaction about the request of 17 January 2020 and previous requests. She summarised and explained:

"...there is a significant number of inconsistencies in itself and with other 5 FOI's I raised in the past 2 years."

The complainant went on to describe her view of the inconsistencies and concluded by stating:

"Please provide hard proof demonstrable (contractual operational and financial) evidence of your statements which contradict the above FOI's that:

1. The waste collection services charged under council tax does is [sic] not an end to end service as stated by the other FOI's and does not include maintaining the bin which is owned and managed by Veolia
 2. the £255 pa charge of the waste bin in my block which is not hired, not owned and not managed by LBS is subtracted and not duplicated in my council tax waste collection service.
 3. I asked for almost 2 years now access to the Veolia contract - please let me know when I could come to see inspect it."
12. Following the intervention of the Commissioner, the Council conducted an internal review of two requests, including the request of 17 January 2020. The Council wrote to the complainant on 21 September 2020. It apologised for failing to recognise the correspondence of 13 February 2020 as a request for an internal review and also apologised for the subsequent delay in responding. It reiterated its initial response and provided further supporting information on Veolia, the fees concerned with waste collection and the information contained in the contract with Veolia, which included:

"Contractor

- There is a single contractor to collect household waste bins, no other entities are involved, only the council and the contractor, Veolia.
- Bins are provided, serviced and maintained by Veolia through the normal collections services contract.

- Occasionally subcontractors may undertake onsite repairs of bins but this activity is unrelated to the collection of waste contract.

Fees

- Bin charges are fixed by an annual decision of the council, not through the provisions of the contract.
- In the Fees and Charges 2019-2020 document, the weekly charges stated are per bin, the number of bins supplied are shared between a number of households as part of a communal service.
- These communal waste services are not included in residents' council tax charges and are therefore a separate charge.
- The council charges the property manager for the supply of bins and the same price applies for public, private, RSL or Council hire of bins.
 - The property manager then recharges residents, typically with an administration fee added. The council has no control over the amount that is recharged to residents.

Information contained with the contract

- The waste collection contract does not contain financial information or costs for provision, purchase or hire of bins.
- Therefore, this document does not contain the information requested.
- The contract is a very long document and some parts are deemed commercially sensitive. If there were relevant parts of this document applicable to your request this would have formed part of our response, subject to the application of the relevant exemption(s), such as commercial interest and appropriate limit."

Scope of the case

13. The complainant initially contacted the Commissioner on 13 February 2020 to complain about the Council's response to her request. This was at the same time as she expressed dissatisfaction to the Council. Following the intervention of the Commissioner the Council provided an internal review. Following her receipt of the internal review the complainant confirmed on 28 October 2020 that she wished the Commissioner to investigate. Initially the complainant explained to the Commissioner that the Council could resolve her complaint as follows:

"1. To stop using the word bin "hire" in service charge as it is misleading
2. To give me access to the Veolia contract to see the waste collection section for provision of waste collection service and the correspondent pricing list."

14. Following consultation with the complainant, the Commissioner considers that the scope of her investigation is to determine whether the Council holds recorded information which could answer the complainant's concerns regarding her belief that she is being charged twice for waste collection, as part of council tax and the service charge. These concerns have resulted in multiple FOIA requests, subject access requests and other correspondence. The scope of the Commissioner's investigation is broader than simply the Veolia contract. Following consultation with the complainant the Commissioner has interpreted the request, and various other requests, to focus on the particular issues of concern to the complainant. She acknowledges both the complainant's purpose in requesting information to satisfy herself that the charges made were justified and the Council's wish to explain why it cannot provide recorded information to achieve this.

Reasons for decision

The appropriate legislation

15. The Commissioner has served this decision notice under the FOIA rather than the Environmental Information Regulations 2004 ("EIR"). Her reasoning for this is that the subject matter concerns paperwork regarding costs incurred by the Council affecting waste collection. More specifically, the complainant's requests, in so far as they relate to the Commissioner's investigation, concern documentation to prove a charge, not information on the state of the elements of the environment, factors affecting those elements nor measures affecting the elements. Having considered the definition of environmental information as described in regulation 2(1) of the EIR² the Commissioner is satisfied that the information sought by the complainant does not fall within the scope of the EIR.

Section 1(1) – information held

16. Section 1(1) of the FOIA provides that:

"Any person making a request for information to a public authority is

² [Regulation 2\(1\) - What is environmental information? | ICO](#)

entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

17. In scenarios where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
18. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider any searches carried out by the public authority. In addition, she will consider any other information or explanation offered by the public authority which is relevant to her determination.
19. In the circumstances of this case, in discussion with the complainant, the Commissioner determined that complainant's primary concern is for disclosure of documented evidence which demonstrates charges incurred by the Council in relation to waste, which result in charges applied to the leaseholders of the apartment block. During her previous requests for information the complainant has not been provided with documentation she expected to be held and therefore requested the Veolia contract to see if it contained the sought after information.
20. In her endeavours to be provided with documentation the complainant has taken issue with the Council referring to the "hire" of bins, the "ownership" of bins and the "management" of bins and asserted that:

"I kept asking the service charges team about the contractual framework for the "bin hire" statement and the Service charge team changed the story 3 times that the bins actually are not hired but they are "bought" by LBS then when I asked to see the PO [purchase order] I was told that the bins are "managed by LBS". I had to raise FOI's on these new claims as the council officers didn't want to provide any demonstrable evidence of their statements. The FOI's showed that:

 - there is no "hire" "contract for the bins or any other for[sic] of operational framework
 - there is no Purchase order
 - there is no Management contract for the paladin bins charged under Service charge"
21. The complainant summarised as follows:

"The correct statement is 'without a contract, without any proof of any service delivery and without any reasonably incurred cost LBS made an internal decision to charge'."

22. To assist her understanding the Commissioner asked the Council to explain which of its waste functions for properties like the complainant's (building owned by the Council with leaseholders) are covered by council tax. The Council explained:

"The council's responsibilities are defined by the Environmental Protection Act 1990 (as amended). This, and the associated regulations and Codes of Practice, sets out the duty to collect waste. As a general rule, the council has a duty to collect household waste from householders and dispose of it without charge. This is the service that has been provided to this complainant in her block. Also within the scope of the EPA1990 is the powers to determine the container that can be used and the charging arrangements (Section 46)³. This gives the power to the council to determine the type of waste container that can be used for the collection of waste. Having determined the type of container (s46(1)), the council has the power to set charges for their supply (s46(3)). It is then for the property manager to either agree that offer, or make provision for the sourcing of those containers themselves.

Waste Management spends an overall budget to provide all services. Some of that is paid by Council Tax, some is paid by central government and some is paid by fees and charges for services – including, hire of bins. Properties who hire bins (and take other discretionary services) pay part of our service costs and only the rest after deduction of this income is charged back to Council Tax. The Council has taken decisions that some services, including bin hire, should be chargeable in order to reduce the net burden on Council Tax. Detailed income and expenditure in the council's budget book sets out the spending for the Environment & Leisure Department, including Waste Management and is available online⁴."

23. The Council provided links to its website regarding council tax and service charges⁵ covering the composition of council tax and waste

³ <https://www.legislation.gov.uk/ukpga/1990/43/section/46>

⁴ <https://www.southwark.gov.uk/council-and-democracy/key-documents/budget-book>

⁵ <https://www.southwark.gov.uk/council-tax/who-pays-council-tax>;
<https://www.southwark.gov.uk/home-owners-services/service-charges/about-service-charges>

management services. The Commissioner asked the Council to provide a general explanation on how the service charges for properties like the complainant's are assessed. It explained:

"Each year, as part of the overall corporate process of fixing fees and charges for chargeable services (ranging from use of leisure facilities, to car parking, waste services etc), the council fixes prices for the forthcoming year. This is a decision made by the politicians as part of the council's budget process. Fees can be fixed as a result of statutory requirements, contract arrangements, or as a decision to generate income (i.e. balancing the council's books). In the case of bin hire charges, the power is given in law, but not otherwise constrained or defined, and councillors are free to set any charges they wish for bin hire – given that the potential hirers are free to pay the price the council charges, or make alternative arrangements of their own to hire or purchase bins from a third party. As a result the hire price set by the council is not connected to the content of the contract or any provisions thereof, nor is it linked to the original price of the bins or their subsequent maintenance (which are provided within the bundle of services included in the contract, but not separately identified or costed). It is a decision of the council that is empowered by statute, but is essentially a commercial/budget decision."

24. The Council added:

"By statute, the council must account for its social housing provision within a ring-fenced account known as the Housing Revenue Account (HRA). This falls under the provisions of the Local Government and Housing Act 1989, which was designed to prevent cross-subsidisation of services between tenant rents and what was then community charge (now council tax). Non-standard refuse collection and storage facilities, predominantly on estates, attracts an additional cost to the HRA (from the General Fund), and which is funded through tenant's base rent, and in the case of homeowners, through their annual revenue service charge.

Cost apportionment between the HRA and the General Fund has been examined on a number of occasions, latterly in 2011, when the council commissioned an independent review by Grant Thornton UK LLP, who concluded that non-standard refuse services were a legitimate charge to the HRA."

25. The Council provided the Commissioner with extracts from correspondence with the complainant demonstrating its previous explanations on the legitimacy of the charges made, and, as the bins are provided under a statutory power, advising that there is no requirement for a separate contract to exist. For example:

"The bins are an additional discretionary service provided to Housing beyond what is provided to all households as part of the council's Waste Collection Authority function which is funded by council tax. Environment & Leisure charge Housing for the bin hire each year and this is as done as an internal recharge within the council's financial system and there is no invoice generated therefore there is no invoice to provide to you. The original charge was agreed historically and is subject to inflation each year and there is no formal contract for the bin hire arrangement."

"Property Managers are not obligated to hire bins from the council. Your landlord, Fair Community TMO, could opt to buy their own bins for the storage of refuse for collection and thus eliminate the hire charge. However, the landlord would then become responsible for the outlay of the cost of the bins, as well as costs associated with any repairs or replacement; this would likely exceed the council's hire charge and would likely be proportionally recharged through service charges."

"The council issues a single recharge against the Housing Revenue Account (HRA) for the hire of bins and various discretionary services. This charge is apportioned and recharged to households by the council's Housing Services; records of the overall charge, apportioned by block and estate, are held by the council."

26. The Commissioner understands that the Council is not charged by Veolia for the provision of the communal domestic bins. In response to the Commissioner's queries regarding council-owned communal residential properties the Council explained that communal bins are provided for under a schedule charged to the Housing Department for all bins provided to Council owned properties. No hiring contract exists between the internal departments of the Council (Housing Department and Environment and Leisure Department, which includes waste management). The service charge applied to residents is applied from the Council and does not stem from the Veolia contract. Veolia provides a contracted service to the Council, as the waste collection authority, not to the individual properties. The Council advised the Commissioner that the Veolia contract is a voluminous document comprising thousands of pages including numbers of bins and addresses throughout the borough but does not include the information the complainant wishes to receive.

The Commissioner's view

27. The Commissioner understands that the complainant wishes to see physical evidence in the form of a contract or agreement giving details of costs incurred by the Council which justify charges to residents of apartment blocks such as her own regarding waste collection. The complainant has not been satisfied by explanations provided by the Council and the Council is unable to provide recorded information to substantiate its explanations. Following from this the complainant is exercised by the Council's use of particular terminology with respect to the bins as she considers that they cannot be hired, owned or managed by the Council because it cannot provide contracts demonstrating the three states. She concludes that the Council is making false statements in its responses.
28. The complainant has labelled examples within the Council's correspondence as "misinformation" and drawn the Commissioner's attention to these points. The Commissioner understands the complainant's confusion as she herself has been provided with ambiguous statements regarding the organisation of the waste collection. However, the Commissioner does not consider the lack of clarity to be deliberate "misinformation". The inconsistent use of particular terms such as "landlord" and "a decision of the Council" has created unhelpful confusion. The Commissioner has reverted to the Council on numerous occasions in order to satisfy herself. It is the Council's further detailed explanations regarding specific points which have satisfied her that that the difficulties encountered in this case have arisen from a lack of clarity in its initial explanations rather than a lack of knowledge of the processes involved. She would recommend that the Council takes care in its descriptions of complex matters and aims for clarity to avoid using terms interchangeably.
29. The Commissioner considers that the Council has made ongoing efforts over a prolonged period to explain the circumstances concerning waste collection and the provision of bins, in the absence of holding recorded information. The Commissioner is aware that this has not satisfied the complainant. However, the Commissioner cannot comment on the Council's internal systems or organisation in respect of any of the services it provides. The Commissioner must consider whether, on the balance of probabilities, the Council has provided any recorded information it holds in response to the complainant's requests, irrespective of whether she would expect recorded information to be held. The Commissioner has received detailed explanations from the Council regarding how the charges for waste collection are internally handled and consequently why it does not hold the documentation expected by the complainant.
30. The Commissioner accepts that the Council does not hold recorded information in the form the complainant considers that it should be held. The Council is fully aware of its own systems in place and as such knows

the information it holds in respect of waste collection and service charges. In responding to the Commissioner's questions the Council provided explanations based on what it knew to be the operating position. The Commissioner accepts that other searches for information were not conducted in the circumstances of this case. The Council is fully aware of the operation of its systems and was able to provide explanations of the process and therefore why no recorded paperwork is created or required.

31. The Commissioner acknowledges the premise of the complainant's statement above in paragraph 21, in that the Council cannot provide recorded information to demonstrate why it is justified in including a service charge related to bins and waste collection. However, the absence of such paperwork does not render the system or the charges invalid.
32. Turning specifically to the contract between the Council and Veolia ("the Veolia contract"), the Council has maintained throughout the Commissioner's investigation that the Veolia contract cannot provide the information sought by the complainant.
33. At the time of the request, and the Commissioner's investigation, the Council was unable, due to Covid restrictions, to arrange any viewing of the contract by the complainant. Notwithstanding the restrictions created by the pandemic, the Council advised that there would be commercially sensitive information which would likely require redaction. The Council explained:

"The contract is fundamentally irrelevant to answering the initial enquiry as we do not charge for bin hire as a consequence of any contract provision. The charge arises from a decision of the council taken by exercising powers conferred by statute. So it appears that this request is a disagreement with the policy of the council and information rights legislation cannot solve that."
34. The Commissioner accepts the Council's premise that the Veolia contract would not provide the complainant with the information she seeks. The Commissioner understands from her correspondence with the complainant that sight of the Veolia contract was not her initial intention and was sought as an alternative, in the absence of other 'evidence'.
35. The Commissioner has thoroughly investigated and following the scope of her investigation set out at paragraph 14, has concluded that the Council does not, on the balance of probabilities, hold recorded information to satisfy the complainant's requirements for evidence to justify and/or document the service charge made by the Council.
37. The Commissioner accepts that the Veolia contract is held by the Council but will not provide the information or 'proof' sought by the

complainant. Disclosure of this document is addressed in "Other Matters" at paragraph 42 bel

Other matters

38. The complainant raised concerns with the Commissioner associated with her view that the Council has suppressed information and asked what action could be taken to prevent the suppression of information and provision of false statements.
39. The Commissioner therefore considered this as a section 77 allegation – the offence of altering, blocking, concealing etc. records to prevent disclosure. Her Criminal Investigations Team concluded that the Council has responded throughout an extended period, attempting to explain the situation with regards to charges for waste collection. Its decision is that there is insufficient evidence to conclude that the Council deliberately blocked or concealed information. As a result of its deliberations no action will be taken
40. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.
41. The complainant effectively asked for an internal review of the outcome of her request on 13 February 2020. The Council did not recognise this request until the intervention of the Commissioner and did not provide the results of its review until 21 September 2020, over seven calendar months later.

42. The Commissioner considers this to be an unsatisfactory period of time. She notes the Council apologised to the complainant for its failures in this regard and would trust that greater attention to response times and recognising requests for internal review be taken in future.
43. During the course of the Commissioner's investigation the Council suggested that it could undertake a corporate task of redacting the Veolia contract and publishing it on its website.
44. The Commissioner welcomes and encourages this proactive disclosure and considers disclosure of a significant contract to be good practice in openness and transparency, irrespective of its relevance in this case. She would encourage the Council to proceed with this as soon as possible, enabling it to direct any further requests in respect of the Veolia contract, to its website.

Right of appeal

45. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Susan Hughes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF