

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

Decision Notice

Date: 14 November 2007

Public Authority: Brighton and Hove Council
Address: Kings House
Grand Avenue
Hove
East Sussex
BN3 2LS

Summary

The complainant requested a copy of a waste management contract Brighton & Hove City Council (the 'BHCC') has agreed with an independent waste management contractor. The BHCC withheld some sections of the contract on the basis that Regulation 12(5)(e) (commercial confidentiality of information) applied. The Commissioner's decision in this matter is that the BHCC has not dealt with the complainant's request in accordance with the Regulations in that some sections of the redacted information should have been supplied to the complainant. The exception to the duty to disclose the requested information was however applicable to other sections of the contract.

The Commissioner's Role

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

The Request

2. The complainant has advised that on 27 January 2005 the following information was requested from the public authority in accordance with Regulation 5 of the Act.

“the full version of the integrated Waste Management Service Contract and all associated schedules in full between Brighton & Hove City Council and East Sussex County Council and Onyx.”

3. The BHCC responded in a letter received by the complainant on the 22 February 2005, stating that it held the information, but that it was exempt from disclosure under Regulation 12(5)(e).
4. The complainant therefore asked the BHCC to review its decision in a letter dated 7 March 2005. The BHCC responded on 30 March 2005 refusing to disclose the information for the same reasons.

The Investigation

Scope of the case

5. On 28 April 2005 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information she requested should have been disclosed to her.
6. The complainant requested a copy of a contract between the BHCC and the contractor. The contract is for the provision of an integrated waste management service, which the Commissioner understands was agreed and signed between the parties in 2003. The Commissioner is also dealing with a complaint about East Sussex County Council (the ‘ESCC’) about the same information. Both councils therefore submitted arguments in support of the application of the exemptions. The term ‘the councils’ as used in this Decision Notice therefore refers to both the BHCC and the ESCC.
7. This information falls within the definition of environmental information provided in Regulation 2(c) which includes within its scope information such as measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements and factors referred to in the Regulations, as well as measures or activities designed to protect those elements. It also falls within the scope of Regulation 2(b) in that it relates to waste. The Commissioner has considered whether some sections of the information should be considered to fall outside the definition of environmental information. His decision is that the entire contract, including the pricing and financial aspects of the contract materially relates to, and is inextricably linked to the fundamental nature the contract such that it would

be a false distinction to consider such information as not being environmental in nature for the present purposes.

Chronology

8. On 9 December 2005 the Commissioner wrote to the BHCC requesting a copy of the information, and offered an opportunity for the BHCC to review its application of the Regulations to the information and provide further argument in support of its application of the exceptions to the information.
9. The BHCC responded on the 14 December 2005, stating that it had received the Commissioner's letter and would respond shortly. Later that same day the BHCC emailed to say that it had issued a copy of the contract to the Commissioner.
10. The contract in question is a public finance initiative contract between the 2 councils and Veolia, formerly Onyx Aurora, the contractors. It contains a principal contract together with 43 schedules. The principal contract and a number of the schedules were disclosed to the complainant as a result of her request, and further schedules were released after the Commissioner contacted the BHCCs in response to the complaint. Further schedules were also disclosed in a redacted form at this time. A significant amount of the information contained in the contract has therefore been disclosed, and is available generally from the websites of the councils.
11. The following schedules were withheld from disclosure. Their titles were however disclosed in the principle contract:

- Schedule 1 Project Plan
- Schedule 2 Works Programme
- Schedule 3 Works Delivery Plan
- Schedule 4 Service Delivery Plan
- Schedule 10 Performance Monitoring Systems and Procedures
- Schedule 12 Payment and Performance
 - Part 1 – Payment Mechanism
 - Part 2 – Unavailability and Performance
- Schedule 26 New Technology Basic Design
- Schedule 27 Pebsham site
- Schedule 33 Base Case
- Schedule 36 Planning Principles.

The following schedules were disclosed in a redacted form:

- Schedule 6 Price Schedule and Annual Contract Price review
- Schedule 38 Interim Service Plan

Analysis

Exception

Regulation 12(5)(e)

12. The BHCC refused the request for information on the basis that Regulation 12(5)(e) applies. This allows commercial or economic information which meets the criteria for either a statutory or a common law duty of confidentiality to remain confidential if that duty is owed in order to protect the legitimate economic interests of any party. The relevant parts of the Regulation are provided in the legal annex to this decision.
13. The tests to be applied in section 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?
14. The BHCC argues that the contract is subject to commercial confidentiality. It states that there is a confidentiality clause in the contract, that a breach of that clause would amount to an actionable breach of confidence and that a breach of that duty would be detrimental to the legitimate economic interests of the contractor and the BHCC.

i) Is the information commercial or industrial in nature?

15. The Commissioner is satisfied that the sections of the contract to which the exception has been applied contain commercial or industrial information. The sections contain information on the planning, development and associated costs of the development of an integrated waste management system for the Brighton & Hove and East Sussex areas.

ii) Is confidence necessary to protect a legitimate economic interest?

16. The contract contains information provided by the contractor as to when and how it intends to carry out the contract and provide waste management services. Some of this information is proprietary, technical or financial in nature and provides a detailed overview of the way the contractor approaches such contracts. The contractor states that disclosure could provide information on its methods of business which may be of advantage to its direct competitors, thereby negating its ability to develop a commercial advantage when tendering for other contracts. The Commissioner accepts that the legitimate economic interests of the contractors could be adversely affected by the disclosure of this information.

17. The Commissioner has considered whether the interests of the BHCC can also be taken into account in considering whether the information should be disclosed. The exception in Regulation 12(5)(e) applies where confidentiality is provided by law in order to protect a legitimate economic interest. In general, confidentiality would only apply to the legitimate economic interests of the confider, (in this case the contractor), as that is the organisation to whom the duty of confidence is owed. The BHCC would not therefore be able to protect its own economic interests using this exception unless there was an agreement that the confidential information agreed in the contract would be confidential to both parties (in that each party agreed to hold the information in confidence and could not therefore disclose it as each would owe the other a duty of confidence to protect their respective economic interests). The Commissioner's decision is that this is the situation in this instance, and therefore he can consider the economic interests of the BHCC in addition to those of the contractor.
18. The BHCC argues that confidentiality is required in order to protect its position as purchaser. It argues that disclosing this information would affect its ability to negotiate best value and to enable it to effectively procure services in the future.
19. The Commissioner must therefore ascertain, for each section of the contract which has been exempted from disclosure whether a) a duty of confidence is owed, b) whether that duty of confidence is in place to protect any of the parties' economic interests, and c) whether those economic interests would be adversely affected by a disclosure of the information.

iii) Is the information subject to a duty of confidence?

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

- The information must have been imparted in circumstances which create an obligation of confidence.
- The information must have the necessary 'quality' of confidence.

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

24. The Commissioner accepts that there is an inherent duty of confidentiality when tenders are submitted to councils in procurement exercises. The Public Contracts Regulations 2006 and their precursor required that where a contractor obtains information as part of a procurement process the BHCC should accede to reasonable requests from the contractor that information passed to the BHCC as part of the procurement process is treated as confidential.
25. Part of the information in the contract is information supplied by the BHCC to the contractor as part of the normal process of forming a contract. The Commissioner has considered whether this information can also be considered confidential. In the case of *Derry City Council v the Information Commissioner* (case EA/2006/0014), the Information Tribunal considered the status of 'confidential' information held within a contract. In that decision the Tribunal came to a view that information within a contract was generally the result of an agreement between the parties rather than information being provided to the BHCC in confidence. However, this was a decision under the Act rather than the Regulations. Under section 41 of the Act there is an additional requirement that the information must have been provided to the authority "by another party". This requirement is not in the Regulations. The Commissioner therefore considers that it is possible that a duty of confidence may be owed by the BHCC on any information shared between parties if the grounds for confidentiality are met.
26. Clause 68 of the contract includes a confidentiality clause. It is therefore clear that at the time the contract was signed there was an expectation that at least some of the information would remain confidential. It is also clear that at the time that the information was imparted there was a clear understanding that the information should be considered confidential. This is the case generally for information supplied during the tendering process. The Commissioner therefore concludes that the information was imparted in circumstances which created, to a limited extent, an expectation that at least some of that information would remain confidential for the duration of the contract.
27. The Commissioner's decision is therefore that the information was imparted in circumstances which gave rise to an obligation of confidence.

Does the information have the necessary 'quality' of confidence?

28. In order to ascertain whether the information has the necessary quality of confidence the Commissioner considers that it can be helpful to ask a number of questions in order to ascertain if the information has the necessary quality of confidence. These include whether:
- the information is trivial, and whether

- the information is available from other sources

Is the information trivial?

29. Information will not be considered confidential if it is trivial. In this case the contract involves a major procurement of waste management services by the BHCC. It includes tendering information which could potentially be used by the contractor's competitors to their own advantage, and to the disadvantage of the contractor. Elements within the contract would disclose a package of information brought together using the skills and experience of the contractor over time, which would be advantageous to other businesses in the area of waste management. Accordingly the Commissioner is satisfied that the information is not trivial.
30. It is noted however that the contract was signed by the parties a number of years ago. A question therefore is whether the confidentiality of that information has waned simply through the passage of time. In the Derry City Council case the Information Tribunal dismissed the possibility that the confidentiality of information would wane over time as a matter of course. At paragraph 34(d) of the decision it found that a duty of confidence would be retained, regardless of the amount of time which may have passed, until the information in question had "either passed into the public domain or had ceased to have commercial significance".
31. There are therefore 2 aspects to consider in this question:
- Has the information passed into the public domain?
 - Does the information which has not passed into the public domain retain its commercial significance?

Is the information already available by other means/has it passed into the public domain?

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

34. Where information has been disclosed in this way a duty of confidentiality will not apply. Regulation 12(5)(e) will not therefore be applicable.
35. Certain elements of the contract are however still considered confidential, and the parties have submitted arguments to show why they have sought to exempt this information from disclosure. Information which the parties claim should be exempt is highlighted in the list of exempted schedules in paragraph 10 above.
36. The base argument for the maintenance of the duty of confidence of this information is that disclosure would cause an adverse effect to the contractors or the BHCC's economic interests.

iv) Does the information retain its commercial significance – would disclosure have an adverse effect upon a party's legitimate economic interests?

37. As stated in paragraph 17 above the Commissioner has established that he may look at the contractors and the councils' economic interests when considering whether disclosure would have an adverse effect.
38. If the information does not retain its commercial significance it is far less likely that confidentiality is necessary to protect a party's economic interests. The Commissioner has therefore considered this question on the basis that if it cannot be shown that the information is still commercially sensitive, then unless other factors are shown why confidentiality should be maintained, disclosure should occur on the basis 12 (5)(e) cannot apply because confidentiality would not be in place to protect a legitimate economic interest.
39. The Commissioner has considered the various different types of information in the exempted schedules, rather than considering the individual schedules independently of each other. He has however related his decisions to schedules where they specifically include that type of information.

a) Pricing schedules – schedule 6, 12 & 33.

40. The councils have submitted an argument that confidence should be maintained for the pricing schedules in the contract as disclosure of this information will have an adverse effect upon the economic interests of the councils. It argues that if the pricing information is disclosed it will reduce the element of competition, which will in turn affect their ability to obtain lower prices and best value in future contract negotiations.
41. There is also an argument that disclosing information that the councils have received in confidence could detrimentally affect its business relationships with third parties in future negotiations. The argument is that a disclosure of certain types of information such as financial models, price breakdowns, CVs and reference sites will compromise the role of the authority as purchaser. Suppliers could withhold sensitive information in the future to the detriment of the purchasing process, and result in a reduction in the authority's ability to negotiate effectively to secure best value for money.

42. There is also an argument that a disclosure of such information may lead some contractors to consider not tendering for contracts with the councils in the future. This might occur if information which the contractors consider particularly commercially sensitive could be disclosed, causing damage or detriment to other aspects of the contractors business not associated with this particular contract.
43. For instance the Commissioner has considered whether the disclosure of this information would allow competitors to analyse the pricing arrangements and either adopt the systems themselves in order to submit a lower offer to other organisations in future tendering exercises or use sections of it to their own advantage in order to better compete with the contractor.
44. There is also an argument that disclosure would detrimentally affect the negotiating position of the contractor in its negotiations with third parties; e.g. if the third party knows that the councils are being charged at a certain rate, they may seek to negotiate their own rates with the contractor down to that level. Alternatively those third parties in existing contractual agreements may be aggrieved if they find out that they are being charged more than the councils for the services being provided. The potential is therefore there for the contractor to find its relationships with third party clients damaged by the disclosure of this information.
45. In considering these arguments the Commissioner has referred to a number of similar cases in other jurisdictions which also dealt with requests for pricing information. These include the Scottish Information Commissioner's decisions in cases 034/2006 & 180/2006, and the Irish Commissioner's decision in case 98049, 98056 & 98057. Although there are differences in legislation between the different regimes, the Commissioner is satisfied that many of the considerations put forward by the Commissioners in those cases are relevant to this case. He also considers that the decision of the Information Tribunal in the Derry City Council case is relevant to this issue.
46. The Commissioner has considered whether the disclosure of the prices the contractor charges the councils would undermine any competitive advantage the contractor may have; specifically whether the disclosure would provide the opportunity for competitors to outbid the contractor in future tendering exercises with other public authorities. Essentially the question to be asked is whether the pricing information from this contract would allow competitors to understand the methodology and strategies of the contractor in submitting the prices they did, and use this information to outbid the contractor in future tendering exercises in other counties.
47. The Commissioner analysed the pricing information which would be disclosed and has considered whether this would be the case. Contracts of this nature involve providing an integrated waste management plan, taking into account a number of different processes and considerations, many of which will be stipulated by the contracting councils or will be dictated by the geographical features of the area of land to be covered. The cost of providing these services (and thereby the cost to be passed on to the councils together with an associated profit margin), may be dependent upon many factors. These could include:

- The geographical characteristics of the areas where services are planned (e.g. urban/rural, costs of property purchase and development requirements).
 - The distance travelled by waste before it can ultimately be disposed of and how best to manage this.
 - The percentage of waste being dealt with in particular ways, (e.g. incineration/landfill/recycling and composting), for instance contracts are likely to have to include any specific requirements laid down by the procuring council (e.g. a stipulation that 50% of waste must be recycled rather than incinerated or sent to landfill).
 - The ability of the contractor to be able to recoup costs through the sale of bi-products from the waste management process (such as aggregates, energy from energy from waste processes or compost from recycling organic waste).
 - The size of the contract in question (e.g. larger, longer contracts could benefit from economies of scale).
 - The likely growth of the tonnages of waste over the period of the contract.
 - The length of term of the contract (e.g. longer term contracts may allow for a greater degree of substantive development by the contractor – sites may be purchased and developed rather than leased, and costs may be recovered over the length of the contract rather than over a shorter period, thereby allowing smaller annual costs over the period).
 - Any requirements under The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) for staff currently on waste management duties, i.e. the likely costs of transferring employee contracts.
 - The number and type of sites required to cover the geographical area where services are to be provided, This may be dependent upon the amounts and types of waste typically produced within the area covered by the contract; e.g. the percentage or tonnages of potentially hazardous waste which will require specialised disposal treatment may be higher in some areas dependent upon usage of the land.
 - The demographics and predicted population growth/diminishment of those areas.
 - The likely sites for development and the existing sites suitable for takeover.
48. The above is a non exhaustive list of factors which might be taken into account by a tendering company when considering the price to charge. Although the Commissioner has not asked the contractor for his specific technique for calculating a tender price, individual factors such as those highlighted could add extra cost to providing a service and may therefore have been taken into account when considering the tender price. Alternatively a much simpler or different method of calculation may have been used. The Commissioner's point is that many different factors *may* be taken into account when considering the price to tender at, and that these considerations would not be evident from the disclosure of the pricing information in this contract. It is the skill of the contractor in

recognising how, or whether elements such as these need to be weighted, and through this seeking to reduce to a minimum any associated costs which will allow them to maximise the profit level they attach to the final tendering price whilst still providing a competitive quote.

49. For each individual contract factors such as those mentioned above are likely to vary dependant upon the circumstances of the case. Although the overall method of contract operation will be similar, the differing importance/costs of the factors for each individual tender are therefore likely to mean that a significantly different calculation would be carried out by a contractor for each individual tender. The contractor must then try to arrive at a price which maximises its profit whilst being the most competitive bid for the contract. It is this choice of factors; this balancing exercise which will make the contractor's bid ultimately successful or not.
50. The Commissioner therefore considers that it is unlikely that the competitive advantage of the contractor would be unduly prejudiced by a disclosure of the pricing information alone. Any parties competing with the contractor for other tenders would need to evaluate the various factors before a final tender price could be decided, much as the contractor would be likely to do. It is therefore extremely unlikely that a tender price for one contract can be directly compared to another in a different area in different circumstances.
51. Following from the above the Commissioner has considered whether any elements of the pricing information should be withheld from disclosure. The Commissioner considers that the profit margins and costs of the contractor are commercially sensitive as they provide information which will highlight the contractor's profitable areas to potential competitors. This might allow competitors to analyse and copy these processes to their own competitive advantage. How a contractor minimises its costs in order to produce a lower tender price is also a 'commercial secret' of the contractor and any disclosure of costing information which allows such an analysis would be commercially advantageous to competitors. The Commissioner considers that disclosure of information on costs and profits would not particularly shed light on the appropriateness of the BHCC's decision in offering the contract; that decision would be based on best value, which should take into account the appropriateness of the overall pricing as well as the methodology being put forward. It would also not be of great value to the general public to know what profit margin the contractor has set on individual parts of the contract providing the tender was the most suitable overall for the services being sought.
52. Schedule 33 of the contract contains the base financial case for the contractor, and explains in detail the costs and assumptions it envisages in producing and running the systems and facilities. The Commissioner therefore considers that this schedule falls within the scope of the exception.
53. A disclosure of the overall prices charged to the councils for individual services would not divulge such information as competitors would not be aware of the costs and profit margins associated with each process. Schedule 6 provides the pricing schedule which stipulates the costs to the councils for services rendered.

Accordingly the Commissioner considers that this information should be disclosed to the requestor.

54. The Commissioner has also considered the calculation formulae set out in schedules 12 and 24 of the contract. The contractor has stated that the methods it uses to calculate the price paid by the councils are commercially sensitive. The Commissioner has therefore considered whether an adverse effect to the contractor's economic interests may result through the disclosure of the methods of price calculation.
55. These schedules explain in detail how the services are charged for and how the price should be calculated and modified depending upon each variation in circumstances. The schedule is likely to be an amalgamation of the contractor's general methods of business and the councils' stipulations. The councils will to an extent have imposed obligations on the contractor to carry out the contract in specific ways, and made payments conditional subject to an appraisal of performance or variations in contractual conditions. As such it is unlikely that the terms are solely those of the contractor. As such the relationship is likely to be unique to a certain degree, and it is unlikely that the payment schedule in schedule 6 applies to other contracts which the contractor is party to. The Commissioner recognises therefore that other councils may seek to implement similar measures in their own contracts in future tenders, which may be to the disadvantage of the contractor. The Commissioner however recognises that there is a likelihood that such factors are discernable by authorities in their own right, or that councils are likely to discuss the ways in which contracts are formulated between themselves in general terms. The potential for an adverse effect to occur is therefore weakened by this.
56. However the Commissioner does recognise that a disclosure of this information may result in a degree of adverse effect occurring where councils in future tenders use this information to their own advantage to obtain a better deal from the contractor. The Commissioner's decision is therefore that such information does fall within the scope of the exception. A public interest test needs to be carried out on this schedule. This is dealt with in paragraph 118 and 119 below.
57. However the overall payments due to the contractor, for example the overall price per tonne, the price charged to the BHCC for individual facilities and the price for "working days" at particular facilities should be disclosed. His view is that this information does not fall within the scope of Regulation 12(5)(e).
58. In so far as the arguments put forward in paragraph 43 above (detriment to the contractor in its negotiations with private companies), the Commissioner has considered the arguments put forward by the Irish Commissioner in case 98049, 98056 & 98057. In this case the Irish Commissioner recognised a slight possibility that detriment could occur, however he found in favour of disclosure of the information on the grounds of public interest. In his decision he stated that he did not feel that the argument should be accorded 'significant' weight on the basis that the information was historic and related to a single transaction. He also felt that it would disclose nothing about the policy adopted by the tenderers or how they arrived at the quoted price. He also took into account the fact that no

evidence had been put forward that the prejudice he had foreseen was likely to occur. He had simply recognised the 'possibility' that it could occur.

59. In the Derry City Council case the Information Tribunal recognised the potential for prejudice to commercial interests in spite of the fact that the majority of the information was in the public domain and that the contract was signed 6 years previously. Nevertheless it also found in favour of disclosure on the basis of the public interest arguments.
60. The Commissioner has considered these arguments. He sees a great deal of difference between this contract and the potential private contracts which the contractor may enter into (which are likely to be on a much smaller scale). In addition, many of the considerations provided in paragraphs 47 to 50 above are likely to apply. Circumstances affecting the cost to the contractor of carrying out the contract are likely to differ in private contracts to an even greater extent than they would in public procurement exercises. The contractor could easily point to economies of scale, and the different circumstances or variables in each case as a means to override any negotiation strategy which sought to rely upon the prices charged in this contract. Accordingly the Commissioner's decision is that a disclosure of this information at this time would be unlikely to prejudice the contractor's negotiations with private companies.
61. Given this decision it is the Commissioner's view that Regulation 12(5)(e) is not applicable to the pricing information in the contract, other than in the limited respect of the costs to the contractor associated with providing the service it has contracted to do and any information indicating the profit levels set on the contract by the contractor. He also considers that the exception is applicable to the methods of calculation set out in schedules 12 & 24 of the contract.
62. The Commissioner has also considered the potential for prejudice to commercial interests if pricing or payment schedules were disclosed. Pricing schedules highlight when specific amounts of money would be payable to the contractor. There is a possibility that competitors could use this information to their advantage and seek to use periods when they are aware that the contractor has no available income from the contract to their own benefit.
63. The Commissioner has considered this argument and does see some merit to it. On the counter side however he has taken into account the fact that the contractor is one of the largest of its type in the United Kingdom and will have a number of other contracts in place. There are likely to be many different pricing schedules in other contracts which would not be divulged in the disclosure of this information. His decision is therefore that it is unlikely that a disclosure of payment schedules from this contract would adversely affect the economic interests of the contractor or the BHCC in this instance. This information should therefore be disclosed.
64. Although he has found that in these particular circumstances that there is no likely prejudice as regards the contractor's future tenders and negotiations with private companies, he is aware that the previous decisions highlighted above have taken account of the possibility of this occurring. He also recognises that the arguments

surrounding this point are finely balanced. His decision in this case is based primarily upon the potential differences in costs likely to be inherent in providing different levels of service in different contracts – that this may materially affect the tender prices appropriate for different contracts. He also does not consider that a negotiation with a private company will be the same as that with a public authority seeking to offer a contract for service for an entire county, and that any negotiation on this basis could easily be refuted.

65. Nonetheless the Commissioner does recognise the fact that there is likely to be some overlap in functions, due primarily to the similarity of the actual services being provided, (i.e. waste management and disposal). Although his decision is that the exception in 12(5)(e) is not applicable, he considers that there is merit in considering the public interest arguments in this instance as the arguments are so finely drawn. These considerations are addressed in paragraphs 102 - 125 below.

b) Operational information – schedule 1- 4, 10, 26 & 27

66. The Commissioner has, for the purposes of this Decision Notice, classified information about the actual and specific function of waste management as operational information. He considers that this includes information about how the contractor actually performs the function of waste management for the councils. This information will include the various waste management functions which have been agreed between the parties, the number and types of site being introduced, the number of staff at each site, levels of the staff involved and information about the manner of waste management for the various types of waste being covered by the contract. It also contains information on the various methods of dealing with the bi-products of the waste such as energy, compost, and ash. It does not include specific, technical information about the sites being considered such as electronic or technical diagrams of the facility, or descriptions of the mechanical or chemical processes being utilised at particular facilities. This type of information is considered in the section entitled 'systems and technical information'.
67. Whilst operational information is spread throughout the contract the schedules indicated include sections which deal more specifically with operational matters.
68. Schedules 1- 4 and schedule 10 provide the backbone of the contract. They detail specifically how and when the contractor intends to build the facilities, and how they will provide the services they are contracted to provide. These schedules primarily contain operational information, although some systems and technical information is included, as is some information on planning and development.
69. The contractor has stated that this information is acutely sensitive as it is information obtained by significant capital expenditure in research and development and would be of considerable advantage to its competitors.
70. The Commissioner has carefully considered this argument. The project management of the implementation of the contract will be to an extent proprietary as it will consist of the methods the contractor uses to ensure a smooth transition from the previous waste contract to the current one.

71. The Commissioner notes however that the project plan would need to be tailored depending on the situation in the counties prior to the contract being agreed, and that each project plan will therefore need to be different to others in order to address the different factors in place. He does recognise that certain elements and timelines would be likely to be very similar in other contracts such as the timelines needed to develop and build facilities, how long testing schedules should run and when in the timeline specific planning and acquisition steps are taken forward in the overall project.
72. Additionally, although time has elapsed since the request was made, and a certain degree of this information may now have passed into the public domain, much of the information would still be current as the plans stipulate timelines up until 2016. Some of the facilities in the contract have yet to be built and/or may still require planning permission. It is therefore possible that disclosing this information would indicate preferred sites for acquisition or preferred subcontractors or equipment manufacturers, thereby potentially affecting negotiations on future deals. Should this occur the contractor's negotiations with third parties could be affected if they are aware that a particular piece of land or a particular piece of equipment is the preferred option. This would therefore potentially affect the cost of the contract to the councils and might undermine their ability to obtain best value.
73. The Commissioner has considered the works delivery programme and the service delivery programme. They contain specific information as to how the contractor will build the facilities, the preferred sites and in some cases preferred manufacturers of the equipment to be used. They also highlight in great detail the specific levels of service which the contractor will use when carrying out the contract. As such they defer extensively to a quality management manual contained in schedule 10 for specific working practices.
74. These schedules provide a high degree of oversight into the intended working practices at the various sites. The contractor has stated that the system it uses is a proprietary system, developed over many years, and which is used throughout its operations. It also states that it would be prejudicial to its commercial interests for it to be disclosed to its competitors because of the years of development which have gone into its production. The contractor also states that it is this system which allows the company to be audited and accredited for various ISO 9001:2000 and 14001 quality standards. The argument would be that as a package these schedules demonstrate the high degree of quality the contractor stipulates for the operation of the contract and that this is a marketing point of the contractor when tendering for contracts.
75. The Commissioner has considered this information and his view is that a system which allows for, and demonstrates a smooth transitional process would be a marketing point of the contractor. He also considers that disclosing preferred choices of the contractor or the councils could undermine negotiating positions when agreements are being sought. He also accepts that ISO quality standards accreditation may be a marketing point of the contractor. The systems in place to achieve such a standard could be duplicated and copied by competitors who

would then benefit from the research, development and experience of the contractor in producing the overall system, thereby undermining any competitive advantage the contractor has built up through the development of these systems. The Commissioner's decision is therefore that Regulation 12(5)(e) is engaged. A public interest test therefore needs to be carried out to determine whether this information should nevertheless be disclosed. This is considered in paragraphs 126 to 137 below.

Training directory – schedule 4

76. The contract contains the contractor's training directory - an in depth and proprietary manual for the training and human resource activities which the contractor deploys in relation to its employees. The Commissioner has considered this directory and takes the view that as a proprietary document which has been researched and established by the contractor, its disclosure would be detrimental to the contractor's commercial interests. Competitors who would otherwise need to spend time and money developing their own systems would be able to analyse this information and either use it themselves or adapt sections to their own systems, thus causing a disadvantage to the contractor. Therefore his decision is that this information falls within the scope of the exception and need not be disclosed.

c) Systems and technical information – Schedules 3, 4 & 10

77. Schedules 3, 4 & 10 contain specific information on the intended construction of various plants including the Energy from waste facility. Included in the information is the name of the preferred supplier of some of the planned facilities, although this is stated as being subject to change by the contractor. The Commissioner considers that disclosing preferred contractors prior to finalising agreements with them may have detrimental implications for the contractor as regards its negotiations with third parties, and accordingly where these are named the information falls within the scope of the exception. Where however agreement has already been reached by the third parties this argument is not applicable.
78. The BHCC and the contractor have provided arguments in support of their view that systems and technical information should be excluded from disclosure. Systems and technical information encompasses information on the mechanical, electrical and chemical processes employed in the provision of the services, and includes information such as the electrical and system plans and schematics for composting machinery and an energy from waste facility. Much of this information is contained in system diagrams and written explanations/descriptions of the processes being employed at particular facilities. Much of the information is intended to be supplied to the contractor from named third parties as part of tendering exercises it has carried out when deciding the appropriate machinery or systems to put forward as part of its tender to the BHCC. It is also noted that some of this information is subject to separate confidentiality clauses between the contractor and the commercial manufacturers or suppliers of the systems.

79. Primarily the arguments in support of withholding this information are as follows:

- The information is not otherwise in the public domain.
- It contains commercially sensitive information on how the contractor has approached the waste management contract, including tendering information from third parties.
- It contains detailed technical information on the machinery and systems used by the contractor which could be studied and adopted by competitors of either the contractor or the suppliers of the machinery.
- Disclosure could disadvantage the contractor's ability to tender for other public or private commercial contracts if competitors to the manufacturers of the machinery use this information for their own benefits.
- Many elements of the technical information include details on commercially sensitive systems and processes developed by third parties – e.g. they may be the trade secrets of third parties who have had tenders accepted by the contractor, in confidence, in order for their products to be used should the contractor's bid be successful.

80. The Commissioner has considered these arguments and accepts that the systems and technical information is likely to be commercially sensitive. The information includes detailed plans and descriptions of machinery and processes which are often the commercial property of third party equipment suppliers, and includes technical information which is sensitive to those suppliers.

81. The Commissioner considers that the systems and technical information lies at the heart of the commercial and industrial information which the exception in 12(5)(e) is trying to protect. This information is a detailed description of the systems and processes which gives the contractor its ability to submit a competitive tender. It is the contractor's skill and experience in combining different technical elements with its own operating procedures which allows it to produce a competitive tender whilst also providing it with a profitable return. A disclosure of this information could weaken the contractor's competitive edge by allowing competitors to copy the most innovative or successful parts of the package and implement them with the successful parts of their own systems. The Commissioner is therefore satisfied that, in general, this information falls within the scope of the exception. Some of this information may also have been supplied to the contractor by third party manufacturers. This is discussed further in paragraph 96 below).

82. However the Commissioner is also aware that some of the technical information will provide further information to interested parties as to whether the systems accepted in the tender are appropriate for the types and amounts of waste being dealt with, and the likely environmental considerations these may highlight. For instance some of the technical and engineering descriptions provided to the BHCC include statistics on the emission levels the facilities are likely to generate when handling waste. Regulation 12(9) disapplies Regulation 12(5)(e) from including data on emissions. Hence the Commissioner's decision on this is that any information of this sort will need to be disclosed to the complainant. Information on measures being used by the contractor to control emissions (such as flue chimney treatments) should also be disclosed.

83. In his decision on this the Commissioner has noted that Article 6(6) of the Aarhus Convention requires that public authorities give the public concerned access to information relevant to decision making on particular facilities (including waste incinerators and landfill sites) specifically including a description of the site and the physical and technical characteristics of the proposed activity. This also specifically includes providing access to any estimate of the expected residues and emissions of such sites. The Convention requires that such information should be made available as soon as it becomes available. Directive 2003/35/EC implements this right into European community law in that it requires that the public concerned should be informed as soon as possible of any plans or programmes for such facilities, and have access to *relevant information* about such proposals.
84. The Commissioner's decision regarding the majority of the systems and technical information is that it does fall within the scope of the exception. Accordingly he has to consider whether the public interest in disclosing the information outweighs the public interest in upholding the exception. These considerations are addressed in paragraphs 138 to 147 below.
85. However, in light of the arguments provided above the Commissioner's decision on the information on the likely emissions in this contract is that it, and any measures planned to protect the environment directly relating to this should be disclosed to the complainant.

Company information – schedule 4

86. The contract contains some company information on the contractor such as articles of association and BS (British standards) certificates. This information would be generally available from Companies House. Regulation 12(5)(e) cannot therefore be claimed as the information is not protected by confidentiality. As there are no exceptions in the Regulations for information which is available by other means the BHCC should disclose this information to the complainant.

Personal information – schedule 4

87. Some personal data is included in the contract in the form of names of staff who run particular operations. Regulation 12(3) (as clarified by Regulation 13), states that third party personal data shall not be disclosed where the disclosure would contravene one of the data protection principles.
88. The Commissioner considers that disclosure of the names and details included in the contract is likely to breach the first data protection principle in that it would be unfair to the individual to disclose private personal information which has been provided to the contractor and the BHCC on the basis of the individual's employment with the contractor.
89. The Commissioner does however consider that the names of individuals who are actually running operations should be disclosed. These are responsible positions and there should be an expectation by the individual that his or her name and grade would be disclosed upon request.

h) Planning and development information schedules 1-4, 26 & 36

90. Some of the planning and development information within the contract is now in the public domain as planning applications have been submitted. Limited details of these are available from the councils' websites, and more detailed information is available through the normal public consultation processes required with the planning application process. It is noted that since the time the contract was signed a number of the proposed sites for development have been submitted for planning approval and plans are available from the associated councils planning offices. Accordingly the Commissioner considers that this information can no longer be considered confidential and the information relating to this within the contract should now be disclosed to the complainant.
91. However some planning applications have yet to be submitted. Where this is the case it may be commercially sensitive to the parties to the contract in that it may divulge preferred sites for acquisition to the public which may ultimately affect negotiations with any third party owners of those sites. There is therefore the potential for prejudice to commercial interests should this information be disclosed prior to the acquisition of these sites. The Commissioner's decision is that the exception is therefore engaged by this information. He has therefore considered the public interest test for this information in paragraphs 136 and 148 - 156 below.

Best and Final Offers (Planning and Environmental Supporting Document) / Best Practicable Environmental Option – schedule 36

92. The Commissioner has considered the information held in schedule 36 of the contract. This schedule contains sections of the Best and Final Offer (BAFO) Document and the Best Practicable Environmental Option (BPEO) document. The contractor has stated that this schedule is commercially sensitive as it includes planning information which could divulge preferred sites for development as part of the contracted services. The argument is that such information could be used by competitors and third parties to prejudice the successful carrying out of the contract. The Commissioner has considered this view and agrees that where preferred sites are indicated there is a potential for negotiations to acquire land to be affected by an early disclosure of this information. He has considered this in paragraphs 90 – 91 above.
93. The Commissioner also notes that the information contained within these documents provides detailed explanations as to why particular sites have been selected over others for the potential siting of facilities, backed up by reviews of current planning policies, environmental legislation and environmental impact reviews.
94. Because of this, the Commissioner notes that it would be very difficult to redact small sections of this document to protect the location of preferred sites. Sites are discussed in significant detail and merely removing the names of particular locations would be unlikely to be sufficient to protect the location from discovery, and hence the potential for competitors or land owners to take measures which could interfere with the proposals.

95. The Commissioner's decision is therefore that this information falls within the scope of Regulation 12(5)(e) and a public interest test is therefore necessary. This is dealt with in paragraphs 148 to 156 below.

Cost of third party equipment hired/purchased by the contractor – costs associated with running and maintaining the equipment. Third party tenders to the contractor

96. The Commissioner considers that this information ties directly in with the operating costs of the contractor and the systems and technical information in the contract. A disclosure of this information would provide valuable information on the running costs of the contractor which could allow competitors to work out the profit margins employed by it in contracting with the BHCC. Paragraph 51 addresses this point further. The Commissioner's decision is that Regulation 12(5)(e) therefore applies to the information.

Public interest arguments

General considerations

97. The council has contracted out one of its core functions; to manage the waste of the community appropriately. It has done so using a substantial amount of tax payer's money and the full term of the contract is 25 years. Although a core function has been contracted out, vital information on how appropriate the contract is to the community has been withheld from the public on the basis that disclosing it could affect the economic interests of the contractor and the council. Although the Commissioner accepts that in a tendering process some information, particularly to do with the tendering methods and prices, should be confidential for reasons of fairness and best value, he questions the value to the community of withholding sections of this information beyond that point, particularly for a timescale running the entire length of term of this contract.
98. It is recognised that the sensitivity of the information will wane over time. Both the councils and the contractor have recognised this, and it is because of this that a great deal of the information from the contract has now been disclosed to the general public through the websites of the councils. However the question which remains at issue in this case is whether any of the information the council and the contractor considers sensitive is still so sensitive that the public interest in maintaining the exception still outweighs that in disclosing the information because to do otherwise would cause an adverse effect on the interests of the contractor or the council, and that this would not be in the best interests of the community. If the best interests of the public are best met with the disclosure of this information then the exception in 12(5)(e) will not be applicable even though a degree of adverse effect would be caused to the economic interests of the parties involved.
99. Waste management is a core function of local authorities, and has the capacity to affect all of the community to a very great degree. It can affect the community in a number of ways in addition to the general effects of ensuring household and

commercial waste is dealt with appropriately. This can include environmental concerns – e.g.

- potential pollution created by sites dealing with the waste such as incinerators and composting facilities,
- increased road traffic through various areas by the removal and transportation of waste,
- environmental concerns regarding the destruction of wildlife habitat,
- house prices in the areas being affected through the services being provided, e.g. by proximity to a site, and
- the cost to taxpayers of ensuring a good level of service is rendered, taking into account the above factors.

100. As such the Commissioner has taken into account the fact that there will be a great deal of public interest in the disclosure of information which throws light on whether:

- the BHCC has made an appropriate decision when contracting out a core service to a third party contractor – that such a contract is not in itself detrimental to the interests of the community or tax payers,
- the BHCC has entered into an appropriate contract, for an appropriate price for the services the community requires,
- the BHCC has fully taken into consideration the needs and concerns of the community, both in terms of waste management, but also as regards the health and safety of the community, and any environmental concerns associated with the management of waste,
- the BHCC has ensured adequate safeguards to ensure that the provision of waste services is protected in the event of unforeseen circumstances or over the length of the term of the contract,
- the BHCC has ensured that the contractor has made adequate plans in the event of population growth or reduction or on changes to the legal requirements in managing waste, and
- the BHCC has ensured that adequate safeguards to protect the environment have been established as part of the contract.

101. The counter arguments relate to:

- the strong public interest in confidences being maintained,
- the likelihood of commercial damage being caused to the contractor through a disclosure of information it considers confidential,
- the possibility that in disclosing this information the level of service to the community may be impaired, and
- the possibility that the cost for obtaining services may increase through decreased competition for contracts, thereby creating detriment to the best interests of the community.

Pricing information

102. Although the Commissioner has refuted the arguments put forward that 12(5)(e) applies to the disclosure of the pricing information, he considers it prudent to examine the hypothetical argument that a party's economic interests would be adversely affected through the disclosure of this information. He has therefore considered the public interest arguments relevant to this.
103. There is an argument that a downward pressure on the quality of the services provided would occur if information was disclosed which allowed competitors to analyse previously successful tenders and submit prices which are more competitive than they might otherwise. The contractor would then need to re-evaluate its own pricing structures in future tenders in order to compete with the lower tenders. This pressure could put at risk the quality of services the contractor provides as it seeks to further cut costs, resulting in a slippage of standards.
104. As a result of such pressures, together with the possibility that sensitive commercial information would be disclosed affecting the contractor's other contracts, the contractor could question the value of entering into contracts with public authorities in the future. Disclosure could therefore have the effect of lowering the number of competitors willing to tender for these types of contracts, ultimately forcing prices up for councils procuring services.
105. A further argument is whether a disclosure of tender prices which have been successful with a particular council in the past could dissuade contractors from providing tenders which significantly undercut the previously accepted price. This would have a negative effect upon open competition and could have the effect of increasing the costs for services payable by the council to the detriment of the community.
106. The Commissioner does not accept an argument that service standards could be detrimentally affected by the disclosure of such information. Councils accepting tenders will be under a duty of care to ensure that the companies they contract with are suitable, that processes for the supervision of the contract are inbuilt into the contract, and that appropriate standards of service are maintained by the contractor. The concept of best value takes into account the nature and quality of the service being offered in addition to the price at which the tender is made. There are also many statutory requirements in place to ensure that environmental and health and safety standards meet acceptable levels, and are maintained at that level. The BHCC will be under a duty to ensure that they contract with contractors whose tender demonstrates that they reach those standards.
107. Similarly the Commissioner does not accept an argument that the contractor may not tender for such contracts in the future. Whilst this is entirely the choice of the contractor, the Commissioner notes the tribunal's considerations in the Irish Commissioner's decision in case 98049, 98056 & 98057. In Canada, a duty for public bodies to disclose precisely this sort of information was introduced in the 1990's. The Public Works and Government Services Canada (PWGSC) is responsible for procuring services and goods for over 100 government agencies and departments. Its document "General Conditions - Standing Offers - Good or

Services”, published on 15 August 2006 contains the following clause in its standard acquisition clauses and conditions for public procurement contracts:

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

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

108. The Commissioner therefore considers that this long running programme of disclosure is strong evidence to the effect that a disclosure of limited pricing information in this instance will not result in an overall reduction in private businesses willing to contract with the council.
109. In addition, the Commissioner considers that contracts of this nature may be highly lucrative for the successful contractors and it is therefore unlikely that they would willingly exclude themselves from tenders simply on the basis of a potential disclosure of a limited amount of information. They may consider doing so if there was a serious risk that disclosure would seriously disrupt their future tenders through, for instance, disclosing their commercial or trade secrets, however this is precisely the danger the exceptions in the Regulations seek to protect against.
110. The BHCC argues that a disclosure of this information would be detrimental to the BHCC’s business by compromising its role as a purchaser. The Commissioner has considered whether other contractors would lose confidence in the councils if information the contractor has submitted in confidence is disclosed. His first consideration on this point is that the introduction of the Act and the Regulations has already changed the ground rules as regards the information a public authority may withhold from the general public it serves. This should create a greater understanding in organisations contracting with authorities that only information which successfully passes the criteria in the exceptions, and which it is genuinely in the public interest to withhold will be protected. It is the Commissioner's view that contractors would, in any event, take into account the fact that they would be contracting with a public authority and that the council would therefore be subject to a greater degree of scrutiny than private business. Similarly it would also be clear that the councils’ would be under a duty to be as open and transparent as possible in their dealings given their duty to the local community and taxpayers. The Commissioner's view is therefore that a disclosure of non sensitive information contained in this contract would not substantially change the perceptions of private businesses, given that rights under Freedom of Information are now established and understood.
111. In accordance with this, if information is not commercially sensitive, or has lost its commercial significance then it is unlikely that a disclosure which does not cause detriment would have the prejudicial affects foreseen on the BHCC to its role as purchaser. Contractors would not be put into a situation where they need to consider withholding information from the council for fear of disclosure, or refusing to tender for contracts on the same basis.

112. The Commissioner also considers that businesses should understand that a decision to disclose pricing information in this situation does not equate to a decision to disclose this sort of information in all cases. There are particular circumstances in the disclosure of pricing information from this sort of contract which are unlikely to be duplicated in the vast majority of other situations. The councils' arguments are therefore weakened by the fact that a decision to disclose in this instance does not provide a precedent for disclosure in all future requests for pricing information in other contracts generally.
113. The councils also argue that a disclosure of this information may lead to contractors being reluctant to provide as much information as they have previously when submitting tenders. This could lessen their ability to obtain best value for money. However the Commissioner considers that the implementation of rights under the Act will already have indicated to business the possibility that information it provides could be disclosed as a result of a request, and separate guidance issued by the Commissioner, by the Ministry of Justice (formerly the Department of Constitutional Affairs) and by the Office of Government Commerce has indicated a need for authorities to directly address the potential for information to be disclosed with contractors for some time. This advice and guidance on the implementation of the Act makes clear that authorities should seek to ensure that contractors are provided with a very clear picture of the likelihood of the disclosure of information, and that authorities should not enter into agreements which provide unsubstantiated claims to confidentiality. They should seek to reduce to a minimum, and clearly define with contractors which information it considers meets the necessary criteria to be considered confidential.
114. In any event the Commissioner considers that if information which is commercially sensitive is withheld this would not be the likely conclusion. Public authorities may choose not to accept tenders where information they require to make a fully informed decision is withheld by a contractor, and contractors wishing to win the contract will not withhold information if as a result their bid is automatically diminished.
115. The Commissioner further considered the argument put forward that a disclosure would allow competitors to analyse and use this information to their own advantage. Although he considers this argument holds little weight where only a limited disclosure is made he has considered the public interest arguments if this was in fact the case. It is his view that even if the parties believe that the exception is engaged by this information the public interest arguments would still rest with the disclosure of pricing information.
116. In the event that the disclosure of pricing information would allow an analysis of the methods of tendering of the contractor the following would apply. The Commissioner considers that the contractor in this instance would also then be able to benefit from the disclosure of this sort of information in other contracts, thereby levelling the playing field and weakening its argument that competitors would gain an unfair advantage to some extent.

117. The Commissioner has considered the general nature of the pricing information in the contract. The central public interest in the disclosure of this information lies in creating transparency and accountability in the spending of public money, and in the financial decisions the councils have made. The specific prices paid by the councils for the services being rendered are essential figures in providing effective oversight into the agreement made by the councils.
118. The Commissioner notes that a wider disclosure of this information may allow other councils to make a better judgement of “best value” when considering tenders for similar contracts in the future. A disclosure of this sort of information would allow councils to consider contracts in place in counties with similar circumstances to their own, and consider whether the prices being tendered to them are appropriate for their particular circumstances. At the least this may better enable them to question the composition of the prices being offered by contractors and react accordingly.
119. In addition it is noted that contractors themselves may benefit from the disclosure of similar information from other successful tenders. They will then have information on prices accepted by other councils in other tenders and can use this information when tendering for similar contracts in the future. Further, there is a possibility that new companies may tender for contracts. In this way tenders should become more competitive and this may lead to more efficient, tailored bids being provided to councils from both experienced and inexperienced bidders in the future.
120. The Commissioner has considered the likelihood that disclosure would be detrimental to the commercial and economic interests of the contractor and the councils. His decision is that this would not be the case. However he has also considered the argument put forward by the contractor that disclosing this information would have an adverse effect on its competitive edge because it would face greater competition in other procurement exercises. The Commissioner considers that any increase of this kind is in the public interest, and that that interest overrules the detriment the contractor may suffer as a result of such an increase. Moreover he does not consider that disclosing pricing information would provide commercially sensitive information to a contractor's rivals. It would merely provide an indication of the levels that a contractor has set on a tender which has been accepted by the council in this instance in the past. It is noted that there is no immediate likelihood of further competition for this contract as it still has many years left to run. The Commissioner also considers that commercial damage is unlikely given that this sort of information is commonly disclosed in other jurisdictions.
121. For all these reasons, the Commissioner considers that the greater weight of the public interest rests in allowing more scrutiny of the financial aspects of the arrangements under which a major function of the council is contracted out to private commercial enterprise, at significant cost to tax payers.
122. However it is noted that information on the costs and profits of the company would not provide greater transparency on the contract. The level of costs and profits are the private information of the contractor. The essential information for

accountability to the community the council serves are the factors pointed out in paragraph 100 above. The particular costs and profits factored within the price do not enhance accountability providing the overall price and services amount to best value for money. The overall costs, together with information as to how the contract is to be carried out provide the basic information required to ascertain if the contract best meets the public interest.

123. The Commissioner has considered the public interest in disclosing the methods of calculation from the contract. Methods of calculating payments may provide incentives to the contractor to consider one method of waste management over another, for instance favouring recycling over incineration. Although other sections of the contract specifically provide minimum targets for dealing with waste in particular ways, environmental lobby groups may wish to argue that there is a strong public interest in the public knowing how fees are calculated in order that they may know if appropriate 'green' incentives are tied into the contract. Although the disclosure of the set targets in the contract will provide a certain degree of transparency, this additional information would provide a much clearer idea of the likelihood of the waste being recycled.
124. However the Commissioner recognises that disclosing the methods of calculation could impinge upon the commercial interests of the contractor in that some sensitive information could be divulged to the contractor's competitors such as its charging methods. Again however the Commissioner notes that sensitive information on the levels of costs and profits of the contractor in providing the process will not be disclosed. The Commissioner therefore considers that the overall public interest lies in the public being able to ascertain if the payment methods meet the public interest factors highlighted in paragraph 100 above, and whether suitable incentives are in place in the calculation methods to encourage the contractor to deal with waste according to the waste hierarchy principle. His decision is therefore that the methods of calculation should be disclosed.
125. For the reasons provided above the Commissioner considers that the costs to the contractor for providing the various services, and the profit levels it has set on the contract need not be disclosed in this instance. Schedule 33 should not therefore be disclosed. However Schedule 6 and 12, detailing the overall cost to the council for the services rendered, and the methods and calculations by which the council is charged, should be disclosed.

Operational Information

126. The central public interest in the disclosure of the operational information within the contract is that of accountability. It is the operational information which provides the public with an overview of what has been agreed by the councils. It is this information which will provide a detailed understanding of the processes and methods of waste management agreed to by the councils, how waste will be dealt with, recycling targets levels and consideration for the overall effect the contract will have on the community. Along with the cost of providing these services, the operational information is the basic level information which above all demonstrates that the councils have achieved best value for money, taking into account such matters as cost, health and safety and protecting the environment.

127. Operational information is therefore one of the most vital areas of the contract which needs to be disclosed in order for the general public to fully understand the waste management agreement. Given the current emphasis on landfill avoidance and environmentally friendly processes there is a great deal of public interest in this information being disclosed.
128. On the counter side there is also a strong public interest in confidences being maintained, particularly where it is recognised that the information which was provided to the councils was provided on the basis that it was not to be disclosed further because doing so would affect the contractor's economic interests. The Commissioner recognises that this is the case and places a great deal of weight in protecting the interests of commercial businesses where to do otherwise would damage that business. To do otherwise could affect relationships between authorities and businesses, could detrimentally affect the provision of services to the public, and the ability of authorities to achieve best value or make the best decision in the interests of the community.
129. The Commissioner recognises that by maintaining confidentiality for commercially sensitive information, councils may be able to achieve stronger working relationships with private business, and obtain sensitive commercial information from contractors which allow it to make a better informed decision on the best tender for a particular service. Ordering disclosure of such information could potentially damage this process, undermining the relationship between parties, resulting in less information being provided to councils as a result. This in itself would prove detrimental to the decision making of the councils.
130. The Commissioner has addressed some of these arguments in paragraphs 110 to 113 above. In addition, in this contract, much of the operational information will be disclosed in any event as facilities are built and become available for use. How the contractor carries out the overall process of waste management will therefore become far more transparent to general observers as time passes.
131. It is the Commissioner's view that in the short term, it may prove detrimental to the parties to disclose information which highlights preferred sites, or preferred manufacturers. His view is however that the names of preferred contractors can generally be achieved through very minor redactions to the contract. The question of preferred sites is dealt with more specifically in paragraphs 148 to 156 below.
132. The commissioner accepts the view of the contractor that the information in schedule 10 - The Quality Management Manual, is commercially sensitive. It is a controlled document which has been provided to the council with limitations on its use and to whom it may be copied to. It provides a detailed account of the contractor's methods of business which would be advantageous to its competitors. The council's ability to scrutinise the working methods of the contractor in such detail before offering a tender is of great importance, allowing it to consider whether the contractor has the necessary experience and quality concerns in the provision of its services. Any potential for damaging this process could undermine the council's ability to make a fully informed decision.

133. The arguments in paragraphs 110 – 114 apply here also. The Commissioner considers that businesses will have a greater appreciation of the need for councils to be accountable in their methods. Additionally councils are in a strong position to require information of this sort from contractors in the tendering process, and would be able to dismiss tenders which fall short of providing all of the necessary information for them to make a fully informed decision.
134. The Commissioner recognises that although the manual is proprietary and the contractor will have spent time and money developing it, much of the information it contains will have been stipulated by the requirements of ISO accreditation. It is likely therefore that the majority of ISO accredited systems have similar structures in place and implement similar measures to ensure that the accreditation standards are met. The Commissioner's view is therefore that the commercial damage likely to the contractor by the disclosure of this information would be lessened by this fact.
135. The Commissioner has viewed the manual and considered whether disclosure would add to public debate or increase public understanding of the councils' decisions. He accepts that there is a strong public interest in allowing access to information which underlies the way the contractor intends to provide its services, and how it addresses its health and safety performance. In particular there is a public interest in knowing that the parties have taken account of necessary safeguards for health and safety and for the safety of the surrounding environment. Such interests can outweigh the commercial damage such a disclosure could cause. However given the commercial sensitivity of the information in this schedule to the contractor, and given the fact that the Commissioner has decided that other operational information more specific to the running of this contract will be disclosed which also addresses such concerns, the Commissioner's decision is that the above factors do not override the public interest in maintaining confidence for this information in this instance. His decision is therefore that the information in schedule 10 falls within the scope of Regulation 12(5)(e) and that the public interest in disclosing this information is outweighed by that in maintaining the exemption.
136. The Commissioner views the information in schedules 1- 4 as of transitory commercial significance only. Once the services are being fully provided there could be little expectation on behalf of the contractor that the information would remain confidential. Its commercial sensitivity would be greatly reduced by the fact that its operating techniques could be discerned by its commercial competitors through observation and visiting the sites concerned. Pollution Prevention and Control (PPC) permits are available from the Environment Agency providing an overall picture of the amounts of waste dealt with and the likely pollution levels as a result of this, and planning applications would be available for consultation from the council for competitors to consider. In addition the contractor already provides a degree of information on its operational techniques through its websites. It has also stipulated in the contract that it will allow educational visits to various sites, including its Energy from Waste facility. This programme of education, whilst meritorious, would disclose much of the operational information currently being exempted from disclosure in response to this request. The Commissioner does not accept that disclosing this sort of

information at this time provides any particular commercial disadvantage over disclosure at a later time. He has also taken account of the impending requirement that such information should be made available "as soon as possible" through regulations stipulating the right of individuals to participate in an authority's decision making process on such facilities.

137. Accordingly the Commissioner considers that the public interest test favours the disclosure of this information, subject to the limited exceptions detailed above in relation to which the Commissioner considers that the public interest in maintaining the exception outweighs the public interest in disclosure.

Systems and technical information

138. The central public interest arguments in the disclosure of this information lie in producing transparency and accountability on council decisions and the spending of public funds, and in disclosing information on systems being employed by the contractor (and therefore by or on behalf of the council), which could have a detrimental effect upon the environment.
139. Arguments surrounding the handling of waste are a central concern of lobby groups who believe that there may be bias towards the use of Energy from Waste facilities as against the recycling of waste by other methods. Arguments have also been put forward that Energy from Waste plants require specific tonnages of waste in order to produce the necessary levels of heat and power to make them cost effective, and target recycling levels may need to be overlooked in order to provide adequate levels of waste for these facilities to continue productively.
140. There are also arguments by some groups that incineration technologies are unsafe in that their bi-products may pollute the environment and have adverse effects upon the community surrounding such sites. To a large extent the processes used in these types of processes are already known, are generally available and have already been commented on by such groups. The Commissioner notes for instance the general explanation of the processes and (in their view) the associated concerns with this type of system published on the Greenpeace website. In addition the contractor provides an overview of the process of incineration in a leaflet available from its website.
141. He also notes that in order to properly scrutinise the decisions made by the council in agreeing the contract it may be necessary for much of the systems and technical information to be disclosed. This would allow interested parties with access to the necessary expertise or experience to properly analyse the full or likely impact of the decision to accept a tender including a specific type of process or facility.
142. However the Commissioner notes that specific emission level data would not be exempted from disclosure under 12(5)(e) and so information on the levels of emissions forecast to be produced by such facilities would already need to be made available to the general public, as would information on the measures put in place to reduce and control these.

143. The Commissioner also notes that European Community standards for emissions apply, and that the councils have agreements from the contractor that these levels will be maintained. The emission levels of such facilities would not be exempt from disclosure and he considers that this significantly weakens the argument that all technical information should be disclosed in order for experts to properly assess the full impact of the facilities. Information which addresses the public health aspects of such facilities also needs to be licensed by the PPC permits and these are also made available to the public by the Environment Agency.
144. The Commissioner also notes that under Article 7(4) of Directive 2003/4/EC, in the event of any imminent threat to human health or the environment caused by a failure of safety systems, any information which could enable the public likely to be affected to take preventative measures would need to be disseminated immediately and without delay. Other legislation in force in the UK also requires the disclosure of information held by facility owners on their emissions into the air at regular intervals. Overall therefore there are already measures to ensure that public safety requirements are met.
145. As regards the public interest in protecting the commercial interests of the parties, many of the arguments put forward in paragraphs 110 to 114 apply. If disclosure did affect the competitiveness of the contractor, or divulged commercial secrets of any third party then it is possible that less information would be supplied to the BHCC in tenders, thereby affecting its ability to make a fully informed decision, and potentially affecting its ability to obtain best value. Without full knowledge of the systems and technical equipment to be employed by a contractor it would be difficult for the BHCC to consider the full impact of employing a particular contractor, and public and environmental safety could therefore be put at risk. In addition, contractors could choose not to tender for contracts if in doing so they could detrimentally affect their competitiveness in other contracts or their relationships with third parties. The loss of such contractors from the tendering process would reduce the competitiveness of such tenders and ultimately lead to an increase in costs to the BHCC and thereby taxpayers. Contractors may also face problems seeking full information from third party suppliers of equipment if the suppliers thought that their commercial secrets could be divulged if the contractor tendered for public contracts, hence contractors could be more prepared to withhold this information from councils, or may be put in a position where they are legally required to withhold this information from councils in spite of the fact that this could be detrimental to their tenders.
146. The Commissioner's decision highlighted in paragraph 53 that information on the cost of the equipment paid by the council would need to be disclosed. Therefore the public interest in showing that value for money in the spending of public funds would to a large extent be met. There is little public interest in knowing the cost to the contractor of purchasing or leasing the equipment as has been discussed above.
147. The Commissioner's decision is therefore that the public interest in disclosing this sort of information is significantly weakened by other information which already needs to be disclosed, and his view is therefore that the overall public interest rests

in maintaining confidence for the systems and technical information within the contract.

Best and Final Offers (Planning and Environmental Supporting Document)/ Best Practicable Environmental Option – schedule 36

148. These documents provide a detailed overview of the reasons for including and placing specific facilities at specific sites within the counties. The information contained within these documents provides detailed explanations as to why particular sites have been selected over others for the potential siting of facilities, backed up by reviews of current planning policies, environmental legislation and environmental impact reviews. The documents provide clear arguments in support of the siting of particular facilities, which would be of immense use to the general public and interested parties in understanding the reasoning of the contractor (and therefore the councils) in accepting this proposal in the contract. It is these documents which, above all else explain the reasoning behind the contractor's decisions, and which will provide much of the information which would shed light on the public interest factors explained in paragraph 100 above.
149. The Commissioner has previously stated that the contractors negotiating position on its preferred sites for acquisition may be damaged by the premature disclosure of those sites. However, when considering these documents the Commissioner recognises that information identifying the preferred sites cannot easily be redacted without much of the information in the documents also being redacted.
150. These documents specifically address the principal policy issues influencing the choice of options available to the contractor in putting forward particular sites for development. They also identify and address the planning and environmental issues which arise at those particular sites. As such even if the specific location details are redacted it would still be possible to identify the actual locations from the rest of the information.
151. The Commissioner has taken into account of the fact that the councils have powers to issue compulsory purchase orders (CPO's) for land under the Acquisition of Land Act 1981 (as amended), where the land is required for social and economic development. Orders under section 226(1)(a) of the Town and Country Planning Act also allow such orders to be issued where there is clear public interest for the councils to acquire the land because acquisition is likely to contribute to achieving the promotion or improvement of the economic, social or environmental well being of the area. Such orders need to be confirmed by the Secretary of State. The Commissioner notes that since the request for information was made by the complainant in this case the councils have issued a CPO for land needed for the Energy from Waste facility.
152. Where such orders are used to acquire land compensation levels for landowners are determined by statute on the basis that the owner should receive "neither less nor more than his loss". The Commissioner considers that this power of local authorities greatly reduces the argument that negotiations would be detrimentally affected by a premature disclosure that the site is the contractor's preferred option. Where competitors or land owners are seeking to take advantage of this in

- negotiations the councils would, where it is within their powers to do so, be able to use CPO's to obtain the land at reasonable cost to complete the development. The Commissioner is aware however that the costs of legal actions to defend decisions on CPO's and compensation levels could in itself be expensive. This may therefore be detrimental to the public interest in achieving best value.
153. The Commissioner notes that a disclosure of this information would provide interested parties with a complete overview of the choices considered, how planning guidelines are met (or not) by siting particular facilities in particular places and would provide greater clarity on the options and decisions made about the environmental impact of constructing sites in particular places. This would add value to the public debate on where particular facilities should be situated, and would provide greater understanding of the reasons for the decision of the council to agree the contract. There is therefore a very strong public interest in this information being disclosed.
154. It is important to recognise that the choices made in this document, although agreed by the councils in the contract, do not necessarily mean that the sites put forward would receive planning permission, or that the preferred sites would remain preferred with the passage of time.
155. The Commissioner recognises that a disclosure of the intended location of a particular site could be detrimental to land or house prices in areas surrounding the preferred site. As the location of particular sites are not yet finalised and the contractor may not have taken any steps as of yet to acquire the sites involved, it is possible that a premature disclosure could prove detrimental to the property values of nearby land owners without real cause. On the counter side it is likely that land owners or lobby groups would wish to know that particular sites have been named as preferred by contractors as early as possible in order that they may make ready any submissions for the planning consultation process or to make decisions as to the future of their land as early as possible.
156. The Commissioner has weighed the above factors and it is his view that the greater public interest lies in the disclosure of this information. The Commissioner considers that the importance of the information which would be highlighted by the disclosure of these documents is such that it overrides the potential detriment which could occur through a disclosure of the information prior to acquisition being finalised.

Cost of third party equipment hired/purchased by the contractor – costs associated with running and maintaining the equipment. Third party tenders to the contractor

157. The Commissioner has considered the public interest in maintaining the duty of confidence over the disclosure of this information. He notes that this information is generally information which is sensitive to the contractor or to the third parties involved. Costing information etc provided in this information would provide competitors with an idea of the costs the contractor incurs in carrying out its functions. This would help competitors better analyse the likely profit margins the contractor has included to the cost of providing the services.

158. A disclosure of this sort of information could also highlight areas where the contractor effectively reduces its costs in order to facilitate a lower overall cost to the council for the contract. Disclosing this could allow competitors to analyse and use this information to their own advantage, thereby potentially negating the contractor's ability to create a competitive advantage over its rivals.
159. However the Commissioner recognises that a wider knowledge of this information would benefit competitors who may then be able to reduce their own costs, and thereby potentially the costs it passes on to councils in future tenders. If this were to occur there would be more likely that best value would be achieved by other councils in future tenders.
160. The Commissioner recognises the importance of protecting the interests of suppliers to the contractor, who may have provided discounted rates to the contractor which they would not wish disclosed to other parties. The third parties may object to a disclosure of this information to public bodies if it would significantly affect their bargaining and negotiating positions in future transactions. There is therefore the possibility that they may require contractors not to disclose some elements of this information to public authorities in future tenders. The Commissioner notes that the provision of this information is useful to councils when considering all the aspects of a tender, and that a loss of this sort of information from tenders could be detrimental to a full consideration of the offer which has been made. This loss may mean that the decision the council comes to is a less informed decision than otherwise it might be. The Commissioner's decision is therefore that in respect of this information the public interest in maintaining the exception outweighs the public interest in disclosure.

The Decision

161. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

The BHCC was entitled to rely upon the exemption in regulation 12(5)(e) when considering the following information:

- Specific systems and technical information which is not otherwise in the public domain. Information on emissions or potential emissions should however be disclosed, as should descriptions of the intended methods of dealing with the bi-products of the waste management process. The Commissioner's decision is that this type of information engages the exception in regulation 12(5)(e) and that the public interest in maintaining the exception outweighs the public interest in disclosing the information.
- Specific information on the costs and profits of the contractor held in the contract. The Commissioner's decision is that this information engages the exception in regulation 12(5)(e) and that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

- Specific information on the likely clawback of costs through the sale of bi-products of the waste management system which aid in lowering the overall cost to the contractor. The Commissioner's decision is that this information engages the exception in regulation 12(5)(e) and that the public interest in maintaining the exception outweighs the public interest in disclosing the information.
- Schedule 10 – The Quality Management Manual. The Commissioner's decision is that this information engages the exception in regulation 12(5)(e) and that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

The council applied regulation 12(5)(e) to the information stipulated below, however the Commissioner's decision is that regulation 12(5)(e) was not applicable for the following reasons:

- All information relating to pricing contained within the contract other than that highlighting specific costs or profits of the contractor. The Commissioner's decision is that this information falls within the scope of regulation 12(5)(e) however the public interest in disclosing it overrides the public interest in maintaining the exemption.
- All operational information contained within the contract other than the names of preferred subcontractors for the supply of equipment and services which are not already known. The Commissioner's decision is that this information falls within the scope of regulation 12(5)(e) however the public interest in disclosing it overrides the public interest in maintaining the exemption.
- All information about emissions levels, or likely emission levels held within the contract. The Commissioner's decision is that this information does not fall within the scope of regulation 12(5)(e) due to the qualification of regulation 12(5)(e) stipulated in regulation 12(9).
- All planning and development information held within the contract, other than that containing systems and technical information falling within the scope of the exception as discussed above. The Commissioner's decision is that this information falls within the scope of regulation 12(5)(e) however the public interest in disclosing it overrides the public interest in maintaining the exemption.

Steps Required

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

To disclose the information as stipulated below, namely:

- All information relating to pricing contained within the contract other than that highlighting specific costs or profits of the contractor.
- All operational information contained within the contract other than the names of preferred subcontractors for the supply of equipment and services which are not already known.
- All information about emissions levels, or likely emission levels held within the contract
- All planning and development information held within the contract, other than that containing systems and technical information falling within the scope of the exception as discussed above.

163. However the Commissioner does not require the following information to be disclosed:

- Specific systems and technical information which is not otherwise in the public domain. Information on emissions or potential emissions should however be disclosed, as should descriptions of the intended methods of dealing with the bi-products of the waste management process.
- Specific information on the costs and profits of the contractor held in the contract.
- Specific information on the likely clawback of costs through the sale of bi-products of the waste management system which aid in lowering the overall cost to the contractor.
- Schedule 10 – The Quality Management Manual.

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

Failure to comply

165. 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

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

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

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

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

Dated the 14th day of November 2007

Signed

**Graham Smith
Deputy Commissioner**

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

LEGAL ANNEX

Duty to make available environmental information on request

5.

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

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

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

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

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

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

Exceptions to the duty to disclose environmental information

12.

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5); and
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -

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

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