

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

Date: 12 August 2010

Public Authority: London Borough of Hammersmith and Fulham
Address: Finance and Corporate Services
2nd Floor, Hammersmith Town Hall Extension
King Street
London W6 9JU

Summary

The complainant requested the names and addresses of the London Borough of Hammersmith and Fulham Council's (the council's) pre-paid waste sack clients under the Environmental Information Regulations 2004 (EIR). The council responded by withholding the information under section 43(2) of the Freedom of Information Act 2000 (the Act) on the grounds that disclosure would be likely to prejudice its commercial interests and those of its waste collection contractor. However, following the intervention of the Commissioner, the council agreed that the requested information was environmental under the EIR and sought to withhold it under Regulation 12(5)(e). The Commissioner concludes that the 12(5)(e) exception is engaged apart from the first three digits of the clients' postcodes. For the remaining information the public interest test favours the requested information being withheld. The Commissioner requires the council to disclose the first three digits of the clients' postcodes.

The Commissioner's Role

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

Background

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

The Request

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

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

4. The council responded on 25 February 2009 stating that it was withholding the information under section 43(2) of the Act on the grounds that disclosure would be likely to prejudice its commercial interests and those of its waste collection contractor.
5. On 7 March 2009 the complainant requested an internal review reiterating his belief the information requested was environmental and therefore covered by the EIR and not the Act.
6. The council responded on 3 April 2010 upholding its original decision.

The Investigation

Scope of the case

7. On 14 June 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. Specifically he asked the Commissioner to consider the council's

application of the Act and its decision to withhold the requested information.

Chronology

8. On 3 July 2009 the Commissioner wrote to the council and requested the withheld information which the council provided on 31 July 2009.
9. On 4 January 2010 the Commissioner invited the council to reconsider the information request under the EIR on the basis that the names and addresses of its pre-paid waste sack clients would be information on the measure of waste collection, which is a measure affecting or likely to effect the elements of the environmental under 2(1)(a) of the EIR (in particular land and landscape) via the factor of 'waste' in 2(1)(b) of the EIR. The Commissioner also asked a number of questions relating to the council's pre-waste sack service.
10. On 8 January 2010 the Commissioner wrote to the council again and explained in more detail as to why he believed the information requested was covered by the EIR.
11. The council responded on 25 January 2010. It stated that having taken legal advice and looked into the matter more fully it agreed that the request should be processed under the EIR. However, it went on to say that it would still withhold the information and cited Regulation 12(5)(e) in the EIR. The council then provided answers to the Commissioner's questions regarding its commercial pre-paid waste sack service.
12. On 28 January 2010 the Commissioner wrote to the council asking for further and more detailed arguments as to why it believed Regulation 12(5)(e) of the EIR was engaged and should be maintained in the public interest.
13. The council responded on 5 March 2010 with further and more detailed arguments and maintained its position that the requested information was excepted under Regulation 12(5)(e) of the EIR.
14. The Commissioner then requested further clarification of a number of issues raised by the council in an email dated 9 March 2010 to which a response was provided on 24 March.

Findings of fact

15. The council collects domestic and commercial waste in partnership with its waste collection contractor, Serco Limited (Serco) with whom it

entered into a seven year contract in 2008 for waste collection, recycling and cleaning services allegedly worth up to £140 million. See the article in letsrecycle.com entitled 'Serco wins £140m waste contract in West London'.¹ The contract (with the commercial terms removed) is on the council's website and provides that Serco will undertake an integrated waste collection, recycling and street cleaning service for the borough. It covers both domestic and commercial customers. Almost 90% of the waste collected is from domestic customers with most of the rest from commercial clients. The council's share of the total business market currently stands somewhere between 25% to 27% which includes both container based contracts and pre-paid waste sack agreements. The contract with Serco does not include a guarantee of work levels. See the 'Contract for Waste Collection Recycling and Street Cleansing Services' between the council and Serco.² The council's commercial waste and recycling service³, its commercial waste charges⁴ (including those for its waste sacks) and details of its private sector competitors⁵ are published on its website.

Analysis

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

16. Section 39 of the Act states that information is exempt information if the public authority holding it is obliged, by regulations under section 74 of the Act, to make the information available to the public in accordance with those regulations or would be so obliged but for any exemption under those regulations. The regulations under section 74 of the Act are the EIR. Information falls to be considered under the EIR if that information is environmental information. Environmental information is defined in Regulation 2 of the EIR.

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http://www.letsrecycle.com/do/ecco.py/view_item?listid=37&listcatid=321&listitemid=9732

2 http://www.lbhf.gov.uk/Images/FinalRevisedWasteandStreetsSpecification_tcm21-138724.pdf

3 http://www.lbhf.gov.uk/Directory/Business/Commercial_waste_and_Recycling/

4

http://www.lbhf.gov.uk/Directory/Business/Commercial_waste_and_Recycling/homepage.asp

5

http://www.lbhf.gov.uk/Directory/Business/Commercial_waste_and_Recycling/Commercial_waste_collection/78921_Commercial_waste_companies_operating_in_H_F.asp

17. A full version of Regulation 2(1) of the EIR which deals with the interpretation of the Regulations and the definition of environmental information is set out in full in the attached legal annex.
18. The Commissioner's view is that the requested information (consisting of the council's pre-paid waste sack clients) is environmental within the meaning of the EIR as it is information on (i.e. concerning or about) the measure of waste collection, which is a measure affecting or likely to effect the elements of the environment under 2(1)(a) of the EIR (in particular land and landscape) via the factor of 'waste' in 2(1)(b).
19. In view of this the Commissioner believes that 'measure' and/or an activity is one which affects or is likely to affect the 'elements of the environment', namely soil (in terms of landfill) land (streets) and landscape (rubbish tips) and 'factors' such as 'waste' as well as measures or activities designed to protect those elements.
20. The information is clearly on a measure that is likely to affect the environment. The names and addresses of the council's pre-paid waste sack clients effectively reveal the identity and geographical location of the businesses within its area that use a specific waste collection and disposal service. This is information about the measure or activity.
21. The Commissioner also believes that the requested information is environmental by virtue of Regulation 2(1)(b) as it is information on (i.e. concerning or about) the factor of waste.
22. The Commissioner has therefore concluded that the requested information is covered by the EIR which is in line with two of his previous decisions on this subject; Ealing Council FS50255080 and Camden Council FS5025077. The council also accepts that the information is covered by the EIR.

Exemptions

Presumption in favour of disclosure

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

Regulation 12(5)(e) of the EIR

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

Is the information commercial or industrial in nature?

26. The exception in Regulation 12(5)(e) only protects the confidentiality of commercial or industrial information.
27. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade, and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. It should be remembered that not all financial information is necessarily commercial information. For example, a lot of information about a public authority's finances or resources will not be commercial information.
28. The Commissioner's view is that "industrial" in this context can be taken to refer to any business activity or commercial enterprise, and is unlikely to expand the scope of the exception to encompass non-commercial information. However, he will consider arguments that non-commercial information is nevertheless industrial information on the facts of a particular case.
29. In the present case the Commissioner believes that the withheld information, which comprises of the names and addresses of the council's pre-paid waste sack customers, is commercial information for

both the council and the businesses concerned. It is essentially a list of customers of the council and it is information relating to the running of the businesses in question. Although the meanings are not defined, looking at various other legal definitions, broadly speaking 'industrial' information is information relating to the processes adopted and commercial information relates to the running of the business. The Commissioner believes that the definition of commercial information is broad and would therefore cover the type of information in this case. This is also the view held by the council.

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

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

Common law of confidence

31. When considering whether the common law of confidence applies, the Commissioner's approach will be similar in some respects to the test under section 41 of the Act, although there are also some key differences. The key issues the Commissioner will consider when looking at common law confidences under this heading are:
- Does the information have the necessary quality of confidence? This will involve confirming that the information is not trivial and is not in the public domain.
 - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and/or any standard practice regarding the status of information. A useful test is likely to be to consider whether a reasonable person would have considered that the information had been shared in confidence.
32. However, in contrast to the Commissioner's approach under section 41 of FOIA, there is no need to consider here whether there would be an unauthorised disclosure to the detriment of the confider. This is because there is no need to establish an actionable breach of confidence for the purposes of this exception. This approach is also supported by the fact that the element of detriment (or adverse affect) will need to be considered. See below for more detail.

Contractual obligations of confidence

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

Statute

34. Although regulation 5(6) disapplies any statutory bars on disclosure for the purposes of the EIR, a statutory bar will still mean that confidentiality is provided by law for the purposes of this exception. However, the other limbs of the exception – and the public interest test will still need to be satisfied.
35. The Commissioner finds that there is no evidence in this case that any confidentiality was provided by statute. Accordingly, he will consider whether any confidentiality was provided by common law and/or contract by considering the above tests.

Common law of confidence

Does the information have the necessary quality of confidence?

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

Is the information trivial?

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

Is the information in the public domain?

39. Information will not have the necessary quality of confidence if it is already in the public domain. See the case of *Coco v Clark* when Megarry J stated that 'however confidential the circumstances of communication, there can be no breach of confidence in revealing something to others which is already common knowledge'. See also the Information Tribunal's decision of *S v the Information Commissioner* and the General Register Office EA/2006/0030.
40. In the present case it could be argued that the information on the identity of which businesses use the council's pre-paid waste sack business is already in the public domain. The Commissioner notes that the waste sacks used by businesses are 'totally different' to those used by domestic customers in that they are a different colour (white/orange not black) and specifically marked as 'trade specific'. Furthermore, the Commissioner notes that the collection days, times and frequency are different to those for domestic customers. Also the council's waste is collected by Serco liveried refuse lorries. It therefore follows that the colour and design of the sacks, the collection days, times and frequency and the type of collection lorry used would give a member of the public a clear visual image of the identity of which business use the council's pre-paid waste sack services.
41. The council does not accept that the requested information (in the list format in which it is held) is already in the public domain. However, it does agree that that given sufficient time and resources it would be possible for someone to prepare a rough list of the council's commercial clients by carrying out a detailed daily street survey and consulting a business directory.
42. On balance the Commissioner has concluded that the requested information in the list format in which it is held by the council is not in the public domain.

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

43. In this case, the requested information was provided to the council by its business customers and by the council to Serco under a contract. The information was therefore shared twice.

Information shared by the business customer and the council.

44. When a business customer enters into a contract with the council for the collection/recycling of its rubbish it provides various details

including its name and address which are recorded in a standard 'Agreement for the removal of trade refuses and recyclables'. The terms of this agreement are available on the council's website⁶ and do not include a confidentiality clause. At the same time as entering into the contract the business customer would also be required to complete and sign an annual waste transfer note (AWTN) giving details of the type and amount of waste emanating from its premises⁷. The AWTN gives details of the customer's name and address but does not contain a confidentiality clause.

45. The council has not provided the Commissioner with any evidence (either in the form of statements from its business customers or contractual clauses or letters) establishing that the information provided to it by its commercial customers is shared on the understanding that it will be treated in confidence. The council acknowledges that there is no confidentiality clause in its agreement with its business customers but has pointed out that at no time are they advised that their details might be disclosed to a third party. The council has pointed out that businesses are under a legal duty to have formal arrangements for the collection and disposal of their commercial waste. They do not have to use the council's services and are at liberty to compare prices before entering into a contract with a particular provider. However, having entered into a contract with a service provider the council believes that business customers should be confident that the information they provide should remain confidential.
46. The Commissioner does not believe the council has provided sufficient evidence to establish that the circumstances under which its business customers share information with it import an obligation of confidence. The collection and recycling of waste is a visible and public operation and the identity of businesses using the council's services would be apparent to anyone carrying out a street survey.

Information shared by the council with Serco.

47. The council provides Serco with details of its business customers to enable Serco to collect and where appropriate recycle their commercial waste. This is done under a 'Contract for Waste Collection Recycling and Street Cleansing Services'.⁸ The council has argued that the information it shares with Serco to enable it to carry out its contractual

⁶ 'Agreement for the removal of trade refuses and recycles'
http://www.lbhf.gov.uk/Images/SampleTermsConditions_tcm21-141907.pdf

⁷ [http://www.lbhf.gov.uk/Images/SampleDutyOfCare\(3\)_tcm21-141947.pdf](http://www.lbhf.gov.uk/Images/SampleDutyOfCare(3)_tcm21-141947.pdf)

⁸ http://www.lbhf.gov.uk/Images/FinalRevisedWasteandStreetsSpecification_tcm21-138724.pdf

obligations of operating a commercial and domestic waste collection and recycling service is provided on the understanding that Serco will not disclose the information to third parties. The 'Contract for Waste Collection Recycling and Street Cleansing Services'⁹ includes a confidentiality clause (19) which the council argues is designed to maintain, amongst other things, information relating to its business. It states that 'each Party will keep confidential the terms of this Agreement; and any and all Confidential Information that it may acquire in relation to the other Party except in so far as information is required for the purposes of TUPE information and consultation and PROVIDED THAT any such disclosure shall be limited to employees' representatives who agree to be bound by these confidentiality obligations'. The council has therefore concluded that its contract with Serco imposes obligations of confidentiality on both parties.

48. The Commissioner accepts from the foregoing that the circumstances under which the council shares information with Serco are sufficient to import an obligation of confidence.

Contractual obligations of confidence

49. The Commissioner also accepts that the circumstances and contractual terms under which information is provided by the council to Serco are sufficient to create an obligation of confidence.
50. The Commissioner therefore concludes that the requested information is subject to a duty of confidence which is provided by law in view of the contractual relationship between the council and Serco.

Is confidentiality required to protect a legitimate economic interest?

51. The Commissioner considers that, to satisfy this element of the test, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. This will require a consideration of the sensitivity of the information and the nature of any harm that would be caused by disclosure.
52. Broader arguments that the confidentiality provision was originally intended to protect legitimate economic interests at the time it was imposed will not be sufficient. The Commissioner considers that, taking into account the duty in paragraph 4.2 of the European Directive¹⁰ to interpret exceptions in a restrictive way, the wording "*where such*

⁹ http://www.lbhf.gov.uk/Images/FinalRevisedWasteandStreetsSpecification_tcm21-138724.pdf

¹⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

*confidentiality **is** provided to protect a legitimate economic interest*” (as opposed to “*was provided*”) indicates that the confidentiality of this information must be objectively required at the time of the request in order to protect a relevant interest.

53. It is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish (on the balance of probabilities) that some harm would be caused by disclosure.

54. In support of his approach, the Commissioner notes that the implementation guide for the Aarhus Convention¹¹ (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance:

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

55. In the present case the Commissioner believes that the confidentiality is designed to protect the legitimate economic interests of the council which provided the names and addresses of its business customers to Serco.

56. The council receives income from its business clients (including those which pre-pay for their refuse sacks). It then pays Serco for the collection and recycling of their commercial waste in accordance with its contract. The council believes that disclosure of the identity of its business customers will have an adverse impact on its economic interests by reducing its income, diminishing its market share, making it easier for its competitors to target its customers with marketing initiatives, reducing its ability to provide an integrated service and maintain standards and reducing its economies of scale.

57. While the council accepts that competitors may approach its existing business customers to seek their custom by either cold calling or random mail shots, it believes that disclosure of its actual customer list would allow competitors to specifically target its customers with a real and significant risk of migration away from its services. Competitors can already access the council’s charges (which are published on its website) and the council believes that this information together with its customer list would give competitors an unfair advantage through specific marketing initiatives. Obviously, a loss of customers would equate with a loss of income; not only for the council but also Serco as

¹¹ <http://www.unece.org/env/pp/acig.pdf>

their income is determined by the number of commercial properties from which they collect waste.

58. The council has pointed out that the importance of income generation during what they refer to as the current protracted financial downturn cannot be overstated. The Commissioner accepts this was a relevant factor at the time the request was made. The council believes that not only should it be protecting the income it receives from existing commercial services but also seeking to gain additional income through the legitimate expansion of its service portfolio and market share
59. The council also accepts that its business customers may terminate their agreements with it at any time and for any reason by giving three months notice in writing. However, it believes that by publishing a list of its business customers would give competitors an unfair advantage by allowing them to target specific customers with a view to securing their business.
60. The council also believes that any loss of customers by the publication of its business list will result in a negative impact on its ability to provide an integrated waste service and maintain existing standards. The council has argued that in the event of its commercial waste and recycling market share being lost to the private sector, the degree of control it exercises will be eroded and the costs of providing the same level of service will increase accordingly. It believes that any such increases will impact on budgets and will have to be passed onto residents and/ or commercial customers in the form of increased council tax, increased waste collection charges and/ or reductions in the levels of service elsewhere.
61. The council believes that cleanliness of the local environment is dependent on a number of factors, including, but not limited to the its ability to sweep streets on a frequency commensurate with land type (e.g. housing density, type of street and locality, the volume of pedestrian and vehicular traffic etc.) and the effective and responsive removal of both household and commercial waste in accordance with published service schedules. A further key element is the council's ability to take enforcement action, where evidence can be obtained to show who might be responsible for littering, fly tipping and leaving waste out for collection either on the wrong day or, in the case of trade waste, either over-producing or leaving waste out of collection for which no valid collection contract exists.
62. The council has pointed out that under the terms of its contract with Serco, it operates both street cleansing and waste (and recycling) collection services. The council also operates the enforcement service

using directly employed staff. In providing both the waste and street cleansing services and the enforcement function, the council is able to provide a more integrated and effective service to its residents and the business community as all of these two elements of the council's provision work closely together and the common data about problem areas is shared. The council believes that by striving to increase its market share of the commercial waste and recycling market, it will retain greater overall control of the street scene and the cost effectiveness of providing these services is enhanced.

63. The council has alluded to a reduction of its economies of scale should it lose business customers to the private sector. Its contract with Serco provides for a fully integrated waste collection, recycling and street cleaning service for its domestic and business customers. The council has argued that any loss of its business customers would mean that it would cost more for providing the same level of service to its remaining customers.
64. The Commissioner has concluded that the economic interest to which the confidentiality is required to protect is that of the council as a result of its contract with Serco to provide a fully integrated waste collection, recycling and street cleaning service. Disclosure of the information would adversely affect the legitimate economic interests of the Council.
65. However, the Commissioner finds that disclosure of the first three digits of the postcodes of the Council's pre paid waste sacks would not adversely affect the legitimate economic interests of the Council. No significant commercial detriment would occur from this high level disclosure as it would only give competitors a general overview of the geographical spread. For this limited information the exception is not engaged.

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

66. Although this is a necessary element of the exception in Regulation 12(5)(e) of the EIR, the Commissioner believes that once the first three elements (listed above)¹² are established it is inevitable that this limb will be satisfied.

¹² 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?

67. On balance the Commissioner believes that the council's legitimate economic interest to which the confidentiality under contract is deemed to protect would be adversely affected by disclosure of its list of business customers, apart from the postcode information mentioned above.

Is the public interest in maintaining the exception outweighed by the public interest in disclosing the information taking into account the presumption in favour of disclosure?

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

Public interest arguments in favour of disclosing the requested information

69. There is a clear public interest in the council being open, transparent and accountable regarding the operation of its integrated waste collection, recycling and street cleansing service to enable and enhance the public understanding of and participation in the public debate of the issues of the day.
70. The council believes that it is already open and transparent regarding its commercial waste collection and recycling services by publishing details on its website¹³. The published information includes the council's prices for waste sacks, the terms under which it sells them and its collection days. The information also includes the details of its contract with Serco (with the commercial terms removed) and also details of its competitors in the private sector offering similar services. The council believes that this published information is sufficient to assist the public in its understanding of its waste collection and recycling services including those for its commercial customers.
71. There is a public interest in allowing individuals to understand decisions made by local authorities in relation to its waste management and recycling services. However, there is little evidence in the present case to suggest that the publication of the council's list of business customers will assist the public's understanding of its commercial waste collection service. Business customers have a statutory duty of care under the Environmental Protection Act 1990 to ensure that any waste they produced is handled safely and within the law. However, businesses are free to choose which organisation (either the council or

¹³ http://www.lbhf.gov.uk/Directory/Business/Commercial_waste_and_Recycling/homepage.asp

- a private contractor) they use to collect and dispose of their waste. Furthermore, business customers that use the council's services are free to terminate their agreement at any time and for any reason providing they give three months notice.
72. There is also a public interest in private businesses being able to benefit from being offered cheaper waste collection services than the council currently provides.
 73. The complainant believes that an increase in competition between the council and commercial waste collection companies would have a positive and beneficial effect on the overall quality of waste management services. However, the council believes that there should be a level playing field for competing for new customers and considers it would be put at an unfair advantage by having to disclose its customer list without when its commercial competitors having to do likewise. The council has pointed out that a loss of business clients as a result of perceived unfair competition would adversely affect its ability to provide an integrated waste collection and disposal service. The council already discloses details of its commercial waste services (including prices) which it believes should ensure adequate competition with its commercial counterparts.
 74. The collection and recycling of commercial waste is a visible and necessary public service. The disclosure of the council's list of business customers (for pre-paid waste sacks) would confirm the identity and location of those businesses and give an indication as to the waste they produce for collection and disposal. The complainant has pointed out that different waste disposal services would operate different collection, storage and ultimately disposal regimes (with consequentially different environmental impacts). Furthermore, he argues that different businesses would produce different types of waste and feed these into the disposal service, directly impacting on the environment to an extent determined by the specific disposal process used. This would provide the public with a 'greater awareness of environmental matters' which is the purpose of the European Directive 2003/4/EC (at paragraph 1) and therefore the EIR. However, the council's list would only reveal its own commercial customers not those who utilise the services of its competitors.
 75. There is a public interest in promoting fair competition in what is acknowledged as a highly competitive market. The council believes that it has achieved this by commencing a detailed and comprehensive tender evaluation in 2007 which resulted in a 7 year integrated waste collection and street cleaning contract being signed with Serco in 2008.

See the council's Cabinet minutes for 4 February 2008¹⁴. Fair competition means that public and private organisations should (so far as is practicable) operate on a level playing field and have parity of opportunity. Private waste companies are not subject to the same level of transparency as the council regarding the publication of their prices and tender evaluations both of which are available on its website. Furthermore, the council publishes a list of the commercial waste collection companies operating in its borough.¹⁵ The council therefore believes that additional transparency by disclosure of its customer list, resulting in a potential loss of business, would not be in the public interest. Such disclosure would afford private competitors the advantage to directly target the council's customers by undercutting their prices and reducing its market share. In terms of disclosure promoting fair competition, the Commissioner has not given this argument significant weight.

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

76. There is a strong public interest in providing and maintaining high quality public services to both local residents and businesses at cost effective and competitive prices. The council achieves this by contracting with Serco to provide an integrated waste collection, recycling and street cleaning service. The council believes that by using a single contractor to carry out its different functions assists it in minimising enforcement requirements and in reducing costs. In other words the loss of commercial waste customers would adversely affect the council's ability to maintain and improve levels of service and adversely affect the environmental conditions in the Borough. The council maintain there is little public interest in disclosing commercially sensitive customer list which might result in a reduction of the quality and an increase in the cost of an integrated service.
77. The Commissioner recognises that there is a strong public interest in confidences being maintained particularly where they are incorporated into confidentiality clauses in commercial contracts. This is the case with the council's contractual agreement with Serco. Confidentiality is particularly important where disclosure of the requested information would adversely affect the legitimate economic interests of the council.

¹⁴ http://www.lbhf.gov.uk/Images/Supplementary20080402_tcm21-92690.pdf

¹⁵ http://www.lbhf.gov.uk/Directory/Business/Commercial_waste_and_Recycling/Commercial_waste_-_collection/78921_Commercial_waste_companies_operating_in_H_F.asp

78. There is a public interest in preventing additional costs to council tax payers or a loss of income to the council (or its waste contractor). The council has argued that in the event of its commercial waste and recycling market share being lost to the private sector the costs of providing the same level of service will increase. According to the council this increase will impact on budgets and the cost will have to be passed onto residents and or commercial customers in the form of increased council tax, increased waste collection charges and/or reductions in the level of services elsewhere.
79. There is a public interest in maintaining the cleanliness of the local environment which the council believes would be harder to achieve were it to lose market share due to the disclosure of its commercial customer list. The council has argued that cleanliness of the local environment is dependent on a number of factors, including, but not limited to its ability to sweep streets on a frequency commensurate with land type (e.g. housing density, the type of street and locality and the volume of pedestrian and vehicular traffic) the effective and responsive removal of both household and commercial waste in accordance with published service schedules. Furthermore, the council has suggested that its ability to take enforcement action where cleanliness breaches occur would be adversely affected where its market was reduced. For example, where evidence was produced to show the identity of business customers responsible for littering, fly tipping, leaving waste out for collection on the wrong day, over-producing waste, or leaving out waste for collection where no valid collection contract existed.

Balance of the public interest arguments

80. The names and addresses of the council's pre-paid waste sack customers has been provided to Serco in confidence to enable it to provide a contractually binding consolidated waste collection, recycling and street cleaning service. This contract was awarded to Serco following a detailed comprehensive tender evaluation process and the terms of the agreement (excluding the financial arrangements) are published on the council's website together with its commercial charges and private sector companies offering alternative waste collection services. The cost and quality of the council's integrated service is dependent upon economies of scale. These would be hampered should it lose market share to the private sector. The Commissioner therefore believes that the public interest in the council being transparent for its decision making and offering a cost effective and comprehensive waste collection and street cleaning service in a competitive market place is significantly met by the information it currently publishes on its website. The Commissioner is not convinced that disclosure of its pre-

paid waste sack clients will enhance the public's understanding of the way it operates and improves the waste collection and recycling services it provides.

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

The Decision

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

Steps Required

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

Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

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

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

Dated the 12th day of August 2010

Signed

**Steve Wood
Head of Policy Delivery**

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

Legal Annex

Environmental Information Regulations 2004

Regulation 2(1) In these Regulations –

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

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

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

“the Commissioner” means the Information Commissioner;

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

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

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

Regulation 12(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

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

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

Regulation 12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

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