

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)  
Decision notice**

**Date:** 5 December 2011

**Public Authority:** Department for Regional Development  
**Address:** Clarence Court  
10 – 18 Adelaide Street  
Belfast  
BT2 8GB

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to an environmental maintenance contract for a specific geographical area.
2. The Information Commissioner's decision is that the Department for Regional Development (DRD) should have handled the request under regulation 12(5)(e) of the Environmental Information Regulations 2004 but that it correctly withheld the information.
3. The Information Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

**Request and response**

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4. On 17 August 2010, the complainant wrote to DRD and requested information in the following terms:

*"Term Contracts for Environmental Maintenance **2010** – EMN1  
Northern Division.*

1. *The name(s) of the sub-contractors engaged in weed control operations in the sections.*
2. *Confirmation of the number of weed control applications provided (as recorded by your office) in 2010 season to date.*

3. *A copy of the measurement format as billed for first payment under the contract".*
5. DRD responded on 16 September 2010. It stated that it did not hold information in respect of parts one and two of the request, and that it was withholding the information in respect of part three relying on section 43 of FOIA.
6. Following an internal review DRD wrote to the complainant on 17 February 2011. It stated that it was maintaining its decision that it did not hold information in respect of parts one and two of the request but did not refer to part three of the request.

### **Scope of the case**

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7. The complainant contacted the Information Commissioner to complain about the way her request for information had been handled.
8. During the course of his investigation, and after he inspected the information, the Information Commissioner determined that DRD had considered the request under the incorrect access regime. DRD had handled the request under FOIA rather than EIR.
9. The Information Commissioner notes that the complainant subsequently made another request on 27 October 2010 for the same information as that at part one of this request. The complainant had sent a number of letters to the Northern Division section engineers in the Roads Service.
10. He further notes that on 5 November 2010, in response to the request of 27 October 2010, DRD wrote to the complainant confirming the details of the names of the subcontractors involved in carrying out weed control operations in different areas.
11. Having considered the information at part one of the request, the Information Commissioner has decided not to include it in the scope of his investigation. Accordingly, the Information Commissioner has confined the scope of his investigation to parts two and three of the request, and considered this information by reference to EIR and not FOIA.

## Reasons for decision

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12. The withheld information in this case forms part of, and relates to, the carrying out of environmental maintenance contracts for the supply of contract services for environmental maintenance – in this case weed control operations in the Northern Division.
13. The complainant asked for information about the number of weed control operations and the measurement format as billed for the first payment under the 2010 contract for EMN1 in the Northern Division.
14. The Information Commissioner understands that the contractor information can be defined under regulation 2(1)(c) as a measure or activity, in this case the weed control operations on an environmental maintenance contract and the measurement format for the first payment for the contract. The information Commissioner has identified this information as affecting or likely to affect the state of the elements as defined under regulation 2(1)(a), in this case the landscape.
15. The Information Commissioner, having inspected the withheld information at part three of the request, is satisfied that it is clear that it too is environmental information for the purposes of the EIR. He has made this determination as the information can be defined as an administrative measure likely to affect an element of the environment, in this case various control operations to maintain the landscape such as grass cutting.
16. Having considered that the information is environmental the Information Commissioner finds that DRD should have considered the request under EIR not FOIA.
17. Part two of the request was for the number of weed control applications carried out in accordance with the contract for the Northern Division in the 2010 period. DRD told the complainant that it did not hold the information and it informed the Information Commissioner that this information was not collated as part of the contract as it was not required or necessary. The Information Commissioner having discussed this aspect of the request with DRD is satisfied, on the balance of probabilities, that he can reasonably conclude that the information is not held by DRD.
18. The Information Commissioner has considered the handling of part three of the request which was for the measurement format as billed for the first payment on the 2010 EMN1 contract for the Northern Division.

19. In withholding the information DRD relied on section 43(2) of FOIA, which is an exemption to protect the commercial interest of any person. As the Information Commissioner has considered that FOIA is the incorrect access regime he has considered the equivalent exception under EIR.
20. The Information Commissioner has therefore focussed on the exception provided at 12(5)(e) of EIR which makes clear that a public authority may refuse to disclose environmental information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
21. For the Information Commissioner to agree that regulation 12(5)(e) of the EIR applies, it must be demonstrated that:
  - i. the information is commercial or industrial in nature;
  - ii. the information is subject to a duty of confidence provided by law;
  - iii. the confidentiality is required to protect a legitimate economic interest; and
  - iv. the confidentiality required to protect a legitimate economic interest would be adversely affected by disclosure.
22. Regulation 12(5)(e) of the EIR is also subject to the public interest test. In addition to demonstrating that the above bullet points are met for each document, DRD must also demonstrate that the public interest in maintaining this exception outweighs the public interest in disclosure.
23. Part three of the request relates specifically to the measurement format as first billed by the contractor on the EMN1 contract for 2010. The Information Commissioner understands, having inspected the information, that the measurement format can be best described as the specific detail of how the contractor billed DRD for the environmental maintenance operations carried out by it. The Information Commissioner understands that the information is financial information and would include financial information specific to that contractor – for example, the rates of £x per square metre for grass cutting in a given geographical area, whether carried out in that area in that period or not. The information also clearly shows the total amounts billed by the contractor where work had been carried out in specific geographical areas in that period.

24. The financial rates information was provided as part of the successful tendering bid for the contract. The Information Commissioner accepts that the detail includes information specific to the commercial operation of the company in carrying out specific functions. Accordingly, the Information Commissioner accepts that there would be an expectation of commercial confidence given in law for providing the information in a situation where competitors are bidding for the same or similar contracts in the future.
25. The Information Commissioner has considered whether confidentiality is required in order to protect a legitimate economical commercial interest. As already stated the information in this case is the specific financial rates and charges billed by the company to DRD. The Information Commissioner has inspected the information and it is clear to him that the information is specific to the company and formed part of the successful bid for the contract. He is therefore satisfied an obligation of confidence is required to protect the economic interests of the company.
26. DRD told the Information Commissioner that it was its view that disclosure of the information would prejudice the commercial interest of the contractors as it believed that, should the information become known, it would affect the ability of those contractors to effectively compete for other similar contracts. It told the Information Commissioner that such similar contracts came up on a regular basis.
27. Having considered the arguments put forward by DRD the Information Commissioner is satisfied that the information being commercial in nature does give rise to a duty of confidence and that confidentiality of that information is required to protect the legitimate commercial interest as described. He is further satisfied, having inspected the information, that disclosure of that information would adversely affect the commercial economic interest of a number of companies.
28. The Information Commissioner, having inspected the withheld information, is satisfied that an adverse effect on the economic and commercial interests of the companies would occur if the quality submission information were disclosed and accordingly that regulation 12(5)(e) is engaged.

***Public interest***

29. Since the regulation is engaged, the Information Commissioner must consider whether the public interest test favours disclosure. EIR specifically state that a presumption in favour of disclosure should be applied. Some weight must therefore be attached to the general

principles of achieving accountability and transparency. This in turn can help increase public understanding and participation in decisions taken by public authorities.

30. In addition to the general considerations, the Commissioner also appreciates that there is a strong public interest in being as transparent as possible in relation to any measures that would have a significant impact upon the environment or which concern public money.

### ***Public interest arguments for disclosure***

31. DRD argued that the disclosure of the information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed participation by the public in the democratic process.
32. The complainant argued that disclosure of the information could contribute to the public interest in how decisions to spend public money are made and contribute to an understanding of value for money.
33. The Information Commissioner notes that under the EIR there is a specific presumption in favour of disclosure. He accepts the arguments that disclosure of the specific information in this case could contribute to openness and transparency in how decisions to spend public money are made and attaches significant weight to this argument.

### ***Arguments against disclosure***

34. Specifically to the withheld information DRD argued that disclosure would not be in the public interest as it could lead to competing firms being in an unfair advantageous position when submitting tenders for similar environmental maintenance contracts across Northern Ireland. DRD told the Commissioner that with this information a rival contractor could structure its bids in future public or private sector competitions to gain advantage. This would be both unfair to the contractors and in the longer term affect DRD's ability to achieve best value for money in future competitions and that this would clearly not be in the public interest.
35. The Information Commissioner attributes significant weight to the argument that an unfair advantage could be gained by competing firms if the information on financial rates and charges billed to DRD were to be disclosed. The Information Commissioner accepts that it would not be in the public interest if such competitions could not be fairly competed for.

36. The Information Commissioner has considered whether, given the geographical area of Northern Ireland, it could be considered that the same contractors may continually compete for the same contracts in the various districts of Northern Ireland when contract renewals arise. He takes the view that the competitive market in Northern Ireland is confined to relatively few competitors so that, if specific quality submissions and scores achieved by competitors in previous tender bids were known, it would affect future bids for those similar contracts. The Information Commissioner has attributed significant weight to this argument.

### ***Balance of arguments***

37. The Information Commissioner accepts that under regulation 12(5)(e) there are certain circumstances in which information can be withheld if it can be seen that disclosure would harm the commercial interests of a third party or the public authority itself. Therefore there is a public interest in ensuring that the commercial confidences are not prejudiced in circumstances where it would not be warranted and proportionate.
38. The Information Commissioner understands that there is a strong public interest in public authorities being as accountable as possible in relation to decisions that affect the environment and concern public money.
39. However, he does not accept that accountability arguments are as strong as those relating to the commercial interests of companies which are engaged in fair competition. Having inspected the specific information, he accepts DRD's arguments that the financial rates are so specific to the company for specific areas of work that disclosure of that information would be disproportionate and not warranted. Accordingly he has determined that the public interest in withholding the information outweighs that for disclosing the information.

### ***Procedural matters***

40. Under regulation 11 of EIR an internal review must be completed within 40 working days of the receipt of request for review. The Information Commissioner notes that the complainant requested a review of the decision on 13 August 2010 but that a review was not conducted by DRD until 17 February 2011 which far exceeded the 40 working days stipulated. This is a breach of 11(4) of the regulations.
41. The Information Commissioner reminds DRD of its obligations in this regard and also draws its attention to the Code of Practice on the discharge of the obligations of public authorities under the Environmental Information Regulations 2004 (SI 2004 No. 3391).

## Right of appeal

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

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

43. 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.
44. Any notice of appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**