

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

**Date:** 18 June 2013

**Public Authority:** Hertfordshire County Council  
**Address:** Information Governance Unit  
County Hall  
Pegs Lane  
Hertford  
Hertfordshire  
SG13 8DE

**Decision (including any steps ordered)**

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1. The complainant requested documents regarding the New Barnfield procurement situated within the boundaries of Hertfordshire County Council (HCC). HCC provided a significant amount of information but also withheld additional information by virtue of regulations 12(5)(e) and 12(5)(b) of the EIR.
2. The Commissioner's decision is that HCC has correctly relied on regulation 12(5)(b) in relation to Appendix N of the Final Business Case. HCC has also correctly relied on regulation 12(5)(e) in respect of the Final Business Case, the relevant appendices, the Contract and all relevant Schedules with the exception of Table 2 of Schedule 11. The Commissioner is unable to make a decision in this notice as regards exceptions in respect of Schedule 3 as HCC has been unable to provide a complete list of contents of all Schedule 3 information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with a complete list of the contents of Schedule 3 and issue a fresh response under the EIR.
  - Disclose the information withheld under Table 2 of Schedule 11 of the Contract.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 18 January 2012, the complainant wrote to HCC requesting the following information:

*"I wish to make a request under the **Environmental Information Regulations (EIR) 2004** [complainant's emphasis] for documents pertaining to the New Barnfield procurement. ...*

- *In particular, I am requesting access to all redacted sections of the Contract and the Final Business Case. " [Complainant's emphasis].*
6. HCC responded on 8 March 2012. It confirmed that an updated copy of the Final Business Case for the Residual Waste Treatment facility was available online and provided the appropriate link. It also confirmed that whilst several previous redactions had now been removed, other redactions remained by virtue of regulation 12(5)(e) of the EIR. HCC also cited regulation 12(5)(b) in relation to Appendix N of the Final Business Case on the basis that the information was covered by Legal Professional Privilege (LPP). With regard to the Contract, HCC confirmed that additional documents from Schedule 3 had now been published but it refused to disclose a significant amount of information from the Contract and its schedules by virtue of regulation 12(5)(e) of the EIR. It also confirmed that it had not provided the majority of information from Schedule 3 on the basis of regulation 12(4)(b). Finally, HCC confirmed that it was relying on regulation 13 to withhold a very small amount of personal information.
  7. Following an internal review HCC wrote to the complainant on 4 April 2012. HCC confirmed that it was satisfied that the information redacted from both the Final Business Case and the Contract by virtue of regulation 12(5)(e) was correct. It also confirmed that its decision to withhold Appendix N of the Final Business Case by virtue of regulation 12(5)(b) was correct. Finally, it informed the complainant that due to the size of Schedule 3, it agreed with the original decision to refuse this information on the basis of regulation 12(4)(b).

## Scope of the case

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8. The complainant contacted the Commissioner on 10 April 2012 to complain about the way his request for information had been handled. He expressed concern at the level of redactions in both the Final Business Case and the Contract and was keen to secure release to the maximum extent.
9. The information falling within the scope of this request includes the Final Business Case and the Contract between HCC and Veolia. The Final Business Case includes Appendices A to T. Of these, the Commissioner notes that HCC has published Appendices A, E, F, H, O, Q, S and T on its website in full and HCC has recently invited the complainant to view Appendix I. These do not therefore fall within the scope of this investigation. With the exception of Appendix N which has been withheld by virtue of regulation 12(5)(b), all remaining Appendices have been withheld on the basis of regulation 12(5)(e).
10. The Contract between HCC and Veolia also includes 33 Schedules. Schedules 6, 9, 10, 14, 15, 18, 20, 22, 27, 28, 29, 31 and 32 have been disclosed in full and do not therefore fall within the scope of the Commissioner's investigation. Schedules 13 and 24 were not used therefore, also fall outside of the scope of this investigation. All other schedules do however form part of this investigation.
11. HCC originally refused to provide the information withheld from Schedule 3 on the basis of regulation 12(4)(b) of the EIR as it considered that the cost of compliance with this part of the request made it manifestly unreasonable. HCC estimated that Schedule 3 contains 5000 pages and the time necessary to consider whether any exceptions to disclosure contained in the EIR were relevant, made the request manifestly unreasonable.
12. However, following further contact with the Commissioner, HCC subsequently confirmed that it was relying on regulation 12(5)(e) for the information withheld from Schedule 3.
13. The Commissioner notes, that in his request for an internal review, the complainant confirmed that he accepted the redaction of legally prohibited items such as signatures. Additionally, in his subsequent complaint to the Commissioner, the complainant confirmed that he accepted the withholding of information subject to legal constraints. As HCC had referred to the Data Protection Act 1998 ('the DPA') in its refusal notice as a legal reason for withholding this type of information, the Commissioner has not included any information withheld on the basis of regulation 13 in this notice.

## Reasons for decision

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### Regulation 12(5)(e)

14. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose 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.
15. HCC is withholding information from the FBC and the following Appendices B, C1, D, G, J, K, L, M, P and R on the basis of regulation 12(5)(e). HCC is also relying on regulation 12(5)(e) for the information withheld from the Contract and its following Schedules: 1, 2, 3, 4, 5, 7, 8, 11, 12, 13, 16, 17, 19, 21, 23, 24, 25, 26, 30 and 33.
16. However, Regulation 12(9) of the EIR states that the extent that environmental information relates to emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs 12(5)(d) to (g).
17. The Commissioner notes that this request for information is likely to include information relating to emissions. In his assessment of this information he has therefore considered whether any of it relates to emissions.
18. The Commissioner has previously decided that regulation 12(9) does not discern between emissions which have occurred and emissions which are forecasted.
19. In his consideration of the information, the Commissioner has applied the plain and natural meaning of the words 'emission' and 'emit'. In the Shorter Oxford English dictionary these are as follows:

*"something emitted; an emanation" and "to give off, send out from oneself or itself (something imponderable, as light, sound, scent, flames etc) discharge, exude"*

respectively. Generally therefore, he considers that emissions will be a by-product of another activity or process added (or potentially added) to the environment and over which any control is relinquished. In accordance with these definitions and the emphasis placed on the release of information relating to emissions in the European Directive 2003/4/EC on public access to environmental information implemented by the EIR, he will give a broad interpretation to the phrase *"information on emissions"*.

20. As referred to in paragraph 18 of this notice, information on emissions includes predicted or forecasted emissions. The Commissioner is satisfied information on emissions is sufficiently broad to encompass assumptions upon which such predictions are based as well as information that details the possible consequences of such emissions.
21. Based on the above, the Commissioner is satisfied that all information withheld under regulation 12(5)(e) contained within the Final Business Case, its Appendices, the Contract and its various Schedules (with the exceptions of Schedules 3 and 11) do not relate to emissions.
22. However, the Commissioner notes that the information withheld from Table 2, Schedule 11 provides details of the Contractor's guaranteed air emission limit values in respect of dust, various gases including carbon monoxide and lead. As he does not discern between emissions which have occurred and emissions that are forecasted he considers that the information in Table 2, Schedule 11 is information directly on emissions. In view of this, the information cannot be exempted under regulation 12(5)(e) due to the application of regulation 12(9).
23. The Commissioner also notes that Schedule 3 contains information relating to emissions and has previously ruled in case reference FER0445318 (7 January 2013), that the WRATE report contained in this Schedule does in fact relate to emissions. Whilst the Commissioner also considers that other documents in this Schedule relate to emissions, it is beyond the scope of this notice to specify these as he is unable to make a ruling regarding regulation 12(5)(e) in relation to the information withheld from this Schedule.
24. As stated in paragraph 11 of this notice, HCC has estimated that Schedule 3 contains some 5000 pages and whilst the Commissioner cannot confirm HCC's estimate, he can confirm that it is indeed voluminous. The Commissioner also acknowledges that HCC has spent a significant amount of time considering the vast number of documents comprising Schedule 3. However, it is the Commissioner's view that he is yet to receive a full table of contents of Schedule 3 and without sight of such a table, it is not possible to determine HCC's reliance on the exceptions cited for this Schedule in its entirety.
25. The Commissioner would wish to point out that he originally believed that Schedule 3 consisted of Parts 1-25 and parts A-D. Following a meeting at HCC's premises in January 2013, it became clear that this was incorrect and the Commissioner understood Schedule 3 to consist of eight Method Statements (MS) each containing a varying number of attachments. However, the existence of additional documents suggests that this may be incorrect.

26. The Commissioner notes that HCC confirmed on 22 February 2013 that [named document] is not linked to a MS but one of the general appendices in Volume 6 of Schedule 3 Contractor's Proposals. The Commissioner is also having difficulty placing the WRATE documents within the contents of Schedule 3 thus far provided. This notice will not therefore contain a decision in respect of HCC's reliance on regulation 12(5)(e) for information withheld from Schedule 3.
27. As he has determined that all other information withheld on the basis of regulation 12(5)(e) does not relate to emissions, he has now gone on to consider a full analysis of that exception.
28. In his assessment of whether regulation 12(5)(e) is engaged, the Commissioner will consider the following questions:
  - Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality required to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?
29. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive because if the information was disclosed under the EIR, it would cease to be confidential.

**Is the information commercial or industrial in nature?**

30. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
31. The Commissioner has considered the information withheld on the basis of regulation 12(5)(e). He notes that it either relates to the commercial activities of HCC, the Contractor (Veolia) or its various sub-contractors. He is therefore satisfied that the information is commercial in nature.

**Is the information subject to confidentiality provided by law?**

32. In relation to this element, the Commissioner considers that 'provided by law' will include confidentiality imposed on any person under either the common law of confidence, contractual obligation or statute.
33. As stated in paragraph 31 of this notice, the withheld information either relates to the commercial interests of HCC or those of Veolia.

### *The Contract and Schedules*

34. HCC has informed the Commissioner that there is an explicit contractual obligation of confidence between HCC and Veolia regarding this information under clauses 85.2 and 85.3 of the contract. It has further confirmed that the contract was executed under seal. It has also confirmed that it meets regularly with Veolia to review its current level of disclosure of the information.
35. The Commissioner accepts that the circumstances and contractual terms under which the Contract and its Schedules was agreed between HCC and Veolia were sufficient to create an obligation of confidence. He has therefore concluded that the information withheld under regulation 12(5)(e) is subject to a duty of confidence which is provided by law.

### *The Final Business Case and its Appendices*

36. HCC has confirmed that whilst some of the Appendices of the Final Business case have been incorporated into the Contract and are therefore covered by a contractual obligation of confidence, it considers that the bulk of the FBC and its Appendices are covered by the common law of confidence.
37. When considering whether the common law of confidence applies, the Commissioner's approach is similar in some respects to the test under section 41 of the FOIA. The key issues the Commissioner will consider are:
  - Does the information have the necessary quality of confidence? This involves confirming the information is not trivial and not in the public domain.
  - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.
38. Having considered the withheld information, the Commissioner is satisfied that the information is not trivial. Additionally, no evidence has been presented to the Commissioner to indicate that the information is in the public domain. The Commissioner therefore considers that the information does have the necessary quality of confidence.
39. HCC considers that an obligation of confidence exists in relation to this information. The FBC and its Appendices was presented to DEFRA as part of its bid for Private Finance Initiative (PFI) funding to assist it in procuring a long-term solution for the treatment and disposal of residual waste in Hertfordshire. It was submitted to DEFRA with an implied duty of confidence for final approval of credits subject to financial and



contractual close. DEFRA would have understood that the information submitted to it as part of HCC's bid for PFI implied a duty of confidence.

40. The Commissioner is therefore satisfied that the information was shared in circumstances importing an obligation of confidence and considers that the common law of confidence applies to this information.

**Is the confidentiality required to protect a legitimate economic interest?**

41. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect. In the Commissioner's view, 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 the disclosure. In accordance with various decisions heard before the former Information Tribunal, the Commissioner interprets '*would*' to mean '*more probable than not*'.
42. HCC considers that the disclosure of the information outlined above would cause detriment to the commercial interests of both itself and Veolia.

*The Final Business Case and relevant appendices – Veolia's economic interests*

43. As stated in paragraph 39 of this notice, the FBC is part of a bid for PFI funding to assist it in procuring a long term solution for the treatment and disposal of residual waste in Hertfordshire. HCC has explained that it contains details and scores of Veolia and other organisations who took part in the tendering process and considers that releasing this information would adversely affect the commercial interests of Veolia and those other organisations, as it would allow rival organisations to undercut them, or to identify areas of weakness in their bid submissions in future tenders for contracts of this sort.
44. Veolia has argued that disclosure of this information would allow its commercial rivals to understand its bidding strategy and use this understanding to give themselves an advantage in future tenders of this sort. Veolia has explained that it operates in a hugely competitive market and whilst some information regarding available technologies is widely known amongst its competitors, the individual differences which make up the FBC and its appendices are not. These differences and the way a service can be packaged for pricing are highly significant and unique to Veolia.



45. The withheld information includes details of breakage costs which played a significant part in its bidding strategy. It also includes details of technical solutions which if disclosed would allow its competitors to obtain commercial advantage in similar projects of this nature.
46. Veolia has also argued that disclosure of this information would harm its relationship with its sub-contractors, and in particular, its chief sub-contractor for construction, as it would reveal details of the financial agreements between them.

*The Final Business case – HCC's economic interests*

47. HCC considers that disclosure of the information withheld from the Final Business Case and its appendices (with the exception of Appendix N) would adversely affect its own commercial/economic interests because if information relating to Veolia's agreement with HCC were to be released it would displace the trust established during the contractual negotiations. It has added that the contract, including design, build and operate phases is expected, if successful, to run for 30 years. It is essential therefore that the trust established to date, is not undermined by the disclosure of this information.
48. HCC has further argued that disclosure of information in respect of Veolia and other companies who submitted tenders in relation to this high profile project would receive wide attention. HCC believes this would discourage other commercial organisations from bidding for future HCC contracts if they believed commercial information provided in confidence might also be released. This in turn would prejudice HCC's commercial interests by reducing its ability to obtain best value for the residents of Hertfordshire in future contracts.
49. Disclosure of the FBC and its appendices would further harm HCC's commercial interests as there are options within the contract to re-negotiate in the event of a planning failure. If information which HCC has withheld from the FBC were to be made available it would identify information which Veolia is not currently privy to. Disclosure of this information would reduce HCC's ability to negotiate best terms on a subsequent contract in the event that planning failure occurs.
50. HCC has also stated that the FBC contains financial information with regard to its proposed and planned expenditure as submitted to DEFRA. This includes confidential options which may be considered in the event of a planning failure. Disclosure of this information would therefore particularly harm the commercial interests of HCC in the event of future contract re-negotiation. HCC has confirmed to the Commissioner, that at the time of writing this notice, the Planning Application is awaiting a Planning Inquiry due in September 2013. The Commissioner accepts

that not only was this a possibility at the time of the request but that it remains a real possibility at the time of writing this notice.

*The Contract and Schedules - Veolia's economic interests*

51. Veolia considers that disclosure of the withheld information from the Contract and its various Schedules would allow its commercial rivals to understand its bidding strategy. It has argued that they could use this understanding to give themselves an unfair advantage in future tenders of this sort. As with the FBC and the relevant appendices, the arguments focus on the fact that Veolia operates in a highly competitive market. It adds that although some information regarding available technologies is widely known, the individual technical differences which it has proposed and the way it has put this particular contract tender together and negotiated pricing is particularly valuable information to its competitors.
52. Veolia considers that disclosure would also harm the economic interests of its main sub-contractor by affecting the price they would be able to negotiate in future construction contracts.

*The Contract and Schedules – HCC's economic interests*

53. HCC has argued that it is at the start of a 30 year relationship with Veolia and there are terms in the contract about this relationship, including estimates of profits from certain activities. If Veolia loses trust in the Council as a result of disclosure, it would affect the Council's economic interests.
54. For example, HCC has explained that the terms of the contract between itself and Veolia assumes confidentiality throughout the duration of the planning application process. If HCC failed to observe confidentiality, it would be required to re-negotiate the terms and this would be to its disadvantage as it would delay the project. This is a large project and any delays in bringing the waste treatment facility into operation would cost HCC some £7 million per annum in landfill tax and gate fees. HCC therefore considers that there is considerable harm to its economic/commercial interests resulting from disclosure of the information contained within the contract and its schedules.
55. It has further argued that whilst the contract with Veolia was publicly announced on 27 July 2011 details of the final contract were still being worked on. It was announced at the time that Veolia needed to complete the relevant environmental impact assessments and prepare the necessary planning application. The latter was expected to be submitted later in the year. HCC has confirmed that at the time of the request the contract still depended upon a successful outcome to its planning application which was not expected to be considered until

August 2012 at the earliest. HCC has further confirmed to the Commissioner, that at the time of writing this notice, the Planning Application is awaiting a Planning Inquiry due in September 2013.

56. HCC has further argued that as the planning application is made to the County Council, in order to maintain impartiality, it has established ethical walls between the procurement/waste disposal interests and the County Development Unit who are responsible for advising on the merits of the planning application and the County Council's Development Committee who will decide the outcome of the planning application. Disclosure of the information would therefore harm its economic position as it would leave it vulnerable to criticism of impartiality.

### **Would confidentiality be adversely affected by disclosure?**

57. As the first three elements of the test cited at paragraph 28 of this notice have been established, the Commissioner is satisfied that disclosure of the FBC, its relevant appendices, the Contract and its Schedules into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests of HCC and Veolia. He has therefore concluded that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the information.

### **Public interest arguments in favour of disclosing the information**

58. It should be noted that regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure. This emphasis reflects the potential importance of environmental information to the public. The Commissioner will therefore always attach some weight to the general principle of transparency.
59. HCC has acknowledged that there is a public interest in allowing scrutiny of how public money is spent and ensuring value for money when purchasing goods and services.
60. HCC has further acknowledged that disclosure may facilitate the accountability and transparency of public authorities for decisions taken by them, including the procurement process.
61. It also recognises that disclosure may allow individuals to better understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions.

62. HCC also accepts that the Energy from Waste project has a high public profile and is controversial in nature and that this translates to a strong public interest in disclosure.

### **Public interest arguments in favour of maintaining the exception**

63. The Commissioner considers that arguments in favour of maintaining the exception must always be inherent in the exception that has been claimed. The interests inherent in regulation 12(5)(e) are the public interest in protecting the principle of confidentiality and that of avoiding commercial detriment.
64. HCC has argued that disclosure of the information at the time of the request, (and even at this stage), would cause detriment to the principle of confidentiality. It therefore considers that there is a strong public interest in maintaining the principle of confidentiality as not only would disclosure undermine the established trust which has been developed between itself and Veolia, and in so doing damage their working relationship, but it would damage the general principle of confidentiality itself.
65. The confidentiality is also required to allow HCC to maintain the ethical walls it has constructed between its procurement function and its planning function. HCC has explained that in this instance, a separate function is required to assess the contractor's planning application on its merits as it would be difficult to maintain HCC's independence if the terms of the contract in full were disclosed.
66. HCC also considers that there is strong public interest in maintaining good relations between itself and the private sector and ensuring that there is competition for public sector contracts. Disclosure of the information would discourage the private sector from doing business with HCC in the future.
67. Whilst HCC accepts that the Energy from Waste project is both high profile and controversial, it has pointed out that information in support of the planning application has been in the public domain since November 2011. It has also argued that it meets with the contractor regularly to ensure that further information can be disclosed throughout the life of the contract. However, at the time of the request, (and to date), the planning process remains on-going therefore the commercial details of the project remain highly sensitive to both HCC and Veolia. Disclosure of such highly sensitive commercial information would not be in the public interest as the harm to HCC's economic interests would prevent it from obtaining best value in securing a viable Energy from Waste project.

## **The balance of the public interest arguments**

68. The Commissioner has considered the arguments put forward both in favour of disclosure and maintaining the exception. The Commissioner acknowledges the explicit presumption in favour of disclosure under regulation 12(2) of the EIR and general principles of accountability and transparency of decisions taken involving the expenditure of public money and affecting the local population. He is also mindful of the strong public interest in the disclosure of information regarding such a high profile and controversial project. However, he has placed considerable weight on the adverse affect disclosure would have on the principle of confidentiality itself and the legitimate commercial interests of both HCC and Veolia.
69. In his view, the timing of the request is crucial as it has been pointed out that not only at the time of the request but at the time of writing this notice, the planning process remains on-going. He has also taken into consideration the fact that information relating to the planning process has been in the public domain since November 2011 and the commercial nature of the withheld information itself. He has therefore concluded that the balance of public interest favours maintaining the exception and that HCC were therefore correct to rely on regulation 12(5)(e) in relation to this information.

### **Regulation 12(5)(b)**

Regulation 12(5)(b) of the FOIA states that information is exempt if disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry or a criminal or disciplinary nature. Regulation 12(5)(b) is a broad exception with the course of justice including but not restricted to information attracting Legal Professional Privilege (LPP). The purpose of the exception is to ensure that there should be no disruption to the administration of justice.

70. In this case, HCC has withheld information under regulation 12(5)(b) on the basis that the information is covered by LPP as it consists of Counsel's opinion.
71. The Tribunal in *Woodford v IC* (EA/2009/0098) confirmed that the test for adversely affect in relation to LPP would be met by the general harm which would be caused to the principle of LPP, without needing to demonstrate that specific harm would be caused in relation to the matter covered by the information.

*"There can be no doubt that disclosure of information otherwise subject to legal professional privilege would have an adverse effect on the course of justice."*

72. Consideration of the specific circumstances is however required when addressing the public interest test.
73. Regulation 12(5)(b) will be engaged if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
74. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
75. HCC has confirmed that it is relying on advice privilege in respect of the information withheld from Appendix N of the FBC.
76. As with section 42 of the FOIA, for public authorities establishing who the legal advisor is will be key to them identifying when a communication is legally privileged. The Commissioner generally considers that the term 'lawyer' means a legal advisor acting in a professional capacity and includes legal executives.
77. In *Calland v IC the Financial Services Authority* (EA/2007/0136) the former Information Tribunal confirmed that legal advice and communications between in-house lawyers and external solicitors or barristers also attract LPP.
78. HCC has informed the Commissioner that the advice was sought and received by lawyers at Sharpe Pritchard who were acting on behalf of HCC throughout the contract negotiations.
79. HCC has confirmed to the Commissioner that it does not consider that the privilege attached to the information has been lost as the information remains confidential. Access to the document has been highly restricted within and was passed to the Legal Services department within HCC as their client. The information was also provided to DEFRA in confidence as part of the FBC submission.
80. The Commissioner has viewed the information and is satisfied that it does constitute advice between a client (HCC) and its lawyer, acting in



its professional capacity for the sole purpose of obtaining legal advice. He is also satisfied that confidence attached to the information has not been lost. He has therefore gone on to consider the public interest test.

### **Public interest arguments in favour of disclosing the information**

81. As stated in paragraph 58 of this notice, the EIR clearly state under regulation 12(2) that when considering exceptions to the duty to disclose environmental information, a public authority must apply a presumption in favour of disclosure and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request.
82. HCC accepts that there is also a general public interest in favour of transparency and accountability in allowing scrutiny of how public money is spent and ensuring value for money when purchasing goods and services including the procurement process.
83. It also recognises that disclosure may allow individuals to better understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions.
84. HCC acknowledges that the Energy from Waste project has a high public profile and is controversial in nature and that this inevitably means there is a strong public interest in disclosure of the information.

### **Public interest arguments in favour of maintaining the exception**

85. The Commissioner considers that the general public interest in maintaining the exception will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between a client and lawyer to ensure full and frank legal advice, which in turn is fundamental to the administration of justice.
86. This is consistent with the former Information Tribunal's ruling in the case of *Bellamy v the IC* (EA/2005/0023) that there is a strong element of public interest inbuilt into the privilege itself. Indeed, it is worth noting that the Tribunal considers that there should be at least equally strong countervailing considerations to override that inbuilt interest.
87. This was further reinforced in the case of *DCLG v Information Commissioner & WR* [2012] UKUT (AAC) (28 March 2012) which concluded that the risk of the disclosure of legally privileged information leading to a weakening of confidence in the general principle of legal professional privilege is a public interest factor of very considerable weight in favour of maintaining the exception and there would have to be special or unusual factors in a particular case to justify not giving it this weight.



88. The timing of the advice is also a significant factor and the Commissioner notes that the advice both at the time of the request, and to date, remains relatively recent having been provided in September 2010.
89. In this particular case, HCC has argued that the advice relates to issues which have not yet been decided and considers that if the disputed information were to be published at this stage, it would inhibit advisors and Council members from full and frank discussion of any issues in relation to the proposed development and in receiving advice to aid their deliberations during the decision making process. As pointed out in paragraph 50 of this notice, the planning application process is incomplete as the matter has been referred to a Planning Inquiry due in September 2013. This advice is therefore still live.

### **The balance of public interest test**

90. The Commissioner notes the explicit presumption in favour of disclosure of the information provided for under regulation 12(2) of the EIR. He also appreciates that in general there is a public interest in public authorities being as transparent and accountable as possible in relation to their decisions. The Commissioner has also placed considerable weight on the high public profile and controversial nature of this project.
91. However, given the particularly strong public interest in safeguarding openness in all communications between a client and lawyer to ensure full and frank legal advice, there would need to be particularly strong public interest factors in favour of disclosure of the information. This would usually include factors where substantial amounts of money are involved, where a decision will affect a large amount of people or evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency. Following his inspection of the information, although he recognises that it is a large project for HCC, he could see no obvious signs that these factors were present in this case to tip the balance in favour of disclosure.
92. The Commissioner has therefore concluded that the balance of public interest is weighted in favour of maintaining the exception and consequently, that HCC was justified in its reliance on regulation 12(5)(b) of the EIR.

## Right of appeal

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93. 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)

94. 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.
95. 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 .....**

**Gerrard Tracey**  
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