

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

**Decision notice**

**Date:** 28 January 2016

**Public Authority:** London Borough of Waltham Forest  
**Address:** Waltham Forest Town Hall  
Forest Road  
Walthamstow  
E17 4JF

**Decision (including any steps ordered)**

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1. The complainant requested information from the London Borough of Waltham Forest ("the Council") about the performance of a private contractor with regard to a contract for the delivery of a domestic waste management services. The Council withheld part of the requested information under section 43(2).
2. The Commissioner's decision is that the Council has incorrectly applied section 43(2) to the information that it has withheld
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - To disclose to the complainant the information falling within Part 5(a)-(f) of his request to which it had applied section 43(2).
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 12 June 2015 the complainant requested the following information from the Council:

*"1) Please provide a comprehensive breakdown of the complaint categories that the council uses to classify domestic waste management services.*

*2) Using the categories referred to in question 1, provide a monthly breakdown of all the complaints the council has received regarding domestic waste management services since January 2009*

*3) Please provide comprehensive breakdown of the fine categories as specified in Kier's contract or other official document and the amount payable for each category of fine*

*4) Please provide copy of the Terms and Conditions in relation to the giving of fines and the repayment of fines, as stated in the contract.*

*5) Please provide a full breakdown of each performance related fine given to Kier by the council since the start of their contract. Details to include, but not limited to,*

*a) reason for the fine (category of offence)*

*b) fine amount*

*c) total value of fines so far this year and total value of fines issued in each of the years since the contract began*

*d) how much Kier currently owes to the council in fines*

*e) The total value of fines issued to Kier in each year since, and including, 2010.*

*f) The total value of fines paid by Kier in each year since, and including, 2010.*

*6) What percentage of household waste has been recycled in each year since the 2009/10 financial year?"*

6. The Council responded on 10 July 2015. It provided some information, indicated that it did not hold information in relation to Parts 1 and 2 of the request and withheld information in relation to Part 5 under section 43(2) of FOIA.
7. The complainant requested an internal review on 22 July 2015. The Council provided the outcome of the internal review on 19 August 2015 in which it provided information in relation to Parts 1 and 2 of the request but maintained its original position with regard to Part 5.

## Scope of the case

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8. The complainant contacted the Commissioner on 28 August 2015 to complain about the way his request for information had been handled. Specifically, he complained about the Council's reliance on section 43(2) of FOIA as a basis for refusing to provide the information he requested in Part 5(a)-(f) of his request.
9. The Commissioner considered whether the Council was entitled to rely on section 43(2) as a basis for withholding the information falling within Part 5(a)-(f) of the complainant's request.

## Reasons for decision

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10. The Council sought to rely on the exemption in section 43(2) of FOIA to withhold the information requested by the complainant in Part 5(a)-(f) of his request.
11. The Commissioner initially considered the extent to which the requested information fell within the scope of FOIA and the extent to which it fell within the scope of the EIR.
12. For information to constitute "environmental information" for the purpose of the EIR it must fall within the definition contained in regulation 2(1), which is that:

*"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);"*

13. The Commissioner's publication "*What is environmental information?*" provides guidance on what information might constitute environmental information for the purposes of the EIR. In relation to regulation 2(1)(c) it states that:

*"The examples in the EIR of "measures (including administrative measures)" are policies, legislation, plans, programmes, and environmental agreements. Measures will include steps taken to ensure an effect (past, present or future), and the methods, processes or instruments used. Administrative measures are specifically mentioned, but the interpretation of measures is not restricted to those of an administrative nature. Measures will also include regulatory, economic and voluntary tools, such as Acts of Parliament, local by-laws, taxes, prosecutions, charges, and voluntary agreements...*

*As "information on" covers information about, concerning, or relating to, this definition extends not only to the written measures, but also to their application. Information held on record as a result of following processes required by a measure is also likely to be information on an activity."*

14. In the Commissioner's view, the requested information about the performance of a contract for the delivery of waste management services, specifically the numbers and types of complaints about the delivery of that service and fines imposed under that contract by the Council concerning issues related to the performance of that contract, constitutes environmental information within regulation 2(1)(c) of the EIR.
15. The disclosure of information under the EIR is subject to a number of exceptions contained in regulation 12(5). The Council has not provided the Commissioner with any arguments with regard to the application of

any of the exceptions under the EIR, despite being given the opportunity to do so. However, it did provide the Commissioner with a copy of the withheld information and with its arguments as to why it believed that information was exempt from disclosure under section 43(2) of FOIA.

16. Section 43(2) provides an exemption under FOIA where the disclosure of information would be likely to prejudice the commercial interests of a public authority or a third party. The exception under the EIR which is most similar to section 43(2) is the exception in regulation 12(5)(e). Regulation 12(5)(e) exempts information from disclosure if 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. The Commissioner therefore considered whether the arguments presented by the Council in relation to the application of section 43(2) were sufficient to engage the exception in regulation 12(5)(e).
17. Regulation 12(5)(e) allows commercial or economic information which meets the criteria for either a statutory or common law duty of confidentiality to apply, to remain confidential if that duty is owed in order to protect the legitimate economic interests of any party.
18. In order for regulation 12(5)(e) to apply, a public authority needs to establish that:
  - (i) the information does not relate to emissions;
  - (ii) the information is commercial or industrial in nature;
  - (iii) it is confidential under either the common law of confidence, contract or a statutory bar;
  - (iv) the confidentiality is protecting a legitimate economic interest;
  - (v) the confidentiality will be adversely affected by disclosure;  
and
  - (vi) the public interest in maintaining the exception outweighs the public interest in disclosing the information.
19. After reviewing the withheld information provided to him by the Council, the Commissioner is satisfied that it fulfils the criteria (i) and (ii) above, in that it does not relate to emissions and is commercial in nature.
20. However, the Commissioner has not received any information from the Council which establishes that the information is confidential under either the common law of confidence, contract or a statutory bar.

Consequently, he is not satisfied that regulation 12(5)(e) is engaged. He has therefore determined that the Council should disclose to the complainant the information that he has requested under part 5(a)-(f) of his request and to which the Council had applied the exemption in section 43(2) of FOIA.

## **Other matters**

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21. The Commissioner initially wrote to the Council on 14 October 2015 to request a copy of the withheld information and its arguments for the application of section 43(2). He requested a response to his letter by 11 November 2015. Having unsuccessfully chased a response from the Council, on 23 November 2015, the Commissioner wrote to the Council informing it that he would issue an Information Notice unless he received a full response by 30 November 2015. The Commissioner received a response from the Council on 30 November 2015.
22. The Commissioner subsequently wrote to the Council again on 15 December 2015 with some questions about the possible application of the EIR to the withheld information. He requested a response by 11 January 2016. Having received no response, the Commissioner wrote to the Council again on 13 January 2016. He indicated that he might not take account, in reaching his decision, any information provided in response to his email of 15 December 2015 if it was received after 22 January 2016. The Commissioner did not receive a response from the Council by the deadline that was set.
23. The Commissioner is very concerned about the Council's lack of engagement with his office in assisting with the investigation of this complaint. This has resulted in a considerable waste of his staff's time in chasing responses and delays in the completion of the investigation of the case. He expects to see a significant improvement in the Council's engagement with his office in the investigation of any complaint he may receive about the Council in future.

## Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

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

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

25. 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.
26. 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 .....**

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