

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

**Date:** 27 June 2024

**Public Authority:** Derby City Council  
**Address:** The Council House  
Corporation Street  
Derby  
DE1 2YL

**Decision (including any steps ordered)**

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1. The complainant requested background information relating to a cabinet meeting over the future of a long-term waste treatment plant from Derby City Council ('The council'). The council withheld some information under Regulation 12(5)(e) of the EIR (commercial confidentiality).
2. The Commissioner's decision is that the council was correct to apply Regulation 12(5)(e) to redact the information from disclosure. However, he has also decided that the council did not comply with the requirements of Regulation 5(2) (time for compliance), and Regulation 11(4) (time for review).
3. The Commissioner does not require further steps.

## Request and response

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4. On 31 January 2023, the complainant wrote to the council and requested information in the following terms:

“Please provide all documents in relating to all items at the Council Cabinet meeting for Feb 2<sup>nd</sup> 2023 in relation to the long-term waste treatment project shown as item 9. This should include all documents in unredacted form as this is public money being spent and clear transparency is needed in the public domain.”
5. A series of correspondence between the complainant and the council followed, wherein the complainant asked the council to provide a response to his request for information. The council treated the complainant’s request to respond as a request for internal review.
6. Ultimately, the council provided its response on 31 July 2023. It disclosed information in a redacted form, applying the exception in Regulation 12(5)(e) to redact the information.

## Scope of the case

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7. During the course of the Commissioner's investigation the Commissioner asked the council to confirm whether its response of 31 July 2023 was its final response on the request, as the response stated that this was its review response.
8. On 2 November 2023, the council said that its review response related only to whether it had failed to comply with the time requirements for responding to requests under Regulation 5(2) of the EIR. It said that it therefore wished to carry out a review of its response to the request, and it confirmed that it would issue its response on this aspect to the complainant in due course.
9. However, on 6 February 2024, the complainant confirmed to the Commissioner that they had still not received the council’s review response.
10. During the course of the Commissioner's investigation the council confirmed that it wished to continue to rely upon Regulation 12(5)(e) to maintain the redactions it had previously made.
11. The following therefore analyses whether the council was correct to rely upon Regulation 12(5)(e) to redact the information. It will also consider whether the council’s response complied with the time requirements of the EIR.

## Reasons for decision

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### Background to the request

12. The council, along with Derbyshire County Council, previously had in place a contract in place to deliver a waste management facility at the site. However, the BBC reports that the site failed to meet the standards they required and so the councils took back control of the site in 2019. This development, and the process to recover the site, cost the council's significant amounts of public money. The BBC reported that the site had cost the council's £34.5 million to maintain by that point.<sup>1</sup>
13. The meeting in question in this request related to a decision on the options available to the council as to what to do with the site.
14. The Commissioner has previously considered a number of cases regarding the development<sup>2</sup>, and has previously ordered a disclosure of information in relation to contracts and financial information relevant at the time of the respective requests.
15. However, in decision notice IC-176284-C5K0<sup>3</sup>, issued on 7 July 2023, the Commissioner found that the council was correct to apply Regulation 12(5)(e) and 12(5)(b) to withhold information similar to the information requested in this case.
16. The current request was made on 31 January 2023, prior to a council cabinet meeting to decide, from a range of options, whether to seek to appoint outside contractors to carry out rectification work and to operate the facility.
17. Although the request was made a number of days prior to the meeting occurring, the background papers to that meeting were held and would have been provided to councillors prior to the meeting taking place.
18. The Commissioner notes, therefore, that the complainant was seeking background papers on a decision that had not yet been taken by the council at the time that it received the request.

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<sup>1</sup> [Sinfin waste plant: Councillors vote to open controversial centre - BBC News](#)

<sup>2</sup> FER0617848 - <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624774/fer0617848.pdf> ,  
FER0909187 <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618657/fer0909187.pdf>,

<sup>3</sup> [ic-176284-c5k0.pdf \(ico.org.uk\)](#)

**Regulation 12(5)(e) – commercial confidentiality of environmental information.**

19. This reasoning covers whether the council was correct to withhold the requested information under Regulation 12(5)(e) of the EIR.
20. Information can be withheld under Regulation 12(5)(e) 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.
21. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of Regulation 12(5)(e), the authority must demonstrate that:
  - the information is commercial or industrial in nature;
  - the information is subject to confidentiality provided by law;
  - the confidentiality provided is required to protect a legitimate economic interest; and
  - that the confidentiality would be adversely affected by disclosure.
22. Regulation 12(5)(e) is also subject to a public interest test if the exception is engaged.

*Is the information commercial or industrial in nature?*

23. Having viewed the withheld information the Commissioner is satisfied that the information is commercial and/or industrial in nature. The withheld information primarily relates to the commercial interests of the various parties and relates to the ongoing development of a waste facility.

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

24. The Commissioner is satisfied that the withheld information is subject to both a contractual and an implied duty of confidence. Unlike under FOIA, information may be held in confidence even where it has not been obtained from another person. In this case, the Commissioner is satisfied that employees would recognise that the information they have access to would be considered confidential, and that disciplinary action may be taken against them if they disclosed that information without the authority to do so. The information is not trivial and is not otherwise in the public domain.
25. In this case the Commissioner is satisfied that the information is subject to an implied and/or a contractual duty of confidence.

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

26. The council has disclosed some of the requested information, however it has withheld or redacted sections under Regulation 12(5)(e). The redacted sections relate primarily to forecasts, risk assessments, estimates, costs, or budgetary information. The Commissioner has viewed the documents, including the redacted sections in an unredacted state.
27. The council argues that the exception is applicable to the withheld information for many of the same reasons which the Commissioner previously agreed were applicable in a previous decision notice, IC-176284-C5K0. It argues that the issues involved are still 'live issues' with the council being closer to carrying out a procurement exercise now than it was at the time of the request in that case.
28. It argues that industry is highly consolidated, with relatively few key contractors, and independent thought and bidding is required from bidders in order for the council to achieve best value. It argues that disclosing its estimates etc would narrow the scope of that independence as bids will level around the financial figures and estimates highlighted.
29. It further explained that where costs are known in procurement exercises, or where there is a maximum budget given to bidders, bids will likely level around the known figures, affecting the overall bids and the likelihood of it achieving best value.
30. It argues that if bidders acquire information about the councils' budget range, minimum acceptable terms, or the councils' view of their next best alternative, knowledge of that information is likely to reduce the level of competition between bidders.
31. It argues that the field of bidders is already likely to be reduced given the complexity of the project, which it argues has already had a "difficult" history.
32. It also argues that if there is little differentiation between bids, and assessment scores are very close, this would add to the risk of subsequent legal challenges to the procurement process being made.
33. It also argued that in an environment where there are relatively few competitors, if all bidders know what the costs are, the potential for collusion to occur would be likely to increase.

34. The Commissioner notes the council's concerns. Whilst he considers that these are primarily generic concerns, it is nevertheless clear that providing prospective bidders with an idea of the council's estimated costs and its budgets for the project would affect the bids which it subsequently receives.
35. Whilst the Commissioner recognises that in a limited market of bidders, many will already have an idea of costs which competitors charge for their services, disclosing the budgets, estimates and costs of the council would be likely to be taken into account by those bidding, to the detriment of the council. Bids are likely to level around those costs, bearing in mind the competitive nature of such bidding competitions.
36. The Commissioner has therefore decided that the exemption in Regulation 12(5)(e) was correctly engaged by the council. He has therefore gone on to consider the public interest test required by Regulation 12(1) of the EIR. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest the information being disclosed.

### **Public interest test**

#### The public interest in the information being disclosed

37. There is always a general public interest in creating greater transparency over public authority decisions and how public money is spent.
38. The handling of waste by local authorities is often a controversial issue, both from the point of the facilities which are developed in order to handle the waste, their siting, and in the means in which waste is dealt with. Concerns were voiced regarding the impact of the site at Sinfin on the local community, and the public will therefore have a specific interest in information relating to the site and its future. Significant amounts of public money have already been spent on the site.
39. There is a public interest in the council being clear about the advice provided to councillors in order to reach their decision on the future of the site. The decision is likely to affect the local community, and involves the use of further public money, regardless of the decision which was ultimately reached.
40. There is a public interest in the public being aware of the advice received so that the public can understand how the changes might affect the community as a whole, and can scrutinise the council's decision on a project which has already cost taxpayers significant amounts.

41. The Commissioner has taken into account the history of this particular site, and the public concern regarding it. He has previously considered information relating to this and ordered disclosure of the information requested, including previous contracts.<sup>4</sup>
42. There is a public interest in the council being open about its plans for the site given the affect it might have upon the local environment, the costs involved, the delay in the site becoming usable, public concerns about its potential effect on public health and its past history.
43. There is also a strong public interest in the information being disclosed given the delays which have occurred in implementing a waste system in the area due to the prior issues with the site.

The public interest in the exception being maintained

44. The Commissioner is satisfied that the issue was clearly live at the time that the request was received. The figures provided to councillors provided insight into the budgets and costs involved in order to move forward with the development, and options with which to do so. The council was preparing to make a decision as to which option to take forward at the time that the request was received.
45. As the issue was still live, the budgets, estimates and financial figures were relevant to the decisions to be taken, but are also relevant to the future bidding process when the council moves ahead with seeking contractors to deliver the site. A disclosure of its budgets and estimates risks affecting the bidding process and affecting the council's ability to obtain the best deal possible in the bidding process and negotiations.
46. The Commissioner recognises that there is a very strong public interest in the market being allowed to determine the best price without interference due to estimates and budgets becoming known prior to the bidding process taking place.

The balance of the public interest

47. The Commissioner notes that the past history of this site, and the significant amount of public money spent by the councils. He also notes that the waste facility remains controversial with many members of the public objecting to it. The Commissioner considers that the level of

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<sup>4</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618657/fer0909187.pdf>

redaction is significant. Without the full figures the public will remain unsure as to the benefits of the council's decisions, and due to the previous history, they will undoubtedly hold concerns regarding the ongoing project. There is therefore a strong public interest in the council being as transparent as possible about the information provided to councillors.

48. However, the Commissioner has to take into account the timing of the request, shortly prior to a decision on the site's future being taken. The result of the commercial prejudice occurring would be a further cost to the council and tax payers if the council did not achieve best value from its future tendering exercise.
49. A disclosure of the information, leading to the council not being able to obtain best value from its procurement process, would compound the significant amounts of public money already spent on developing the site.
50. The Commissioner accepts that there is a very strong public interest in allowing the market to determine the costs without affecting it by disclosing the council's budgets and estimates.
51. Whilst the Commissioner accepts that there is a strong public interest in the council being as transparent as possible over its decisions on the site, he is therefore satisfied that, on balance, at the time of the request the public interest in the exception being maintained outweighed that in the disclosure of the information.
52. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the Regulation 12 exceptions.
53. Whilst the Commissioner has been informed by the presumption in favour of disclosure, he is satisfied that, for the reasons given above, the exception has been applied correctly.

## **Procedural matters**

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### **Regulation 5(2) – time for compliance.**

54. Regulation 5(1) of the EIR provides that, subject to any exceptions or exclusions applying, a public authority that holds environmental information shall make it available on request.



55. Regulation 5(2) provides that the authority should provide its response to a request under Regulation 5(1) as soon as possible and no later than 20 working days after the date of receipt of the request.
56. In this case the complainant made their request for information on 31 January 2023. The council did not disclose information falling within the scope of the request until 31 July 2023.
57. The Commissioner has therefore decided that the council's response did not comply with the requirements of Regulation 5(2) of the EIR.

### **Regulation 11 – Representations and reconsideration**

58. Unlike under the Freedom of Information Act (FOIA), complainants have a statutory right to request that an authority reconsiders its response to a request for information, providing they do so within 40 working days of receiving the authority's response.
59. Regulation 11(4) requires the authority to provide its response to the request for reconsideration within 40 working days of receiving the request.
60. The complainant's requests for the council to provide its initial response was initially taken to be a review response by the council. However, On 2 November 2023, the council confirmed to the Commissioner that it would carry out a review of the request for information. However, it did not subsequently provide its response to the complainant within the time period stipulated by Regulation 11(4).
61. The Commissioner's has therefore decided that the council did not comply with the requirements of Regulation 11(4) of the EIR.

### **Other matters**

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62. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.
63. The Commissioner is disappointed with the lack of engagement on the part of the council in this case. Despite the council agreeing to carry out an internal review of its decision with the Commissioner on 2 November 2023 the council did not subsequently provide the outcome of this to the complainant.
64. The Commissioner therefore considers the council's engagement with his office on this case to have been poor and he expects to see improvements if any future investigations which he carries out.

65. In the future, the Commissioner expects the council to take the actions it has confirmed to him it will carry out within the timelines specified.
66. The above issue will be logged and used by the Commissioner when considering the overall compliance of the council.
67. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft Openness by design strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA and EIR enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in his Regulatory Action Policy<sup>5</sup>.

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<sup>5</sup> <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

## **Right of appeal**

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68. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

69. 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.

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

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