

Freedom of Information Act 2000 (Section 50) Environmental Information Regulations

Decision Notice

Date: 30 June 2010

Public Authority: Nottinghamshire County Council
Address: Centenary House
1 Wilford Lane
West Bridgford
Nottingham
NG2 7QZ

Summary

Nottinghamshire County Council (NCC) entered into a public finance initiative contract, with Veolia Environmental Services (Veolia) to outsource certain waste management functions in order to enable NCC to discharge its statutory waste management obligations. The complainant asked to see the contract and related documents. NCC eventually provided much of the information requested but withheld some citing the Regulation 12(5)(e) and 13(1) exceptions under the Environmental Information Regulations (EIRs) after considering the balance of the public interest. The complainant did not press for the Commissioner to decide the Regulation 13(1) matters and the Commissioner has not done so. The Commissioner also decided, following decisions in earlier leading cases, that the Regulation 12(5)(e) exception had been correctly engaged by NCC for some of the information. For some of information withheld under 12(5)(e) the balance of the public interest in maintaining the exception did not outweigh that in disclosure. The remaining information was correctly refused as the balance of the public interest in maintaining the exception outweighed that in disclosing the information. For some information the Regulation 12(9) exception applied. In not making certain information available NCC breached regulations 5(1) and 5(2). The Commissioner also decided that delays by NCC had breached regulations 7(1), 7(3) and 14(2). In a separate legal process, the complainant asked NCC for some of the relevant information under the provisions of the Audit Commission Act 1998. The High Court granted access.

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. On 26 June 2006 Nottinghamshire County Council (NCC) entered into a public finance initiative (PFI) contract, with Veolia E S Nottinghamshire Ltd (Veolia) to outsource to Veolia certain waste management functions in order to assist NCC in the discharge of its statutory waste management obligations; this was contract A. A corresponding contract, contract B, was set up on the same date between NCC and Nottinghamshire Environmental Services Limited. These PFI contracts (the PFI contracts) were complementary. They are extremely large and complex documents, one of the largest and most complex contracts that NCC has ever entered into. The contracts and associated documentation run to several thousand pages.
3. The proposed changes to the waste management systems for Nottinghamshire were planned to include an energy recovery facility (ERF), often referred to as an incinerator. These proposals encountered significant opposition from a residents' group, including the complainant, known as People Against Incineration (PAIN). The ERF matter is the subject of a public planning inquiry process.
4. There has been considerable correspondence between the complainant and others on his behalf and NCC. The subject of the Commissioner's investigation and decision is the PFI contracts and the full business case which was submitted to central government by NCC. This notice sets out the Commissioner's decision on those matters. Narrative on correspondence concerning matters which are peripheral to his decision has not been included.
5. The Information Commissioner had been called upon to decide a similar matter arising within the East Riding of Yorkshire in February 2008, ICO reference FER0066052. A further case, regarding the East Sussex County Council, the *East Sussex* decision, was decided in November 2007, ICO

reference: FER0099394. In deciding the NCC matter, the Commissioner has been guided by relevant aspects of these earlier decisions (the lead decisions) which concerned the contracting out of waste management services to an independent contractor.

6. In another initiative, a separate legal process from his request under the Act, the complainant asked NCC for some of the same information under section 15(1) of the Audit Commission Act 1998 (the 1998 Act). NCC decided that the information had to be provided under the terms of section 15(1) of the 1998 Act but Veolia objected and instigated an action to prevent disclosure. The matter came before the High Court who decided in July 2009 that the information (in schedules 6A, 6B, 6C and 7 of the PFI contracts) should be disclosed under the 1998 Act; this decision is being appealed by Veolia to the Court of Appeal.

The Request

7. On 29 April 2006 the complainant asked NCC for copies of the PFI contract and related information. On 30 May 2006 NCC replied saying that the PFI contract was still in the process of negotiation and agreement and would not be available until the whole process was complete. Once the process was complete, NCC said that it planned to disclose parts of the contract to the public excluding commercially sensitive information as appropriate. The complainant also requested copies of the Outline Business Case for the waste management outsourcing decision and the subsequent Full Business Case (FBC). NCC has disclosed the full text of the Outline Business Case and no consideration was given to that matter by the Commissioner. The FBC text was partly disclosed with redactions intended to protect the commercial position of Veolia and of a reserve bidder for the contracts. The complainant appealed against the FBC redactions which also formed part of the Commissioner's consideration.
8. On 26 June 2006 NCC entered into the PFI contracts A and B.
9. On 25 April 2007 the complainant told NCC that it had repeatedly refused to release the PFI contracts even though requests had been made many times both before and after the contracts had been signed. He made clear that he still wished to see full copies of the contracts.
10. On 6 May 2007 the complainant asked NCC for, among other things, an electronic copy of the FBC. On 1 June 2007 NCC told the complainant that a redacted version of the PFI contracts was being sent to him and saying that the information being withheld would be considered by NCC's

internal public interest panel. On 27 June 2007 NCC told the complainant that the FBC would be considered by NCC's public interest panel and no formal response to the request could be given until its decision was known. However on 9 August 2007 NCC told the complainant that it had decided to release a redacted version of the FBC as an interim measure.

11. On 4 December 2007 the complainant drew NCC's attention to the then Commissioner's decision in the *East Sussex* case. He asked NCC to reconsider release of the information in the PFI contracts that was being withheld from him.
12. On 18 December 2007 and again on 2 January 2008 the complainant pressed NCC to release details of the PFI contracts. On 2 January 2008 NCC told the complainant that the information not so far released was under consideration and a decision was expected by end-January. On 9 February 2008 the complainant asked NCC for an internal review of the decision not to supply the information "that has repeatedly been requested".
13. On 1 May 2008, nearly three months later, NCC wrote to the complainant with a letter which, it said, acted as a Refusal Notice. NCC provided a full copy of the Outline Business Case for the PFI contract and said that the bulk of the information in the PFI contract with Veolia would be released shortly following consideration by NCC's public interest panel. NCC withheld some information from the PFI contracts and the FBC saying that the EIRs applied and relying on the exceptions in Regulation 13(1) (personal data) with Regulation 13(2)(a)(i). NCC also relied on the exception in Regulation 12(5)(e) (confidential commercial information). NCC said that the matter had been considered by NCC's public interest panel; the panel had met on 4 April 2008 following the adjournment of earlier meetings. Veolia had been invited to make representations to the public interest panel but the complainant and PAIN had not.
14. On 10 June 2008 NCC disclosed to the complainant redacted versions of the PFI contracts and the FBC.
15. In an email dated 24 April 2009, NCC told the complainant that in October 2008 its Chief Executive had undertaken an internal review of the NCC decision and had decided to uphold the original decision of the public interest panel.

The Investigation

Chronology

16. On 1 July 2008 a named firm of lawyers (the lawyers) complained to the Commissioner on behalf of the complainant that NCC had not acted within the parameters set by the decisions in the lead cases.
17. On 13 August 2008 the Commissioner's staff invited comments from NCC who provided an initial response on 29 August 2008.
18. On 7 October 2008 and again on 2 February 2009 the lawyers complained to the Commissioner of delay in resolving the matter and on 12 February 2009 the Commissioner began his investigation. On 24 February 2009 the lawyers drew the Commissioner's attention to what it said was the "inordinate period of time" it had taken NCC to disclose the redacted PFI contract which had been requested on 29 April 2006 but not provided until 9 August 2007.
19. On 12 March 2009 NCC provided the Commissioner with a full response to the complaint and confirmed that the main exception applied was that in Regulation 12(5)(e) with a small amount of information also being withheld under the Regulation 13(1) exception. NCC emphasised that only information of the utmost commercial sensitivity had been considered by the public interest panel because the parties had already agreed to release a large amount of information; the redacted version of the information was kept under review and further information was being released as its commercial sensitivity diminished. NCC said that the complainant was aware of this.
20. On 22 March 2009 NCC told the complainant that the Secretary of State had called in the planning approval of the ERF and there was a due and proper process which NCC was duty bound to abide by, including a Public Inquiry. On 24 April 2009 NCC confirmed to the complainant that there had been an internal review of its decision to withhold parts of the information in the PFI contracts. The NCC Chief Executive had decided in October 2008 to uphold the public interest panel's decision.
21. In the separate but related action, heard before the High Court on 25 August 2009, based on section 15(1) of the Audit Commission Act 1998 (the 1998 Act), the complainant sought access to, among other information, the full text of the schedules 6A, 6B, 6C and 7 to the contracts. NCC was minded to provide access to those schedules under the 1998 Act but Veolia sought to prevent disclosure by way of judicial review. In a Judgment dated 1 October 2009, which had regard to the

Act and the EIRs, Mr Justice Cranston decided that, notwithstanding Veolia's contention that there would be a breach of commercial confidentiality, the complainant was entitled to inspect the schedules as set out in the 1998 Act. NCC confirmed to the Commissioner on 7 October 2009 that it had, as a matter of fact, allowed the complainant to inspect the full information in schedules 6A, 6B, 6C and 7 of contract A.

22. On 6 January 2010, NCC confirmed to the Commissioner that it continued to rely on the exception contained in Regulation 12(5)(e) and that, while schedules 6A, 6B, 6C and 7 had been disclosed to the complainant, they had not been made public. NCC told the Commissioner that its public interest panel had heard from representatives of Veolia but had not taken evidence from the complainant and his associates.
23. The Commissioner, through his staff, has examined all of the relevant withheld information. On 19 January 2010, his staff provided NCC with a preliminary view of his decision that was incomplete but was followed on 10 February 2010 with a complete preliminary view. In reaching his preliminary view, the Commissioner has drawn upon relevant aspects of the Commissioner's earlier decisions in the lead cases. He invited NCC to accept this view as a basis for informal resolution of the complaint.
24. On 28 April 2010 NCC made further representations to the Commissioner about his preliminary view. He considered these representations and, in the light of them, put a slightly amended preliminary view to NCC on 5 May 2010.
25. On 9 June 2010 the complainant told the Commissioner that he was already in possession of the detailed payment method (including the unredacted payment equations and variables) for the equivalent of Contract B in Shropshire. He said that this was a more recent Veolia PFI contract and that it had been provided to him during 2009.
26. On 17 June 2010 NCC told the Commissioner that it was working to release further information to the complainant by end-June. NCC provided the Commissioner with a document listing the information that NCC was working to release and indicated some information that remained under consideration. The Commissioner saw that the information listed by NCC for release was consistent with his own preliminary view except that some information that he considered should be released was either still to be withheld by NCC or remained under consideration with a final decision having not yet been taken.

Scope of the case

27. The complainant made many repeated requests for the information. Rather than focus on the initial request (made on the 29 April 2006) the Commissioner considered that it is reasonable to consider the correspondence on 2 January 2008 as the latest request and that NCC were entitled to extend the period for consideration for a further 40 working days, relying on Regulation 7(1). Taking the time for final compliance to 27 February 2008. This final request was therefore made after the contract was signed.
28. The Commissioner's decision is that the relevant information falls within the definition of environmental information provided in EIR Regulation 2(1)(c) which includes within its scope information on 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 the Regulations, as well as measures or activities designed to protect those elements. It also falls within the scope of Regulation 2(1)(b) on factors relating to waste. In addition, those parts of the relevant information that deal with human health and safety issues fall to be considered within Regulation 2(1)(f).
29. The Commissioner has considered whether some sections of the information should be considered to fall outside the definition of environmental information. His decision is that the information requested, including the pricing and financial aspects of the information materially relates to, and is interlinked to, the overall reason for the contract to such an extent that it would be a false distinction to consider any residual information as not being environmental in nature.
30. The Commissioner considered whether there were any relevant limits to his jurisdiction for the purpose of the EIRs and decided that there were not. He noted that his jurisdiction has never been disputed by the parties and that Veolia is a public authority by virtue of the fact that the control of the waste management function is retained by NCC through the contract to discharge statutory waste management functions and that waste management is a public service.
31. During the course of the Commissioner's investigation one matter complained of was resolved informally and therefore is not addressed in this notice. The complaint related to Regulation 13(1) and was resolved informally when the complainant agreed not to press the matter. The Commissioner accordingly gave that matter no further consideration.
32. The Commissioner has also considered two related matters, complaints from the same complainant against Veolia itself under different ICO

references. These matters were both resolved informally with no decision notices being issued.

Findings of fact

33. The PFI contracts were signed on 26 June 2006 and NCC made a redacted version of them available to the general public on 12 June 2008.
34. NCC convened a panel of three senior officers, who were working independently of this matter and of the department concerned, to consider the balance of the public interest. The panel met on 4 April 2008 and took evidence in person from representatives of Veolia as well as from NCC officers. The complainant and other interested persons were not given an opportunity to make representations to the panel. Notes regarding the application of the Commissioner's guidelines and the Commissioner's decisions in the lead cases were included within the advice given to the panel.

Analysis

Substantive Procedural Matters

35. NCC told the Commissioner that it was aware of its duty to make information available or refuse a request within 20 working days of receipt as set out in Regulation 5(2) of the EIRs and that this timescale could be extended to 40 days as determined in Regulation 7(1). NCC accepted before the Commissioner that these timescales were far exceeded and that it was in breach of Regulation 7(1). NCC did not notify the complainant as required in Regulation 7(3) which it had also therefore breached. In mitigation NCC said, and the Commissioner accepts, that its officers were in regular contact with the complainant and those working with him on these and other relevant matters and that it had made every effort to provide the complainant with advice and assistance. NCC also breached Regulation 14(2) as it did not issue a refusal notice within 20 working days.
36. The lawyers, acting for the complainant, told the Commissioner that they wished him to investigate whether NCC had breached Regulation 9, the obligation to provide advice and assistance, in view of the delay in NCC providing him with a redacted version of the contracts. The Commissioner has already decided that the delays were in breach of Regulation 7(1) and 7(3). He has decided that the delays in providing information did not constitute a breach of Regulation 9(1).

Exceptions

37. The exception provided by Regulation 12(5)(e) protects the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. Relevant exceptions are set out in the legal annex to this decision.
38. NCC told the Commissioner that the Regulation 12(5)(e) exception could only be relied upon where it was satisfied that releasing the information would have an adverse affect. NCC was satisfied, for the information to which it had applied the exception, that Veolia would be disadvantaged in the marketplace because the effectiveness of its tenders would thereby be reduced, in turn this would affect the quality of tenders received by public authorities including itself.
39. The lawyers, for the complainant, drew the Commissioner's attention to the earlier decisions in the lead cases. They disputed the application by NCC of the Regulation 12(5)(e) exception and referred especially to information about: specific systems and technical information; specific information on costs and profits of the contractor; and, specific information on the likely claw back of costs through the sale of waste by-products which, they said, the Commissioner had agreed in the lead cases was the only information that should be withheld. The lawyers argued that the scope of the information still being withheld by NCC went far beyond that decided by the Commissioner in the lead cases.
40. The Commissioner has drawn upon the lead cases and all parties to the case acknowledge their relevance. There are many similarities between the cases in terms of the size of the company involved, the range of services involved and similarity between many aspects of the information. The Commissioner has noted that NCC has not sought to make a case that any differences between the circumstances in the cases are significant. The Commissioner has followed the key principles in the lead cases (set out in paragraphs 46 to 97), whilst carefully considering the information in question in this case. The principles from the lead cases include how unique the information in question was and how the information could be used by competitors. Much of the analysis from the lead cases is directly applicable to this case. The Commissioner believes that information in the current cases falls within the categories considered in the lead cases.
41. The Commissioner considered the following questions in determining the application to the information withheld of the regulation 12(5)(e) exception:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

Is the information commercial or industrial in nature?

42. The Regulation 12(5)(e) exception only protects the confidentiality of commercial or industrial information. The Commissioner considers that for information to be commercial or industrial in nature it needs to relate to a commercial activity, either of the public authority or a third party. The Commissioner is satisfied that the PFI contracts and the FBC related to the planning and development of a waste management system for Nottinghamshire and that the relevant information being withheld is commercial in nature.

Is the information subject to confidentiality provided by law?

43. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute. In this matter he has seen evidence that it was the intention of the parties, during the negotiations and as provided in the contract, for some defined parts of the information exchanged by them not to be disclosed. The Commissioner is satisfied that some of the relevant information had been imparted to NCC in circumstances which gave rise to an obligation of confidence. He also considered whether the information had the necessary 'quality' of confidence. He is satisfied that some of it did as some of the information still being withheld is not trivial and is not available from other sources.

Is the confidentiality provided to protect a legitimate economic interest?

44. The Commissioner considers that, to satisfy the legitimate economic interest element of the test, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. The Commissioner accepts the argument that the legitimate economic interests of Veolia and its commercial partners would be adversely affected by the disclosure of some of the information where disclosure could provide information on Veolia's methods of business which could be of advantage to its direct competitors. This information includes its business model and information about the profitability of its contractors.

45. The supporting arguments which the Commissioner relied upon in deciding that the Regulation 12(5)(e) exception is engaged are set out in detail in the lead cases and not rehearsed here. The Commissioner has decided that the Regulation 12(5)(e) exception is engaged in respect of some of the information still being withheld by NCC as indicated in his detailed decision annexed to this notice. He then proceeded to consider the balance of the public interest to the information in respect of which he had decided that the exception was engaged.

Would the confidentiality be adversely affected by disclosure?

46. Although this is a necessary element of the exception, the Commissioner considers that once the first three elements are established it is inevitable that this limb will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and will also inevitably harm the legitimate economic interests that have already been identified.

Public interest

47. The EIRs apply a presumption in favour of disclosure at Regulation 12(2) and also, at Regulation 12(1)(b), require determination of the balance of the public interest. In deciding the balance of the public interest, the Commissioner has considered how matters stood at the time of the renewed request in February 2008. This was nearly a year and a half after contract signature in June 2006. NCC have said, and the Commissioner accepts, that the balance of the public interest in some of these matters can be expected to change over time.

Public interest arguments in favour of disclosing the requested information

48. In addressing the public interest the lawyers, for the **complainant**, provided the Commissioner with detailed arguments which he has taken fully into account that essentially relied upon the arguments and conclusions reached by the Commissioner in the lead cases and invited the Commissioner to apply them to the current matter.

49. **NCC** said that it recognised that there were arguments in favour of disclosing all of the relevant information and that under the legislation there is a presumption in favour of disclosure. NCC said that waste management was a core function of local authorities and that the public had a right to know that the contract was for an appropriate price, for the provision of appropriate services, with adequate safeguards. It was important for NCC to demonstrate transparency and accountability in the

spending of public money. Disclosure of operational information would: give an overview of what had been agreed by NCC; allow a detailed understanding of the process; and, help to demonstrate that value for money had been achieved. Generally the more information that was in the public domain, NCC said, the greater the scope for public debate and understanding of the reasons for its decisions.

50. The Commissioner also notes the arguments in favour of disclosure made in the lead cases and considers they are also directly applicable to this case, noting the strong overall public interest in disclosure and the different levels of public interests in disclosure for particular information.

Public interest arguments in favour of maintaining the exemption

51. NCC told the Commissioner that only information of the utmost commercial sensitivity had been considered by the public interest panel and subsequently withheld from the complainant because NCC and Veolia had already agreed to release a large amount of information in accordance with the spirit of the Act. NCC set out for the Commissioner its detailed case for and against disclosure all of which he has taken into account in his decision making.
52. In summary NCC said that the main arguments against releasing a full unredacted version of the contract were to protect confidences and avoid commercial damage to Veolia and NCC. In disclosing the information, the level of service to the community could be impaired, for example by deterring contractors from bidding in the future. NCC added that the aims of transparency and openness and greater understanding might not be furthered by the release of detailed pricing and technical information. It was more likely that the contractor's competitors would benefit. While this might lead to increased competition, it had to be weighed against protecting the legitimate economic interests of Veolia, NCC and their commercial and industrial partners.
53. In summary NCC said, it had decided that the majority of the information could be disclosed but that Veolia and NCC officers had correctly objected to the release of detailed financial modelling information and information that would affect their future negotiating positions. NCC therefore had decided that the technical and detailed information requested would not add significantly to the public debate but would significantly harm the commercial interests of Veolia and itself; it should therefore be withheld.

Balance of the public interest arguments

54. In reaching his decision, the Commissioner has taken full account of the arguments put to him by the parties. Through his staff, he has reviewed all of the information being withheld and taken full account of its content. He has also followed the principles set out in the decisions in the lead cases. In summary he decided that the public interest in maintaining the exceptions outweighed the public interest in disclosure for information about: specific systems and technical matters; the costs and profits of contractors including the relevant financial models; the claw back of costs e.g. from the sale of by-products; and technical manual matters. Information other than these categories fell to be disclosed.
55. The Commissioner has prepared a detailed decision schedule covering all of the relevant information from the contracts and the FBC, based on the foregoing principles, which he has provided to NCC. It is not annexed to this notice as it necessarily contains information the disclosure of which is itself in dispute.

Emissions

56. The Commissioner has seen that schedules 35 to contracts A and B contain information related to emissions. Regulation 12(9) provides that to the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g). The Commissioner takes the view is that the emissions referred to at Regulation 12(9) are not limited to emissions that have already taken place and could include past, present and future emissions. The Commissioner acknowledges the emphasis placed on the release of information relating to emissions and interprets information relating to emissions broadly to reflect this. Requested information does not have to be specifically information on emissions for the regulation to apply, it also extends to information that relates to emissions.

The Decision

57. The Commissioner has decided that the request was not dealt with in accordance with the Act in respect of the delays which were in breach of Regulations 7(1), 7(3) and 14(2). NCC breached Regulations 5(1) in failing to disclose the information which he has determined should have been disclosed. NCC also breached Regulation 5(2) for failing to make the requested information available within 20 working days.

58. He decided that the Regulation 12(5)(e) exception had been correctly relied upon by NCC and that, for some of the relevant information, the public interest in maintaining the exception outweighed that in disclosing the information as set out in his decision schedule.
59. He decided that the Regulation 12(9) exception applied to some information as set out in his decision schedule.

Steps Required

60. The Commissioner requires NCC to ensure compliance with the EIR by disclosing to the complainant the information so indicated in his decision schedule. The detailed decision schedule is itself being withheld until the conclusion of any appeal proceedings and the time for any appeal to be made against the Commissioner's decision has passed.
61. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

62. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

63. 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 30th day of June 2010

Signed

Steve Wood
Head of Policy Delivery

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

Legal Annex

Statutory Instrument 2004 No. 3391

The Environmental Information Regulations 2004

Interpretation

2. - (1) In these Regulations -

"the Act" means the Freedom of Information Act 2000;

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

"appropriate records 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^[4] 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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

Duty to make available environmental information on request

5. - (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

Extension of time

7. - (1) Where a request is made under regulation 5, the public authority may extend the period of 20 working days referred to in the provisions in paragraph (2) to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.

...

(3) Where paragraph (1) applies the public authority shall notify the applicant accordingly as soon as possible and no later than 20 working days after the date of receipt of the request.

Advice and assistance

9. - (1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.

Exceptions to the duty to disclose environmental information

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

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

...

(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

(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g)."

Personal data

13. - (1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

...

Refusal to disclose information

14. - (1) If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

(2) The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

...

Copy of Decision Notice FER0066052

**Freedom of Information Act 2000 (Section 50) and
The Environmental Information Regulations 2004.**

Decision Notice

Date 12 February 2007

Public Authority: East Riding of Yorkshire Council
Address: County Hall
Cross Street
Beverley
East Riding of Yorkshire
HU17 9BA

Summary

The complainant requested a copy of a waste management contract the council has agreed with an independent waste management contractor. The council withheld some sections of the contract on the basis that Regulation 12(5)(e) (confidentiality of information) applied.

The Commissioner's decision in this matter is that the council has not dealt with the complainant's request in accordance with the Regulations in that some sections of the redacted information should have been supplied to the complainant. The exception to the duty to disclose the requested information was however applicable to other sections of the contract.

The Commissioner's Role

1. The Environmental Information Regulations (The Regulations) 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 Regulations 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 Regulations.

The Request

2. The complainant has advised that on 5 January 2005 the following information was requested from the public authority;

"A copy of the contract signed between the council and WRG Ltd over the future disposal of waste to meet government landfill targets."

3. The council responded in a letter dated 2 February 2005, stating that it held the information, but that it was exempt from disclosure under sections 22 (future publication) and 43 (commercial interests).
4. The complainant therefore asked the council to review its decision. The council wrote to the complainant on 9 February confirming that it had received this request and that it would reply within 10 working days. It then replied on 14 February 2005 refusing to disclose the information for the same reasons.

The Investigation

Scope of the case

5. On 28 February 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the information he requested should have been disclosed to him. The information requested is a contract between the contractor, East Riding of Yorkshire Council and Kingston upon Hull City Council, signed on the 7 October 1999 for the provision of an integrated waste management service between that December 1999 to December 2024.
6. The Commissioner's decision is that this information falls within the definition of environmental information provided in Regulation 2(c) which includes within its scope information such as 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 the Regulations, as well as measures or activities designed to protect those elements. It also falls within the scope of Regulation 2(b) in that it relates to waste.).
7. The Commissioner has considered whether some sections of the information should be considered to fall outside the definition of

environmental information. His decision is that the entire contract, including the pricing and financial aspects of the contract materially relates to, and is interlinked to the overall reason for the contract to such an extent that it would be a false distinction to consider this particular information as not being environmental in nature.

Chronology

8. The complainant requested a copy of a contract between the council and the contractor. The Commissioner wrote to the council on 30 March 2005 requesting a copy of the information, and offered an opportunity for the council to review its application of the Act to the information and provide further argument in support of the exemptions it had applied to the information. He also stated to the council that in his view it was likely that the request should have been dealt with under the Regulations.
9. The council responded to the complainant in a letter dated 26 April 2005, stating that it had reviewed its decision under the Regulations, and had decided that some of the information was exempt under Regulation 12(5)(e). It did however provide the complainant with the opportunity to view and copy some sections of it at the council offices. The complainant accepted this opportunity.
10. The Commissioner's investigating officer wrote back to the council on 10 June 2005, again requesting a copy of the contract in order to evaluate the application of the exceptions. The council wrote back on 17 June 2005 stating that without the Commissioner serving an Information Notice the council did not feel obliged to provide it to him. It also stated that the complainant had not yet requested a review of its decision.
11. The Commissioner's investigating officer telephoned the council on 21 June 2005 in response to this letter. In that conversation the investigating officer pointed out to the council that it had in fact carried out a review. He then explained the informal approach the Commissioner takes when initially asking a public authority for information in relation to an investigation. The council solicitor stated that in his view the council could not provide the information on an informal basis as it needed to ensure that it did not breach a duty of confidence which it owed to the contractor. Nevertheless he agreed to contact the contractor and ask for its permission to supply the information to him.

12. The Commissioner's investigating officer rang the council again on 29 June 2005, and a solicitor for the council confirmed that they were preparing to send a submission to him.
13. The Commissioner's investigating officer emailed the council on 13 July 2005 asking when the information would be issued, and followed this with a telephone call on 19 July 2005 for the same reason. In that conversation the solicitor confirmed that a request had been made to the contractor, and that the council was awaiting clearance to issue the contract to the Commissioner from the contractor's executive.
14. The council replied on 5 August 2005 stating that the contractor refused to allow the information to be disclosed on the basis of commercial confidentiality. It went on to state that if the Commissioner wished a copy of the information he would need to issue an Information Notice. However, that email was not initially received and the Commissioner's investigating officer emailed the council on 25 August 2005 requesting a full submission by the 31 August 2005. The email was then received.
15. An Information Notice was issued on 8 September 2005, and the council then provided the information to the Commissioner on 7 October 2005.
16. The council also provided variation orders to the contract to the Commissioner on 12 October 2005.
17. On 16 December 2005 the Commissioner's investigating officer contacted the council by telephone, stating that some areas of the contract which the council had decided were no longer covered by the exceptions should be disclosed to the complainant. The council agreed to look into this. The Commissioner wrote to the council on 19 January 2006 requesting an update as to whether the information had been disclosed. The council replied on 23 January 2006 stating that it had not yet done so but would do in the immediate future.
18. The Commissioner received a letter from the complainant on 7 February stating that he had received a CD from the council which provided the information.
19. On 9 February 2006 the Commissioner contacted the complainant clarifying that the information was not all of the information he had requested. He also asked the complainant to write back to the office if he was content with the information he had now received. The complainant did not reply to this but did write on 16 June 2006 stating

that he wanted the Commissioner to make a decision on the rest of the information in the contract.

Analysis

Exception

Regulation 12(5)(e)

20. The council refused the request for information on the basis that Regulation 12(5)(e) applies. This allows commercial or economic information which meets the criteria for either a statutory or a common law duty of confidentiality to remain confidential if that duty is owed in order to protect the legitimate economic interests of any party. The Regulation in full is provided in the legal annex to this decision.
21. The tests to be applied in section 12(5)(e) are therefore:
- a) Is the information commercial or industrial in nature?
 - b) Is the information subject to a duty of confidence which is provided by law?
 - c) Is confidentiality required to protect a legitimate economic interest?
 - d) Would the confidentiality required to protect a legitimate economic interest be adversely affected by disclosure?
22. The council argues that the contract is subject to a duty of confidence. They state that there is an implied duty of confidence in the submission of tenders, and that the tendering documents are included as part of the contract. The council therefore argues that an actionable breach of that confidence would arise if the contract is disclosed.

Is the information commercial or industrial in nature?

23. The Commissioner is satisfied that the sections of the contract and the variation orders to which the exception has been applied contain commercial or industrial information. The sections contain information on the planning, development and associated costs of the development of an integrated waste management system for the Hull and East Riding area.

Is confidence necessary to protect a legitimate economic interest?

24. The Commissioner notes that the contract contains all of the documentation between the parties prior to the signing of the contract.

This includes the information provided by the contractor in the tendering process.

25. The council argues that confidentiality is required in order to enable the contractor to tender for other waste management contracts in the future without being at a competitive disadvantage, and to manage its operations as a private commercial venture with a duty to its employees and shareholders. It provides arguments in support of this view by stating that disclosing this information would allow competitors to learn about the pricing mechanisms, bargaining positions, methods of tendering and methods of contract operation of the contractor, thereby negating its ability to develop a commercial advantage over its competitors.
26. The Commissioner accepts the argument that the legitimate economic interests of the contractors could be adversely affected by the disclosure of this information as disclosure could provide information on the contractor's methods of business which may be of advantage to its direct competitors.
27. The Commissioner must therefore ascertain, for each section of the contract which has been exempted from disclosure whether a) a duty of confidence is owed, b) whether that duty of confidence is in place to protect any parties' economic interests and c) whether any adverse effect to those interests would result as a result of a disclosure of the information.

Is the information subject to a duty of confidence?

28. The Commissioner does not accept that a confidentiality clause or a general implication of a duty of confidence will, in itself, mean that all information caught by the clause should be, or will be considered confidential. To accept such a proposition would essentially give public authorities the opportunity to contract out of their obligations under the Act and the Regulations. The Commissioner will therefore look behind any specific stipulation or implied duty of confidence to the nature of the information concerned and consider whether the duty should stand for each particular section or topic.
29. When considering this complaint he has borne in mind that Regulation 12(2)(a) states that a public authority should apply a presumption in favour of disclosure when considering a request for environmental information. Hence, when considering a complaint containing environmental information the Commissioner applies the presumption that the requested information should be disclosed. The Commissioner will therefore only agree that information is exempt from disclosure

where a public authority has provided clear evidence to the effect that an exception applies, and that the public interest in maintaining that exception outweighs the public interest in disclosing the information

30. For a duty of confidence to be owed under the common law it is necessary for certain criteria to be met. The key elements for this are that the information must:
- have been imparted in circumstances which create an obligation of confidence, and
 - have the necessary 'quality' of confidence.

Was the information imparted in circumstances which created an obligation of confidence?

31. The Commissioner accepts that there is an inherent duty of confidentiality when tenders are submitted to councils in procurement exercises. The Public Contracts Regulations 2006 require that where a contractor obtains information as part of a procurement process the council should accede to reasonable requests from the contractor that information passed to the council as part of the procurement process is treated as confidential.
32. In this case there is no evidence to suggest that the contractor initially specified that all information it supplied to the council should be treated in confidence, however the council argues that an implied duty of confidence exists. There is also no specific confidentiality clause in the contract between the councils and the contractor. There are however confidentiality agreements between third parties and the contractor (relating to agreements the contractor has for third parties to supply equipment for the contractor in order for it to provide the service). These third party documents have been included in the package of information incorporated into the contract and are therefore also caught by this request. However, the Commissioner recognises that it is an accepted principle in English law that commercial information provided in the course of a tender is supplied under an obligation of confidence. He is therefore satisfied that the information supplied by the contractor was imparted in circumstances which created an obligation of confidence.
33. Part of the information in the contract is information supplied by the councils to the contractor as part of the normal process of forming a contract. The Commissioner has considered whether this information can also be considered confidential. In the case of *Derry City Council v the Information Commissioner* (case EA/2006/0014), the Information Tribunal considered the status of 'confidential' information held within a

contract. In that decision the Tribunal came to a view that information within a contract was generally the result of an agreement between the parties rather than information being provided to the council in confidence. However, this was a decision under the Act rather than the Regulations. Under section 41 of the Act there is an additional requirement that the information must have been provided to the authority "by another party". This requirement is not in the Regulations. The Commissioner therefore considers that it is possible that a duty of confidence may be owed by the council in relation to any information shared between parties or created jointly by them.

34. The Commissioner has considered whether the interests of the council can be taken into account in considering whether the information should be disclosed. The exception in Regulation 12(5)(e) applies where confidentiality is provided by law in order to protect a legitimate economic interest. In general, confidentiality would only apply to the legitimate economic interests of the confider, (i.e.; in this case the contractor) as the organisation to whom the duty of confidence is owed. The council would not therefore be able to protect its own economic interests through this exception unless there was an agreement that the confidential information agreed in the contract would be confidential to both parties (i.e. that each party agreed to hold the information in confidence and could not therefore disclose it as they both owe the other a duty of confidence to protect their respective economic interests). The Commissioner's decision is that this is the situation in this instance, and therefore he can consider the economic interests of the council in addition to those of the contractor.
35. The Commissioner's decision is therefore that the information was imparted in circumstances which gave rise to an obligation of confidence.

Does the information have the necessary 'quality' of confidence

36. In order to ascertain whether the information has the necessary quality of confidence the Commissioner considers that it can be helpful to ask a number of questions in order to ascertain if the information has the necessary quality of confidence. These include:
- whether the information is trivial;
 - whether the information is available from other sources.

Is the information trivial?

37. The information will not be considered confidential if it is trivial. In this case the contract involves a major procurement of waste management

services by the council. It includes tendering information that the contractor states could be used by its competitors to their own advantage, and to the disadvantage of the contractor. Elements within the contract would disclose a package of information brought together using the skills and experience of the contractor over time, which would be advantageous to other businesses in the areas of waste management. Accordingly the Commissioner is satisfied that the information is not trivial.

38. It is noted however that the contract was signed by the party in October 1999, more than 5 years before the request was made. A consideration is therefore whether the confidentiality of that information has waned simply through the passage of time between the contract being signed and the date the request was received. In the Derry City Council case the Information Tribunal dismissed the possibility that the confidentiality of information would wane over time as a matter of course. At paragraph 34(d) of the decision it found that a duty of confidence would be retained, regardless of the amount of time which may have passed, until the information in question had "either passed into the public domain or had ceased to have commercial significance".
39. There are therefore 2 aspects to consider in this question:
- Has the information passed into the public domain?
 - Does the information which has not passed into the public domain retain its commercial significance?

Is the information already available by other means/has it passed into the public domain?

40. If the information is already available by other means then confidentiality cannot apply. Similarly if it is already available any arguments to the effect that disclosure would be detrimental to commercial or economic interests are negated, as a disclosure has already occurred.
41. The Commissioner notes that there is already a great deal of general information on the waste management services being provided in the public domain. A lot of this information is also included within the contract. Information is available from various sources, including the websites of the contractor and the council, and through the public consultation process when planning applications are submitted. Further information is available through the waste management licences or Pollution Prevention and Control (PPC) Permits required by statute which are published by the Environment Agency. This information also

includes details on tonnages handled at the contractor's sites. The contractor also states that it has an open door policy which allows members of the public to visit sites through prior arrangement.

42. Where information has been disclosed in this way a duty of confidentiality will not apply. Regulation 12(5) (e) will not therefore be applicable.
43. Although a lot of the information in the contract is readily available by other means the structure of the contract is such that it is difficult to unravel which sections are already in the public domain and which are not.
44. The Commissioner has therefore asked the council and the contractor to clearly define which information is not publicly available and provide an explanation of the application of the exceptions to that information. The council has made clear that certain elements of the contract are considered confidential, and the parties have submitted arguments to show why they seek to exempt this. Information which the parties claim should be exempt include:
 - information on the pricing structures and mechanisms agreed in the contract,
 - information on the operational agreements in the contract,
 - systems and technical information highlighting the processes the contractor uses in its management of waste,
 - financial information on the contractor,
 - elements of the contract involving personal information of the contractors staff,
 - information on bonds and liability cover entered into by the contractor as regards the contract,
 - information on the company itself – articles of association etc.,
 - planning and development information (to a limited extent),
 - third party information provided to the contractor on the hire/purchase or maintenance of equipment, and
 - feasibility studies carried out by the contractor or its agents.
45. The base argument for the maintenance of the duty of confidence of this information is that disclosure would cause an adverse effect to the contractors or the council's commercial interests. When considering the confidentiality of this information the Commissioner has therefore considered whether the information retains its commercial sensitivity or its commercial significance. If the information is not sensitive the criteria for the exception would not be met as confidentiality would not be necessary in order to "protect a legitimate economic interest".

Does the information retain its commercial significance – would disclosure have an adverse effect upon a party's legitimate economic interest?

a) Pricing structures

46. The council and the contractor have submitted an argument that confidence should be maintained for the pricing sections of the contract as disclosure of this information will have an adverse effect upon the economic interests of the contractor. Their argument is that if the pricing information is disclosed the contractor will lose its competitive advantage over its rivals when competing for other contracts of a similar nature.
47. The council has provided an argument that disclosing information which it has received in confidence could detrimentally affect its business relationships with third parties in future negotiations. It argues that disclosure of certain types of information such as financial models, price breakdowns, CVs and reference sites will compromise the role of the authority as purchaser. Suppliers could withhold sensitive information in the future to the detriment of the purchasing process, and result in a reduction in the authority's ability to negotiate effectively to secure best value for money.
48. The Commissioner has also considered whether the disclosure of this information would allow competitors to analyse the pricing arrangements and adopt the systems themselves in order to submit a lower offer to other organisations in future tendering exercises.
49. There is also an argument that disclosure would adversely affect the negotiating position of the contractor in its negotiations with third parties; for example, if the third party knows that the council is being charged at a certain rate, they may seek to negotiate their own rates with the contractor down to that level. Alternatively, those third parties in existing contractual agreements may be aggrieved if they found out that they are being charged more than the council for the services being provided. The potential is therefore there for the contractor to find its relationships with third party clients damaged by the disclosure of this information.
50. In considering these arguments the Commissioner has referred to a number of similar cases in other jurisdictions which also dealt with requests for pricing information. These include the Scottish Information Commissioner's decisions in cases 034/2006 & 180/2006, and the Irish Commissioner's decision in case 98049, 98056 & 98057. Although there are differences in legislation between the different regimes, the

Commissioner is satisfied that many of the considerations put forward by the Commissioners in those cases are relevant to this issue.

51. The Commissioner has considered whether the disclosure of the prices the contractor charges the council would undermine any competitive advantage the contractor may have; specifically whether the disclosure would provide the opportunity for competitors to outbid the contractor in future tendering exercises with other public authorities. Essentially the question to be asked is whether the pricing information from this contract would allow competitors to understand the methodology and strategies of the contractor in submitting the prices they did, and use this information to outbid or undermine the contractor in future tendering exercises in other counties.

52. The Commissioner analysed the pricing information which would be disclosed and has considered whether this would be the case. Contracts of this nature involve providing an integrated waste management plan, taking into account a number of different processes and considerations, many of which will be stipulated by the contracting councils or will be dictated by the geographical features of the area of land to be covered. The cost of providing these services, (and thereby the cost to be passed on to the council together with an associated profit margin), may be dependent upon many factors. These could include:
 - The geographical characteristics of the areas where services are planned, (e.g. urban/rural, costs of property purchase and development requirements).
 - The distance travelled by waste before it can ultimately be disposed of and how best to manage this.
 - The percentage of waste being dealt with in particular ways, (i.e. incineration/landfill/recycling and composting), for instance contracts are likely to have to include any specific requirements laid down by the procuring council (e.g. a stipulation that 50% of waste must be recycled rather than incinerated or sent to landfill).
 - The ability of the contractor to be able to recoup costs through the sale of bi-products from the waste management process (such as aggregates, energy from energy from waste processes or compost from recycling organic waste).
 - The size of the contract in question, (e.g. larger, longer contracts could benefit from economies of scale)
 - The likely growth of the tonnages of waste over the period of the contract.
 - The length of term of the contract, (i.e. longer term contracts may allow for a greater degree of substantive development by

the contractor – sites may be purchased and developed rather than leased, and costs may be recovered over the length of the contract rather than over a shorter period, thereby allowing smaller annual costs over the period).

- Any requirements under The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) for staff currently on waste management duties, e.g. the likely costs of transferring employee contracts.
- The number and type of sites required to cover the geographical area where services are to be provided. This may be dependent upon the amounts and types of waste typically produced within the area covered by the contract, e.g. the percentage or tonnages of potentially hazardous waste which will require specialised disposal treatment may be higher in some areas dependent upon usage of the land
- The demographics and predicted population growth/reduction of those areas.
- The likely sites for development and the existing sites suitable for takeover.

53. The above is a non-exhaustive list of factors which might be taken into account by a tendering company when considering the price to charge. Although the Commissioner has not asked the contractor for his specific technique for calculating a tender price, individual factors such as those highlighted could add extra cost to providing a service and may therefore have been taken into account when considering the tender price. Alternatively a much simpler or different method of calculation may have been used. The Commissioner's point is that many different factors *may* be taken into account when considering the price to tender at, and that these considerations would not be evident from the disclosure of the pricing information in this contract. It is the skill of the contractor in recognising how, or whether elements such as these need to be weighted, and through this seeking to reduce to a minimum any associated costs which will allow them to maximise the profit level they attach to the final tendering price whilst still providing a competitive quote.

54. For each individual contract factors such as those mentioned above are likely to vary dependant upon the circumstances of the case. Although the overall method of contract operation will be similar, the differing importance/costs of the factors for each individual tender are therefore likely to mean that a significantly different calculation would be carried out by a contractor for each individual tender. The contractor must then try to arrive at a price which maximises its profit whilst being the most competitive bid for the contract. It is this choice of factors; this

balancing exercise which will make the contractor's bid ultimately successful or not.

55. The Commissioner therefore considers that it is unlikely that the competitive advantage of the contractor would be adversely affected by a disclosure of the pricing information alone. Any parties competing with the contractor for other tenders would need to evaluate the various factors before a final tender price could be decided, much as the contractor would be likely to do. It is therefore extremely unlikely that a tender price for one contract can be directly compared to another in a different area in different circumstances.
56. Following from the above, the Commissioner has considered whether any information held in the contract as to how the individual elements of the price are made up should be disclosed. The Commissioner considers that the profit margins and costs of the contractor are commercially sensitive as they provide information which highlights the contractor's profitable areas to potential competitors. This might allow competitors to analyse and copy these processes to their own competitive advantage. How a contractor minimises its costs in order to produce a lower tender price is the 'commercial secret' of the contractor and any disclosure of costing information which allows such an analysis would be commercially advantageous to competitors. The Commissioner considers that disclosure of information on costs and profits would not particularly shed light on the appropriateness of the council's decision in offering the contract; that decision would be based on best value, which should take into account the appropriateness of the overall pricing as well as the methodology being put forward. It would also not be of great value to the general public to know what profit margin the contractor has set on individual parts of the contract providing the tender was the most suitable overall for the services being sought.
57. A disclosure of the overall prices charged to the council for individual services would not divulge such information as competitors would not be aware of the costs and profit margins associated with each process. However providing constituent parts of the overall price, such as the costs to the contractor and the profit level the contractor adds on top of this to determine the overall price would divulge commercially sensitive information.
58. The Commissioner also considers that information on costs to the contractor for services it provides is essentially the private information of a private commercial company. Information detailing the profits of the contractor therefore falls within the scope of the exemption, as do indicators of costs associated with the individual or overall processes.

59. In so far as the arguments put forward in paragraph 49 above, (detriment to the contractor in its negotiations with private companies), the Commissioner has considered the arguments put forward by the Irish Commissioner in case 98049, 98056 & 98057. In this case the Irish Commissioner recognised a slight possibility that detriment could occur, however he found in favour of a disclosure of the information on the grounds of public interest. In his decision he stated that he did not feel that the argument should be accorded 'significant' weight on the basis that the information was historic and related to a single transaction. He also felt that it would disclose nothing about the policy adopted by the tenderers or how they arrived at the quoted price. He also took into account the fact that no evidence had been put forward that the prejudice he had foreseen was likely to occur. He had simply recognised the possibility that it could occur.
60. In the Derry City Council case the Information Tribunal recognised the potential for prejudice to commercial interests in spite of the fact that the majority of the information was in the public domain and that the contract was signed 6 years previously. Nevertheless it also found in favour of disclosure on the basis of the public interest arguments.
61. The Commissioner has considered these arguments. He sees a great deal of difference between this contract and the potential private contracts which the contractor may enter into (which are likely to be on a much smaller scale). In addition, many of the considerations provided in paragraphs 52 to 55 above are likely to apply. Circumstances affecting the cost to the contractor of carrying out the contract are likely to differ in private contracts to an even greater extent than they would in public procurement exercises. The contractor could easily point to economies of scale, and the different circumstances or variables in each case as a means to override any negotiation strategy which sought to rely upon the prices charged in this contract. Accordingly the Commissioner's decision is that a disclosure of this information at this time would be unlikely to prejudice the contractor's negotiations with private companies.
62. Given this decision it is the Commissioner's view that Regulation 12(5)(e) is not applicable to the overall pricing information in the contract, other than in the limited respect of the costs to the contractor associated with providing the service it has contracted to do and any information indicating the profit levels set on the contract by the contractor.. It is therefore applicable to the costs to the contractor associated with providing the contracted services and any information indicating the profit levels set on the contract by the contractor.

63. The Commissioner has also considered the potential for prejudice to commercial interests if pricing or payment schedules were disclosed. Pricing schedules highlight when specific amounts of money would be payable to the contractor. There is a possibility that competitors could use this information to their advantage and seek to use periods when they are aware that the contractor has no available income from the contract to their own benefit.
64. The Commissioner has considered this argument and does see some merit to it. On the counter side however he has taken into account the fact that the contractor is one of the largest of its type in the United Kingdom and will have a number of other contracts in place. There are likely to be many different pricing schedules in other contracts which would not be divulged in the disclosure of this information. His decision is therefore that it is unlikely that a disclosure of payment schedules from this contract would adversely affect the economic interests of the contractor or the council in this instance. This information should therefore be disclosed.
65. He has also considered whether any adverse effect to the contractor's interests may result through the disclosure of the methods of price calculation. The contract explains in detail how the services are charged for and how the price should be calculated and modified depending upon each variation in circumstances. The schedule is likely to be an amalgamation of the contractor's general methods of business and the councils' stipulations. The councils will to an extent have imposed obligations on the contractor to carry out the contract in specific ways, and made payments conditional subject to an appraisal of performance or variations in contractual conditions. As such it is unlikely that the terms are solely those of the contractor. As such the relationship is likely to be unique to a certain degree, and it is unlikely that the payment schedule in this contract applies to other contracts which the contractor is party to. The Commissioner recognises therefore that other councils may seek to implement similar measures in their own contracts in future tenders, which may be to the disadvantage of the contractor. The Commissioner however recognises that there is a likelihood that such factors are discernable by authorities in their own right, or that councils are likely to discuss the ways in which contracts are formulated between themselves in general terms. The potential for an adverse effect to occur is therefore weakened by this.
66. However the Commissioner does recognise that a disclosure of this information may result in a degree of adverse effect occurring where councils in future tenders use this information to their own advantage to obtain a better deal from the contractor. The Commissioner's

decision is therefore that such information does fall within the exception. A public interest test needs to be carried out in relation to this information. This is dealt with in paragraph 124 and 126 below.

67. However the overall payments due to the contractor, for example the overall price per tonne, the price charged to the council for individual facilities and the price for "working days" at particular facilities should be disclosed. His view is that this information does not fall within the exception in Regulation 12(5)(e).
68. Although he has found that in these particular circumstances that there is no adverse effect as regards the contractor's future tenders and negotiations with private companies by disclosing the limited amount of pricing information he has decided should be disclosed, he is aware that the previous decisions highlighted above have taken account of the possibility of this occurring. He also recognises that the arguments surrounding this point are finely balanced. His decision in this case is based primarily upon the potential differences in costs likely to be inherent in providing different levels of service in different contracts and that this may materially affect the tender prices appropriate for different contracts. He also does not consider that a negotiation with a private company will be the same as that with a public authority seeking to offer a contract for service for an entire county, and that any negotiation on this basis could easily be refuted.
69. Nonetheless the Commissioner does recognise the fact that there is likely to be some overlap in functions, due primarily to the similarity of the actual services being provided (i.e. waste management and disposal). Although his decision is that the exemption in 12(5)(e) is not applicable to this information, he considers that there is merit in considering the public interest arguments for all of the pricing information in this instance as the arguments are so finely drawn. These considerations are addressed in paragraphs 103 to 126 below.

b) Operational information

70. The Commissioner has, for the purposes of this Decision Notice classified information about the actual and specific function of waste management as operational information. He considers that this includes information about how the contractor actually performs the function of waste management for the council. This information will include the various waste management functions which have been agreed between the parties, the number and types of site being introduced, the number of staff at each site, and levels of staff involved, and information about the manner of waste management for

the various types of waste covered by the contract. It also contains information on the various methods of dealing with the bi-products of the waste such as energy, compost, and ash. It does not include specific, technical information about the sites being considered such as electronic or technical diagrams of the facility, or descriptions of the mechanical or chemical processes being utilised at particular facilities. This type of information is considered in the section entitled 'systems and technical information'.

71. The contractor argues that information on how it intends to operate the contract is already publicly available from various different sources. It points particularly at its own and the council's websites, that two sets of exhibitions were held in a number of areas explaining the proposals, and also to the normal public consultation processes required through the planning application processes.
72. The Commissioner is satisfied that much of the information has now been disclosed and is publicly available through the above means. However, it is also clear that the information in the public domain is scattered across various websites and through varying processes of dissemination. The Regulations do not include an exception for information which is available from other sources, hence the Commissioner's decision is that information contained in the contract relating to the contractor's operating processes should be disclosed to the complainant in response to this request as Regulation 12 (5)(e) is not engaged in relation to such information.
73. Where operational information is not already publicly available he notes that the council has not submitted arguments in support of its claim that the exception applies. He is aware that the majority of this information is available, such as how many, and which types of sites the contractor has decided to use, and that because of this any remaining undisclosed information would be minor compared to the larger question as to how the contractor actually provides the services. However some of the information may not have been made available which addresses some of the more important environmental questions, such as how and where bottom ash, fly ash and other bi-products and residues of the various processes will be either treated and disposed of or recycled. The Commissioner considers that this information should be disclosed in light of the fact that no specific arguments have been put forward by the council or the contractor to suggest why the exception is engaged for this information.
74. As the Commissioner's decision in relation to this information is that the exception is not engaged there is no formal requirement for him to consider the public interest in the disclosure of this information. It is

however the Commissioner's view that the public interest arguments in disclosing information on the treatment of the bi-products greatly outweigh any adverse effect on the economic interests of the contractor in this instance. He has therefore outlined his view on the public interest arguments in paragraphs 127 -139 below.

c) Systems and technical information

75. The council and the contractor have provided arguments in support of their view that systems and technical information should be excluded from disclosure. Systems and technical information encompasses information on the mechanical, electrical and chemical processes employed in the provision of the services, and includes information such as the electrical and system plans and schematics for composting machinery and an energy from waste facility. Much of this information is contained in system diagrams and written explanations/descriptions of the processes being employed at particular facilities. Much of the information has been supplied to the contractor from third parties as part of tendering exercises it has carried out when deciding the appropriate machinery or systems to put forward as part of its tender to the council. It is also noted that some of this information is subject to separate confidentiality clauses between the contractor and the commercial manufacturers or suppliers of the systems.
76. Primarily the arguments in support of withholding this information are as follows:
- The information is not otherwise in the public domain.
 - It contains commercially sensitive information on how the contractor has approached the waste management contract, including tendering information from third parties.
 - It contains detailed technical information on the machinery and systems used by the contractor which could be studied and adopted by competitors of either the contractor or the suppliers of the machinery.
 - Disclosure could disadvantage the contractor's ability to tender for other public or private commercial contracts if competitors to the manufacturers of the machinery use this information for their own benefits.
 - Many elements of the technical information include details on commercially sensitive systems and processes developed by third parties – i.e.: they may be the trade secrets of third parties who have had tenders accepted by the contractor, in confidence, in order for their products to be used should the contractor's bid be successful.

77. The Commissioner has considered these arguments and accepts that the systems and technical information is likely to be commercially sensitive. The information includes detailed plans and descriptions of machinery and processes which are often the commercial property of third party equipment suppliers, and includes technical information which is sensitive to those suppliers.
78. The Commissioner considers that the systems and technical information lies at the heart of the commercial and industrial information which the exception in 12(5)(e) is trying to protect. This information is a detailed description of the systems and processes which gives the contractor its ability to submit a competitive tender. It is the contractor's skill and experience in combining different technical elements with its own operating procedures which allows it to produce a competitive tender whilst also providing it with a profitable return. A disclosure of this information could weaken the contractor's competitive edge by allowing competitors to copy the most innovative or successful parts of the package and implement them with the successful parts of their own systems. . The Commissioner is therefore satisfied that, in general, this information falls within the scope of the exception. Some of this information may also have been supplied to the contractor by third party manufacturers. This is discussed further in paragraph 95 below.
79. However the Commissioner is also aware that some of the technical information will provide further information to interested parties as to whether the systems accepted in the tender are appropriate for the types and amounts of waste being dealt with, and the likely environmental considerations these may highlight. For instance many of the technical and engineering descriptions provided to the council also include statistics on the emission levels the equipment is likely to generate when handling waste. Regulation 12(9) disapplies Regulation 12(5)(e) from including data on emissions. Hence the Commissioner's decision on this is that any information of this sort will need to be disclosed to the complainant. Information on measures being used by the contractor to control emissions (such as flue chimney treatments) should also be disclosed.
80. In his decision on this the Commissioner has noted that Article 6(6) of the Aarhus Convention requires that public authorities give the public concerned access to information relevant to decision making on particular facilities (including waste incinerators and landfill sites) specifically including a description of the site and the physical and technical characteristics of the proposed activity. This also specifically includes providing access to any estimate of the expected residues and emissions of such sites. The Convention requires that such information

should be made available as soon as it becomes available. Directive 2003/35/EC implements this right into European community law in that it requires that the public concerned should be informed as soon as possible of any plans or programmes for such facilities, and have access to *relevant information* about such proposals.

81. The Commissioner's decision regarding the majority of the systems and technical information is that it does fall within the exception. Accordingly he has to consider whether the public interest in maintaining the exception outweighs that in disclosing the information. These considerations are addressed in paragraphs 140 - 149 below.
82. However, in light of the arguments provided above the Commissioner's decision in relation to the information in this contract on emissions likely to arise from its operation is that it should be disclosed to the complainant together with any information on measures planned to protect the environment from the likely emissions.

d) Financial information of the contractor

83. The contract has supplied information on its financial standing as part of the tender it submitted. This includes details of annual accounts from the year the contract was agreed, as well as details of banking services and facilities the contractor had in place at that time. This is essentially the private information of the contractor and does not, of itself impact upon the contractor's ability to carry out the functions it has contracted to do. Essentially the council has required this information from the contractor in order to assure itself that the contractor has the ability and financial stability to carry out the functions it is contracting to carry out. The contractor provided this information to the council as evidence that this was the case. If this information is disclosed detailed information on the company's finances, all be it from a number of years ago, would be disclosed to its competitors, who may still potentially be able to use this information to their own advantage.
84. It is recognised that some elements of the financial information in the contract would be available from Companies House, (such as the annual accounts of the contractor from the period). Regulation 12(5)(e) cannot therefore be claimed for this information as the information cannot be protected by confidentiality. There are no exceptions in the Regulations for information which is available by other means. Hence the council should have provided this information to the complainant.

85. The remaining information highlights overdraft or loan facilities and payment schedules dealing with the contractor's financial cash flow. As such it had the potential to be commercially sensitive at the time it was provided and therefore would possibly retain its status as confidential information on the basis that confidentiality protected the contractor's legitimate economic interests. However it is recognised that at the time of the request the information would have been a number of years out of date, and that a disclosure at that time would have been unlikely to provide information on the current financial status of the contractor.
86. The Commissioner has considered this. Any loan facility information would establish a level of costs being paid by the contractor which the Commissioner considers could be used by competitors. As loan agreements can be paid back over various periods of time the Commissioner considers that there may be a level of detriment in spite of the time which has passed, and that confidentiality is in place to protect any economic detriment which would occur if such information were to be disclosed. The Commissioner's view is therefore that the exception is engaged in relation to this sort of information in the contract. He has therefore carried out a public interest test in relation to this information which is explained at paragraphs 150 to 155 below.

e) Company Information

87. The contract contains some company information on the contractor such as details of its directors, name changes and articles of association. This information would be generally available from Companies House. Regulation 12(5)(e) cannot therefore be claimed as the information is not protected by confidentiality. Therefore the council should disclose this information to the complainant.

f) Personal information

88. Some personal data is included in the contract in the form of names and cv's of staff who will run particular operations. Regulation 12(3) (as clarified by Regulation 13), states that third party personal data shall not be disclosed where the disclosure would contravene one of the data protection principles.
89. The Commissioner considers that disclosure of the c.v.'s in the contract would breach the first data protection principle in that it would be unfair to the individual to disclose private personal information which has been provided to the contractor and the councils on the basis of the individual's employment with the contractor.

90. The Commissioner does however consider that the names and positions of those individuals named in the contract who actually run operations should be disclosed. These are responsible positions and there would be an expectation by an individual in such positions that his or her name and grade would be disclosed upon request. It is noted however that as the contract is a number of years old it is quite possible that the individuals named in the contract were no longer correct at the time the council received the request, or that they never in fact took up position at the facilities in question. Where this is the case the Commissioner considers that there would be no expectation by those individuals that their personal information would be disclosed.

g) Bonds and liabilities

91. The contract contains information from the contractor on performance bonds and liabilities it has entered into, based on the stipulations of the council to provide guarantees on the amounts paid to the contract in advance of the services provided, and in order to ensure the continued provision of services in the event of financial problems or insolvency. This information has been exempted from disclosure by the council. In letters dated 15 August 2006 and 11 October 2006 the Commissioner specifically asked the council or the contractor to clarify what the adverse effect would be to the economic interests of any party if this information was disclosed. In response the contractor stated that the information was provided in confidence. It further stated that the information was not available generally, that it would not be known generally throughout the industry and that there was little public interest in disclosing the information compared to the protecting the commercial interests of the contractor. It did not provide arguments or statements as to what specific adverse effect it envisaged to its economic interests if this information was disclosed. A specific requirement of the exception in Regulation 12(5)(e) is that disclosure would adversely affect a duty of confidentiality which is specifically in place to protect the legitimate economic interests of a party. The Commissioner does not consider the contractor's response is adequate in explaining the adverse effect that would occur to its economic interests.
92. As neither the council nor the contractor has provided sufficient argument for the Commissioner to properly consider the consequences of the disclosure of this information, the Commissioner considers that the parties have failed to make a case in the first instance for the exemption to apply. The Commissioner's decision is therefore that the exception in 12(5)(e) has not been engaged and this information should therefore be disclosed.

h) Planning and development information

93. The contractor has submitted an argument that all of the planning and development information within the contract is now in the public domain. It points particularly at its, and the council's websites which explain the intentions, at the fact that two sets of exhibitions were held in a number of areas explaining the proposals, and also to the normal public consultation processes required through the planning application processes. It is noted that since the time the contract was signed a number of the proposed sites for development have been through the planning application process and have either been agreed or refused and alternatives been drawn up. Accordingly, the Commissioner considers that this information can no longer be considered confidential and the information relating to this within the contract should now be disclosed.
94. The question of identifying preferred sites is now redundant, as the Commissioner understands that all planning information is now in the public domain.

I) Cost of third party equipment hired/purchased by the contractor – costs associated with running and maintaining the equipment. Third party tenders to the contractor.

95. The Commissioner considers that this sort of information ties directly in with the operating costs of the contractor and the systems and technical information in the contract. A disclosure of this information would provide valuable information on the running costs of the contractor which could allow competitors to work out the profit margins employed by it in contracting with the council. Paragraphs 56 - 57 address this point further. The Commissioner's decision is that Regulation 12(5)(e) therefore applies to the information. A public interest test therefore needs to be carried out. This is considered in paragraphs 156 - 160 below.

J) Third party reports /energy studies

96. As part of its tender the contractor submitted a study on the prospects of selling electricity and heat from an "Energy from Waste" facility to various sources. The report contains statistical information from third parties on their energy and heat consumption. The Commissioner has considered the status of this report and considers that this information falls within the scope of Regulation 12(5) (e). This is on the basis that the report contains an analysis of third party energy usage which would be of advantage to competitors of the businesses concerned. The Commissioner also considers that the research contained within the

study may be of benefit to the competitors of the contractor, for instance by providing figures on the potential cost savings through the resale of energy produced by the waste management process.

97. The Commissioner considers that the report itself may have a market value, and that disclosure could dissuade contractors from providing this sort of information to councils in the future. Accordingly the Commissioner's view is that Regulation 12(5)(e) is engaged by this information. The Commissioner has therefore carried out a public interest test on this information which is provided in paragraphs 161 to 168 below.

Public interest arguments

General considerations

98. The council has contracted out one of its core functions; to manage the waste of the community appropriately. It has done so using a substantial amount of tax payer's money and the full term of the contract is 25 years. Although a core function has been contracted out, vital information on how appropriate the contract is to the community has been withheld from the public on the basis that disclosing it could affect the commercial or economic interests of the contractor. Although the Commissioner accepts that in a tendering process some information, particularly to do with the tendering methods and prices, should be confidential for reasons of fairness and best value, he questions the appropriateness of withholding sections of this information beyond that point, particularly for a timescale running the length of term of this contract.
99. It is recognised that the sensitivity of the information will generally wane over time. Both the council and the contractor have recognised this, and it is because of this that a great deal of the information from the contract has now been disclosed to the general public through the websites of the council and the contractor. However the question which remains at issue in this case is whether any of the information the councils and the contractor considered to be sensitive was still so sensitive at the time that the request was received that the public interest in maintaining the exception outweighed that in disclosing the information.
100. Waste management is a core function of local authorities, and has the capacity to affect all of the community to a very great degree. It can affect the community in a number of ways in addition to the general

effects of ensuring household and commercial waste is dealt with appropriately. This can include environmental concerns – e.g.

- potential pollution created by sites dealing with the waste such as incinerators and composting facilities,
- increased road traffic through various areas by the removal and transportation of waste,
- environmental concerns regarding the destruction of habitat,
- house prices in the areas being affected through the services being provided, e.g. by proximity to a site, and
- The cost to taxpayers of ensuring a good level of service is rendered, taking into account the above factors.

101. As such the Commissioner has taken into account the fact that there will be a considerable public interest in the disclosure of information which throws light on whether

- the council has made an appropriate decision when contracting out a core service to a third party contractor, that such a contract is not in itself detrimental to the interests of the community or tax payers,
- the council has entered into an appropriate contract, for an appropriate price for the services the community requires,
- the council has fully taken into consideration the needs and concerns of the community, both in terms of waste management, but also as regards the health and safety of the community, and any environmental concerns associated with the management of waste,
- the council has ensured adequate safeguards to ensure that the provision of waste services is protected in the event of unforeseen circumstances and over the length of the term of the contract,
- the council has ensured that the contractor has made adequate plans in the event of population growth or reduction or on changes to the legal requirements in managing waste, and
- the council has ensured that adequate safeguards to protect the environment have been established as part of the contract.

102. The counter arguments relate to:

- the strong public interest in confidences being maintained,
- the likelihood of commercial damage being caused to the contractor through a disclosure of information it considers confidential,
- the possibility that in disclosing this information the level of service to the community may be impaired, and

- the possibility that the cost for obtaining services may increase through decreased competition for contracts thereby creating detriment to the best interests of the community, either in the council's area or elsewhere.

Pricing information

103. Although the Commissioner has refuted the arguments put forward that 12(5)(e) applies to the disclosure of the pricing information, he considers it prudent to examine the hypothetical argument that a parties' economic interests would be adversely affected through the disclosure of this information. He has therefore considered the public interest arguments relevant to this.
104. The central argument submitted by the contractor is that less reputable competitors may cut corners in order to achieve a lower, more competitive tender. Offers from companies of this nature may not put as much weight on matters such as environmental compliance or the quality of services they provide. The contractor suggests that less experienced companies may also seek to win contracts without the necessary experience to be able to effectively provide services, potentially to the detriment of the local community.
105. The contractor argues that if this downward pressure was brought to bear on the delivery of services it would need to re-evaluate its own pricing structures in future tenders in order to compete with the lower tenders. It argues however that this pressure could put at risk the high quality of services it and other reputable contractors provide, resulting in a slippage of standards, and potential detriment to the services they provide to the general public.
106. As a result of such pressures, together with the possibility that its sensitive commercial information would be disclosed affecting the contractor's other contracts, the contractor argues that it would need to question the value of entering into contracts with public authorities in the future. It states that disclosure could therefore have the effect of lowering the number of competitors willing to tender for these types of contracts, ultimately forcing prices up for councils procuring services.
107. A further argument is whether a disclosure of tender prices which have been successful in the past would dissuade contractors from providing tenders which significantly undercut the previously accepted price. This would have a negative effect upon open competition and could have the effect of increasing the costs for services payable by the council to the detriment of the community.

108. The Commissioner does not accept that a disclosure of the price payable by the council would allow less ethical contractors to undermine future tender bids. Councils accepting such tenders will be under a duty of care to ensure that the companies they contract with are suitable, that processes for the supervision of the contract are built into the contract, and that appropriate standards of service are maintained by the contractor. The concept of best value takes into account the nature and quality of the service being offered in addition to the price at which the tender is made. There are also many statutory requirements in place to ensure that environmental and health and safety standards meet acceptable levels, and are maintained at that level. The council will be under a duty to ensure that they contract with contractors whose tender demonstrates that they reach those standards
109. Similarly the Commissioner does not accept an argument that the contractor may not tender for such contracts in the future. Whilst this is entirely the choice of the contractor, the Commissioner notes the tribunal's considerations in the Irish Commissioner's decision in case 98049, 98056 & 98057. In Canada a duty for public bodies to disclose precisely this sort of information was introduced in the 1990's. The Public Works and Government Services Canada (PWGSC) is responsible for procuring services and goods for over 100 government agencies and departments. Its document "General Conditions - Standing Offers - Good or Services", published on 15 August 2006 contains the following clause in its standard acquisition clauses and conditions for public procurement contracts:
- "2005 08 (2006-08-15) Disclosure of Information
- The Offeror agrees to the disclosure of its standing offer unit prices or rates by Canada, and further agrees that it will have no right to claim against Canada, the Identified User, their employees, agents or servants, or any of them, in relation to such disclosure."
110. The Commissioner therefore considers that this long running programme of disclosure is strong evidence to the effect that a disclosure of limited pricing information in this instance will not result in an overall reduction in private businesses willing to contract with the council.
111. In addition, the Commissioner considers that contracts of this nature may be highly lucrative for the successful contractors and it is therefore unlikely that they would willingly exclude themselves from tenders simply on the basis of a potential disclosure of a limited

amount of information. They may consider doing so if there was a serious risk that disclosure would seriously disrupt their future tenders through, for instance, disclosing their commercial or trade secrets, however this is precisely the danger the exceptions in the Regulations seek to protect against.

112. The council argued that a disclosure of this information would be detrimental to its relations with third parties, thereby compromising its role as purchaser. The Commissioner has considered whether other contractors would lose confidence in the council if information the contractor has submitted in confidence is disclosed. His first consideration on this point is that the introduction of the Act and the Regulations has already changed the ground rules as regards the information a public authority may withhold from the general public it serves. This should create a greater understanding in organisations contracting with authorities that only information which successfully passes the criteria in the exceptions, and which it is genuinely in the public interest to withhold will be protected. It is the Commissioner's view that contractors would, in any event, take into account the fact that they would be contracting with a public authority and that the council would therefore be subject to a greater degree of scrutiny than private business. Similarly it would also be clear that the council would be under a duty to be as open and transparent as possible in its dealings given its duty to the local community and taxpayers. The Commissioner's view is therefore that a disclosure of non sensitive information from this contract would not substantially change the perceptions of private businesses, given that information access rights are now well established and understood.
113. The Commissioner also considers that businesses will understand that a decision to disclose pricing information in this situation does not equate to a decision to disclose this sort of information in all cases. There are particular circumstances in the disclosure of pricing information from this sort of contract which are unlikely to be duplicated in the vast majority of other situations. The council's arguments are therefore weakened by the fact that a decision to disclose in this instance does not provide a precedent for all future requests for pricing information in other contracts generally.
114. The council also argues that a disclosure of this information may lead to contractors being reluctant to provide as much information as they have previously when submitting tenders which could lessen its ability to obtain best value for money. However the Commissioner considers that the implementation of rights under the Act will already have indicated to business the possibility that information it provides could be disclosed as a result of a request. Advice and guidance on the

- implementation of the Act which is provided for public authorities makes clear that they should seek to ensure that contractors are provided with a very clear picture of the likelihood of the disclosure of information, and that authorities should not enter into agreements which provide unsubstantial claims to confidentiality. They should seek to reduce to a minimum, and clearly define with contractors which information it considers meets the necessary criteria to be considered confidential.
115. In any event the Commissioner considers that if information which is commercially sensitive is withheld this would not be the likely conclusion. Public authorities may choose not to accept tenders where information they require to make a fully informed decision is withheld by a contractor, and contractors wishing to win the contract will not withhold information if as a result their bid is automatically dismissed.
116. The Commissioner further considered the argument put forward that a disclosure would allow competitors to analyse and use this information to their own advantage. Although he considers this argument holds little weight where only a limited disclosure is made, he has considered the public interest arguments if this was in fact the case. It is his belief that even if the parties believe that the exception is engaged by this information the public interest arguments would still rest with the disclosure of pricing information.
117. In the event that the disclosure of pricing information would allow an analysis of the methods of tendering of the contractor the following would apply. The Commissioner considers that the contractor in this instance would also then be able to benefit from the disclosure of this sort of information in other contracts, thereby levelling the playing field and weakening its argument that competitors would gain an unfair advantage to some extent.
118. The Commissioner has considered the general nature of the pricing information in the contract. The central public interest in the disclosure of this information lies in creating transparency and accountability in the spending of public money, and in the financial decisions the council has made.
119. The Commissioner notes that a wider disclosure of this information may allow other councils to make a better judgement of "best value" when considering tenders for similar contracts in the future. A disclosure of this sort of information would allow councils to consider contracts in place in counties with similar circumstances to their own, and consider whether the prices being tendered to them are appropriate for their particular circumstances. At the least this may

better enable them to question the composition of the prices being offered by contractors and react accordingly.

120. In addition it is noted that contractors themselves may benefit from the disclosure of similar information from other successful tenders. They will then have information on prices accepted by other councils in other tenders and can use this information when tendering for similar contracts in the future. Further, there is a possibility that new companies may tender for contracts. Although the contractor has stated that this would result in a reduction of the quality of services the community receives, the Commissioner disagrees with this assessment, as it is up to the council to ensure that the appropriate bid is selected. In this way tenders should become more competitive and this may lead to more efficient, tailored bids being provided to councils from both experienced and inexperienced bidders in the future.
121. The Commissioner has considered the likelihood that disclosure would be detrimental to the commercial and economic interests of the contractor and the council. His conclusion is that this would not be the case. However he has also considered the argument put forward by the contractor that disclosing this information could increase the likelihood that the contractor would face greater competition in other procurement exercises. He considers that any impact of this kind is in the public interest, and that that interest overrides the detriment the contractor may suffer as a result of such an increase. Moreover he does not consider that disclosing pricing information would provide commercially damaging information to a contractor's rivals. It would merely provide an indication of the pricing and service levels that the contractor has set in a tender which has been accepted by the council in this instance. It is noted that there is no immediate likelihood of competition for this contract as the contract still has many years left to run. The Commissioner also considers that commercial damage is unlikely given that this sort of information is commonly disclosed in other jurisdictions.
122. For all these reasons, the Commissioner considers that the greater weight of the public interest rests in allowing more scrutiny of the financial aspects of the arrangements under which a major function of the council is contracted out to private commercial enterprise, at significant cost to tax payers.
123. However it is noted that information on the costs and profits of the company would not provide greater transparency on the contract. The level of costs and profits are the private information of the contractor. The essential information for accountability so far as the community is concerned is information highlighting the factors pointed out in

paragraph 101 above. The particular costs and profits factored within the price do not enhance accountability providing the overall price and services amount to best value for money. The disclosure of the overall cost to the council, together with information as to how the contract is to be carried out, is sufficient to meet the public interest.

124. The Commissioner has considered the public interest in disclosing the methods of calculation from the contract. Methods of calculating payments may provide incentives for the contractor to consider one method of waste management over another, (for instance favouring recycling over incineration). Although other provisions in the contract specifically provide minimum targets for dealing with waste in particular ways, there is a strong public interest in disclosing how fees are calculated to show how any such incentives are tied into the contract. Although the disclosure of the set targets in the contract will provide a certain degree of transparency, this additional information would provide a much clearer idea of the likelihood of, for example, waste being recycled.
125. The Commissioner recognises that disclosing the methods of calculation could impinge upon the commercial aspects of the contractor in that some sensitive information could be divulged to the contractor's competitors such as its charging methods. Again however the Commissioner notes that sensitive information on the levels of costs and profits of the contractor in providing the service will not be disclosed. The Commissioner therefore considers that the overall public interest lies in the public being able to ascertain if the payment methods meet the public interest factors highlighted in paragraph 101 above, and whether suitable incentives are in place in the calculation methods to encourage the contractor to deal with waste according to the waste hierarchy principle. His decision is therefore that the methods of calculation should be disclosed.
126. For these reasons the Commissioner considers that the costs to the contractor for providing the various services, and the profit levels it has set on the contract need not be disclosed in this instance.

Operational information

127. The central public interest in the disclosure of the operational information within the contract is that of accountability. It is the operational information which provides the public with an overview of what has been agreed by the council. It is this information which will provide a detailed understanding of the processes and methods of waste management agreed to by the council, how waste will be dealt with, recycling targets levels and consideration for the overall effect

- the contract will have on the community. Along with the cost of providing these services, the operational information is the basic level information which above all demonstrates whether the council has achieved value for money, taking into account such matters as cost, health and safety and protecting the environment.
128. Operational information is therefore one of the most important areas of the contract the disclosure of which would enable the general public to more fully understand the waste management agreement. Given the current emphasis on landfill avoidance and environmentally friendly waste management processes there is considerable public interest in this information being disclosed.
129. On the counter side there is also a strong public interest in confidences being maintained, particularly where it is recognised that the information which was provided to the council was provided on the basis that it was not to be disclosed further because doing so would adversely affect the contractor's economic interests. The Commissioner recognises that this is the case and places a great deal of weight in protecting the interests of commercial businesses where to do otherwise would potentially damage that business. To do otherwise could adversely affect relationships between public authorities and businesses and could detrimentally affect the provision of services to the public and the ability of authorities to achieve best value or make the best decisions in the interests of the community.
130. The Commissioner recognises that by maintaining confidentiality for commercially sensitive information, councils may be able to achieve stronger working relationships with private business, and obtain sensitive commercial information from contractors which allow it to make better informed decisions on the best tender for particular services. Ordering disclosure of such information could potentially damage this process. This in itself would prove detrimental to the decision making of the council and consequently to the community it serves.
131. The Commissioner has addressed some of these arguments in paragraphs 112 to 115 above. In addition, in this contract, much of the operational information will be disclosed in any event as facilities are built and become available for use. How the contractor carries out the overall process of waste management will therefore become far more transparent to general observers as time passes.
132. It is the Commissioner's view that in the short term, it may prove detrimental to the parties to disclose information which highlights preferred sites, or preferred manufacturers. His view is however that

the names of preferred contractors can generally be redacted from the contract. The question of preferred sites is now redundant, as the Commissioner understands that all planning information is now in the public domain. He has not therefore made a final decision on this matter and has explained his reasons for this in paragraphs 93 and 94 above. His preliminary viewpoint refers to his previous decision in case FER0073984; Brighton & Hove Council, (at paragraphs 148 to 156). He takes the view that without further arguments being submitted the balance of the public interest would have favoured the disclosure of this information.

133. The contract contains detailed environmental targets for the contractor, detailing the tonnages it will receive under the contract, and stipulating the amounts which should be dealt with or recycled in particular ways. This information should be disclosed, apart from the targets for the total amounts of electricity which would be generated. These electricity targets may be withheld as disclosure would indicate the potential clawback of costs available to the contractor. The Commissioner's decision on this particular information is that the public interest in maintaining the exemption outweighs that of disclosing the information.
134. The contract also contains descriptions of the processes for treating and recycling bi-products of the incineration process. This section goes into great detail as to the processes involved in the potential re-uses/recycling of the different types of ash resulting from the incineration process.
135. The Commissioner notes that when the ash is first recovered from the incineration process it contains material poisonous to health and the environment such as heavy metals. Some of the ash will also be fine particulate matter, which has the potential to escape if it is not dealt with appropriately. Recycling this material may also have the potential for affecting the environment or public health if, for instance, inappropriately treated waste is reintroduced into the community as a recycled product. There is therefore considerable public interest in this information being disclosed in order that the general public can have a greater understanding of the processes involved in reusing this material, including how it is treated and how it might be used once it has been treated.
136. Disclosure would also allow experts in the field greater knowledge of the processes the contractor uses to treat the waste. They could then highlight any levels of risk involved in the reuse of the material in particular ways. Disclosure would therefore highlight any potential problems which might remain after recycling this material, and should

ultimately create greater confidence in the council's and the contractor's actions in this respect in the way that they have considered, and taken appropriate action for, treating and recycling the waste.

137. The contract also details the tonnages which will be handled by the particular processes in the contract. The contractor has stated that the Pollution Prevention and Control (PPC) permits registered with the Environment Agency on its public register already highlight the tonnages it handles. The Commissioner's view is therefore that this information should be disclosed.
138. The Commissioner views much of the operational information in the contract as of transitory commercial significance only. Once the services are being fully provided there could be little expectation on behalf of the contractor that the information would remain confidential. Its commercial sensitivity would be greatly reduced by the fact that its operating techniques could be discerned by its commercial competitors through observation and visiting the sites concerned. PPC permits are available from the Environment Agency providing an overall picture of the amounts of waste dealt with and the likely pollution levels as a result of this, and planning applications would be available for consultation from the council for competitors to consider. In addition the contractor already provides a degree of information on its operational techniques through its websites. The Commissioner does not accept that disclosing this sort of information at this time provides any particular commercial disadvantage over disclosure at a later time. He has also taken account of the impending requirement that such information should be made available "as soon as possible" through regulations stipulating the right of individuals to participate in an authority's decision making process on such facilities.
139. Given the above, the Commissioner notes that there is a strong public interest in the general public being aware how the contractor is conducting its waste management operations, particularly given the potential emissions and adverse effects such operations could have on the surrounding community and the environment. As arguments have not been sufficiently provided to counter this, and the information is largely already available, the Commissioner's decision is that all of the operational information contained within the contract should be disclosed to the complainant as Regulation 12(5)(e) is not engaged. In the Commissioner's view there is also, in any event, a very strong public interest in this information being disclosed. However in line with the arguments considered in paragraph 137 above the electricity production figures do not have to be disclosed.

Systems and technical information

140. The central public interest arguments in the disclosure of this information lie in the transparency and accountability of council decisions and the spending of public funds and in public awareness of systems employed by the contractor (and therefore on behalf of the council), which could have a detrimental effect upon the environment.
141. Issues surrounding the handling of waste are of particular concern to those who believe that there may be bias towards the use of energy from waste facilities as opposed to the recycling of waste. Arguments have also been put forward that energy from waste plants require specific tonnages of waste in order to produce the necessary levels of heat and power to make them worthwhile, and target recycling levels may need to be overlooked in order to provide adequate levels of waste for these facilities to continue productively.
142. There are also arguments by some groups that incineration technologies are unsafe in that their bi-products may pollute the environment and have adverse effects upon the community surrounding such sites. To a large extent the processes used in this area are already known, are generally available and have already been commented on by such groups. The Commissioner notes for instance the general explanation of the processes and (in their view) the associated concerns with this type of system published on the Greenpeace website. In addition the contractor provides an overview of the process of incineration in a leaflet available from its website.
143. He also notes that in order to properly scrutinise the decisions made by the council in agreeing the contract it may be necessary for much of the systems and technical information to be disclosed. This would allow interested parties with access to the necessary expertise or experience to analyse the full or likely impact of the decision to accept a tender including a specific type of process or facility.
144. However the Commissioner notes that specific emission level data would not be exempted from disclosure under 12 (5)(e) and so information on levels being produced by such facilities would already need to be made available to the general public, as would information on the measures put in place to reduce and control these.
145. The Commissioner notes that European Community standards for emissions apply, and that the council has agreements from the contractor that these levels will be maintained. The emission levels of such facilities would not be exempt from disclosure and he considers that this significantly weakens the argument that all technical

information should be disclosed in order for experts to properly assess the full impact of the facilities. Information which addresses the public health aspects of such facilities also needs to be licensed by the PPC permits and these are also made available to the public by the Environment Agency.

146. The Commissioner also notes that under Article 7(4) of Directive 2003/4/EC, in the event of any imminent threat to human health or the environment caused by failures of safety systems, any information which could enable the public likely to be affected to take preventative measures would need to be disseminated immediately and without delay. Other legislation in force in the UK also requires the disclosure by facility owners of information held on their emissions into the air at regular intervals. Overall, therefore, there are already measures to ensure that public safety requirements are met.
147. As regards the public interest in protecting the commercial interests of the parties, many of the following points apply. If disclosure did affect the competitiveness of the council contractor, or divulged commercial secrets of any party, then it is likely that less information would be supplied to the council in tenders, thereby affecting its ability to make a fully informed decision, and potentially affecting its ability to obtain best value. Without full knowledge of the systems and technical equipment to be employed by a contractor it would be difficult for the council to consider the full impact of accepting a particular tender, and public and environmental safety could potentially be put at risk. In addition, contractors could choose not to tender for contracts if in doing so they might detrimentally affect their competitiveness when tendering for other contracts. The loss of such contractors from the tendering process would reduce the competitiveness of the market and could ultimately lead to an increase in costs to the council and thereby taxpayers.
148. The Commissioner also notes that information on the price paid by the council for the supply and the use of the facilities would need to be disclosed, and therefore the public interest in showing that value for money in the spending of public funds would to a large extent be met. There is little public interest in knowing the cost to the contractor of purchasing or leasing the equipment as discussed above.
149. The Commissioner's decision is therefore that the public interest in disclosing this sort of information is significantly weakened by the information which already needs to be disclosed, and his view is therefore that the overall public interest rests in maintaining confidence for the systems and technical information within the

contract. The public interest in maintaining the exception therefore does not outweigh the public interest in disclosing this information.

Financial information of the contractor

150. For the reasons provided in paragraph 83 - 86 the Commissioner's decision is that the report falls within the scope of Regulation 12(5) (e). He has therefore considered the public interest in disclosing this information.
151. The Commissioner has considered the public interest in maintaining the exception compared to that in disclosing this information. There is a strong public interest in the council being transparent and in disclosing one of the factors which it considered when making the decision to offer the contract to this contractor. However the Commissioner notes that in this case a disclosure would not provide the public with a significantly greater understanding of the decision of the council to accept the contract.
152. If there was a suggestion that the offer had been made to a company with financial problems or with no resources to properly carry out the functions it had agreed to do then there may be situations where it would be in the public interest to disclose this information. However there is no suggestion that this is the case in this instance.
153. The Commissioner accepts that disclosing detailed financial information on a private company which is not up to date, and which would potentially be to its detriment could lead to contractors being reluctant to supply such information to councils as part of tendering exercises in the future. This could damage councils' abilities to recognise that companies are tendering for contracts without the necessary financial stability to be able to properly carry out the services they are tendering for.
154. The Commissioner recognises that councils may often require financial information of this sort as a requirement for doing business with the council. This therefore creates a level playing field where companies compete with each other over public authority contracts.
155. The Commissioner has weighed the public interest in disclosing the remaining information. Disclosing it would only provide a very limited degree of additional understanding of the reasons for the council accepting the tender in this case. There is therefore very little weight in favour of disclosure of the information. He has weighed this against the potential damage to the company's economic interests if the information is disclosed, and the detriment to good decision making

this could create if this sort of information was withheld by contractors in the future. He considers that information highlighting the level of costs paid by the contractor to carry out the contract is commercially sensitive and that a disclosure of this information would provide a clearer indication of the level of profits the contractor is making from this contract to its competitors. Although the Commissioner recognises that this would only be one of many costs the contractor has to bear, his view is that this would help to provide a clearer analysis of the likely profit versus costs levels set on the contract. His decision is therefore that the public interest in maintaining the exception outweighs the public interest in disclosing this type of information.

Cost of third party equipment hired/purchased by the contractor – costs associated with running and maintaining the equipment. Third party tenders to the contractor.

156. For the reasons provided in paragraph 95 the Commissioner's decision is that the report falls within the scope of Regulation 12(5) (e). He has therefore considered the public interest in disclosing this information.
157. The Commissioner has considered the public interest in maintaining the duty of confidence over the disclosure of this information. He notes that this information is generally information which is commercially sensitive to the contractor. This information would help competitors better analyse the likely profit margins the contractor has added to providing the services.
158. A disclosure of this sort of information could also highlight areas where the contractor effectively reduces its costs in order to facilitate a lower overall cost to the council for the contract. Disclosing this could allow competitors to analyse and use this information to their own advantage, thereby potentially negating the contractor's ability to establish a competitive position in relation to its rivals.
159. On the counter side, a wider knowledge of this information would benefit competitors who may then be able to reduce their own costs and thereby, potentially, the costs passed on to councils in any future tenders. If this were to occur there would be a greater likelihood that best value would be achieved.
160. The Commissioner recognises the importance of protecting the interests of suppliers to the contractor, who may have provided discounted rates to the contractor which they would not wish to be disclosed to other parties. The third parties may object to a disclosure of this information to public bodies if it would significantly affect their bargaining and negotiating positions in future transactions. There is

therefore the possibility that they may require contractors not to disclose some elements of this information to public authorities in future tenders. The Commissioner notes that the provision of this information is useful to councils when considering all the aspects of a tender, and that a loss of this sort of information from tenders could be detrimental to a full consideration of the offer which has been made. This loss may mean that the decision the council comes to is a less informed decision than otherwise it might be. The Commissioner's decision is therefore that in respect of this information the public interest in maintaining the exception outweighs the public interest in disclosure.

Third party report on the resale or use of energy from an Energy from Waste Plant

161. For the reasons provided in paragraph 96 - 97 the Commissioner's decision is that the report falls within the scope of Regulation 12(5) (e). He has therefore considered whether the public interest in disclosing this information outweighs the public interest in maintaining the exemption.

162. The Commissioner considers that the following applies to the energy report:

- The report includes third party energy consumption figures provided by those third parties on the basis of viability studies for the sale of energy directly to them.
- The report analyses various geographical areas and considers the viability of the direct sale of energy or heating to residential properties within certain areas. It therefore contains information which may be of use to competitors who may use this analysis to set up their own unrelated businesses.
- The report highlights cost analysis on the sale of the above in order to recoup costs associated with waste management. Thus allowing the contractor to reduce the overall prices it charges the council.
- If this sort of information is disclosed there is a possibility that third parties may refuse to provide it to contractors or their agents in the future – it establishes a level of energy costs which may be of use to their competitors. The Commissioner however considers that a redaction of the names and locations of businesses who have supplied their information to the reports authors could prevent such prejudice occurring.
- Although at the time of the request planning permission for the site had been refused, an Energy from Waste facility has recently

received planning permission, but in a different area to the proposed site considered in the energy study. It is noted however that the new site is close to the previous one, and there is therefore the potential for some prejudice arising out of the content of the report if these plans were to be disclosed.

163. The central public interest in disclosing this information lies in transparency in relation to the actions and decisions of the council. The analysis and recommendations provided in the report on the sale of energy has the potential to affect some areas of the community and is a factor which would have been taken into account when accepting the contractor's tender. Decisions made by the contractor or the council may therefore have had a direct effect upon the public living around the facility. In addition the Commissioner notes that there is wide scale public interest and debate about energy consumption and the viability of such schemes.
164. The report would also provide information on the reasons for the intended operating methods of the contractor which would help the general public better understand the decision of the council to initially accept the proposals in the contract in the form it did. This would add value to public debate as to whether the energy from waste plant is a suitable option for the area. Increased knowledge about this may therefore create greater public confidence in the decision making of the council. The information could also add to debate about how the council can contribute to targets in reducing reliance on carbon dioxide producing energy sources through the reuse of heat and steam created by such facilities. For these reasons, the approach taken by the contractor may also be of wider interest to citizens in other local authority areas seeking to add to the debate on similar plans for combined heat and power facilities.
165. A disclosure of this information may also allow interested parties to understand better whether the incentives for recycling waste are affected by the recouping of costs from the energy from waste process. It is noted however that targets for recycling are a core part of the contract.
166. It is noted that the energy from waste facility initially proposed in the contract had planning permission turned down in May 2003, before the request was received. Since the request however, an application for another site reasonably close to the original one has received planning consent. This would not fall within the scope of the request and is not therefore considered further within this Decision Notice. The Commissioner must make a decision based upon circumstances of the case and the information falling within the scope of the request at the

- time the request was received. At that time planning permission had been refused for the site proposed in the contract. However many of the options provided in this document may still have been viable, albeit with amendments due to the refusal of the application at the initial site. Much of this information may therefore still be commercially sensitive as it highlights a significant cost saving method of the contractor in detail. Should competitors have access to this information at too early a stage in the planning process this may have allowed other parties to use the report to their own competitive advantage. The Commissioner considers that this is unlikely however as the report is based on the premise of the energy from the waste facility being built by the contractors at, or close to the original site. Given that the contractor is contracted to provide waste services in the area for the long term it is unlikely that an analysis which is specific to the areas surrounding the facility, and in respect of which there will no opportunity for direct competition in the immediate future, would be of particular use to competitors.
167. The Commissioner considers that the report highlighted to the council one of the strategies the contractor intended to use to lower the cost of the tender. It may also have allowed the council to fully consider how the levels of cost reclamation through the process of incineration could influence the way the contractor intended to deal with the waste. For instance if the cost levels of incineration were far lower than that of recycling, the council could have sought further guaranteed recycling targets from the contractor in order to ensure that the process was environmentally sound. Thus information of this sort is valuable to councils when considering the overall effect of the contract to the environment and the local community. A disclosure of this information could dissuade contractors from providing this level of detail to councils in the future, which could in turn affect the council's decision making. This loss may mean that councils come to a less informed decision than otherwise they might. However the Commissioner considers that the council could, in this sort of situation make it a mandatory requirement for tendering contractors to submit information of this sort as part of the tendering documentation. The Commissioner also considers that the intended reuse of the energy from the proposed site would have been a core reason for accepting the contract and therefore it would be unlikely that the tender would have been so successful had it not provided this information to the council as part of the tender. It is therefore unlikely that the contractor would in fact refuse to provide this information to the council if this would have greatly weakened the tender compared to its competitors.
168. Given the above, the Commissioner's view is that this information falls within the scope of the exception in Regulation 12(5)(e) however the

public interest in maintaining the exception does not outweigh that in disclosing this information. The information should therefore be disclosed. The Commissioner does however accept that the names and addresses of the third party businesses which have provided their information to the authors of the report can be redacted from the document.

The Decision

169. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

170. The council was entitled to rely upon the exemption in regulation 12(5)(e) when considering the following information:

- Specific systems and technical information which is not otherwise in the public domain. Information on emissions or potential emissions should however be disclosed, as should descriptions of the intended methods of dealing with the bi-products of the waste management process. The Commissioner's decision is that this type of information engages the exception in regulation 12(5)(e) and that the public interest in maintaining the exception outweighs the public interest in disclosing the information.
- Specific information on the costs and profits of the contractor held in the contract. The Commissioner's decision is that this information engages the exception in regulation 12(5)(e) and that the public interest in maintaining the exception outweighs the public interest in disclosing the information.
- Specific information on the likely clawback of costs through the sale of bi-products of the waste management system which aid in lowering the overall cost to the contractor. The Commissioner's decision is that this information engages the exception in regulation 12(5)(e) and that the public interest in maintaining the exception outweighs the public interest in disclosing the information.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Regulations:

171. The council applied regulation 12(5)(e) to the information stipulated below, however the Commissioner's decision is that regulation 12(5)(e) was not applicable for the following reasons:

- All information relating to pricing contained within the contract other than that highlighting specific costs or profits of the contractor. The Commissioner's decision is that this information does not fall within the scope of regulation 12(5)(e) and that, in

any event, the public interest in disclosing it is not outweighed by the public interest in maintaining the exemption.

- All operational information contained within the contract other than the names of preferred subcontractors for the supply of equipment and services which are not already known. The Commissioner's decision is that this information falls within the scope of regulation 12(5)(e) however the public interest in disclosing it is not outweighed by the public interest in maintaining the exemption.
- All information about emissions levels, or likely emission levels held within the contract. The Commissioner's decision is that this information does not fall within the scope of regulation 12 (5)(e) due to the qualification of regulation 12 (5)(e) stipulated in regulation 12(9).
- All planning and development information held within the contract, other than that containing systems and technical information falling within the scope of the exception as discussed above. The Commissioner's decision is that this information does not fall within the exception in regulation 12(5)(e)
- All information on the bonds and liabilities of the contractor within the contract. The Commissioner's decision is that this information does not fall within the exception in regulation 12(5)(e) as neither the contractor nor the council have provided arguments demonstrating why 12(5)(e) is applicable.
- The study on the resale or reuse of energy report other than the names and addresses of companies which have provided their details to the reports authors. The Commissioner's decision is that this information falls within the exception in regulation 12(5)(e) however the public interest in disclosing it is not outweighed by the public interest in maintaining the exemption.

Steps Required

172. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To disclose information from contract signed between the contractor, East Riding of Yorkshire Council and Kingston upon Hull City Council, on the 7 October 1999 for the provision of an integrated waste management service between December 1999 and December 2024 as stipulated below, namely:

- All information relating to pricing contained within the contract other than that highlighting specific costs or profits of the contractor.
- All operational information contained within the contract other than the names of preferred subcontractors for the supply of equipment and services which are not already known.
- All information about emissions levels, or likely emission levels held within the contract
- All planning and development information held within the contract, other than that containing systems and technical information falling within the scope of the exception as discussed above.
- The names and positions of individuals who were proposed to run particular facilities, other than where they were not in fact put in charge of those facilities in actuality, or where they no longer ran those facilities at the time the request was received by the council.

173. However the Commissioner does not require the following information to be disclosed:

- Specific systems and technical information which is not otherwise in the public domain. Information on emissions or potential emissions should however be disclosed, as should descriptions of the intended methods of dealing with the bi-products of the waste management process.
- Specific information on the costs and profits of the contractor held in the contract.

- Specific information on the likely clawback of costs through the sale of bi-products of the waste management system which aid in lowering the overall cost to the contractor.

174. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

175. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

LEGAL ANNEX

The following provisions are extracts from the Environmental Information Regulations 2004

Duty to make available environmental information on request

5.

(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to a standardised procedure used.

(6) Any enactment or rule of law that would prevent the disclosure of information

in accordance with these Regulations shall not apply.

Exceptions to the duty to disclose environmental information

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
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

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

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

(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;

(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

Personal data

13.

(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or

second condition below is satisfied, a public authority shall not disclose the personal data.

(2) The first condition is -

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –

- (i) any of the data protection principles; or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.