

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 8 November 2022

**Public Authority:** East Devon District Council

**Address:** Knowle  
Sidmouth  
Devon  
EX10 8HL

### **Decision (including any steps ordered)**

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1. The complainant requested from East Devon District Council (“the Council”) information relating to a waste services contract. The Council disclosed some information, and withheld the remainder under section 43(2) (commercial interests) of FOIA.
2. The Commissioner’s decision is that the Council was not entitled to withhold the requested information under section 43(2).
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information.
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 17 August 2021, the complainant wrote to the Council and requested information in the following terms:

**"Therefore I request a copy of the signed services agreement between Suez and East Devon District Council for refuse collection and recycling arrangements, including any side letters or qualifying agreements entered into between the two parties regarding the provision of such services."**

6. The Council responded on 7 September 2021. It stated that the information was exempt under section 43(2).
7. Following an internal review, the Council wrote to the complainant on 11 October 2021. It revised its position and refused to comply with the request under section 12 (costs) of FOIA.
8. The Council provided an updated internal review on 25 January 2022. It disclosed the previously withheld information subject to some redactions under section 43(2).

## Scope of the case

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9. The complainant contacted the Commissioner to complain about the way their request for information had been handled, and specifically that the Council was not entitled to withhold information under section 43(2).
10. The scope of this case and of the following analysis is whether the Council was entitled to rely upon section 43(2) to withhold the remaining information.

## Reasons for decision

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### Section 43(2) – Commercial interests

11. Section 43(2) provides an exemption for information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

12. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered her guidance on the application of section 43<sup>1</sup>, which clarifies that: "A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."
13. The withheld information represents parts of a waste services contract between the Council and Suez.
14. The Commissioner wrote to the Council on 9 August 2022 and outlined the explanation (and evidence) that the Council would need provide should it wish to rely upon the exemption. The Commissioner also directed the Council to his published guidance for public authorities.
15. The Council subsequently issued a revised response in which it disclosed some further information to the complainant and provided an explanation in support of the exemption.
16. Having considered the revised response and the Council's explanation in support of the exemption, the Commissioner notes the following:
  - The Council has indicated that some of the information would prejudice its own commercial activity but has not provided a sufficiently detailed explanation of how this would occur. For example, the Commissioner notes the contract derives from 2016, but that whilst the Council refers to timing to be a reason for the application of the exemption, there is no clear explanation of how the 2016 information would now prejudice the Council's position in the event of re-tendering.
  - In respect of the information that the Council claims would prejudice the commercial activity of Suez, there is no evidence that the Council has sought input from Suez, or which would demonstrate that the Council's arguments are based on prior knowledge of Suez' concerns.
17. The Commissioner considers that the Council has had reasonable opportunity to set out why the exemption applies. Having considered the Council's position, the Commissioner is not satisfied that it has

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<sup>1</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/#exemptions>

demonstrated that section 43(2) is engaged in respect of the withheld information.

## Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

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

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

19. 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.
20. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Daniel Perry**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**