

Freedom of Information Act 2000 (Section 50)
Environmental Information Regulations 2004

Decision Notice

Date: 29 June 2011

Public Authority: The Environment Agency
Address: Tyneside House
Skinnerburn Road
Newcastle Business Park
Newcastle upon Tyne
NE4 7AR

Summary

The complainant requested a number of items of information about a specified landfill site. The EA confirmed that it held information relevant to the request and explained that it considered the information was exempt by virtue of the exception found in Regulation 12(5)(e) [confidentiality of commercial or industrial information...]. During the course of the investigation, the EA disclosed redacted versions of the information that it had withheld. It continued to rely on Regulation 12(5)(e) for the remaining information. The Commissioner finds that Regulation 12(5)(e) has been appropriately applied to the remaining withheld information. However, he has recorded a number of procedural breaches in relation to the failure to reply in accordance with the EIR but requires no remedial steps to be taken.

The Commissioner's Role

1. The Environmental Information Regulations (the '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. Landfill sites are regulated by a legislative regime. Landfills include all waste sites that are subject to permitting in accordance with the Landfill (England and Wales) Regulations 2002.
3. The EA is responsible for granting the necessary permit to operate a landfill site. As part of this process, the applicant must demonstrate to the EA that the person in charge of the operation to be controlled by the permit is a 'Fit and Proper Person'. To prove this, they must demonstrate that they have not been convicted of a relevant offence, are technically competent and that they have made or intend to make adequate financial provision - 'the FP requirement'.
4. The Pollution Prevention and Control (England and Wales) Regulations 2000 ('the PPC Regulations') require that sites with potential long term liabilities (such as landfill sites) have the adequate financial provision in place prior to them being granted a permit. As part of this process, the EA is obliged to determine that the financial provision is 'adequate' to discharge the obligations of the permit for as long as the Landfill poses a hazard. It is also obliged to review the situation periodically. It has internal guidance which explains how it calculates what constitutes an adequate financial provision.
5. The adequate financial provision can be provided in a number of ways. The most common is a bond. This bond explains that when specified events occur, money will be paid directly to the EA, who can then use the money to put things right. There are around 800 such bonds around the country and the EA has confirmed that every current operator believes this information is commercially confidential.
6. The relevant legislation and structure of the public register of Landfill information is as follows. Three sets of legislation provide relevant background for the request:
 1. Regulations 29 to 31 of the Pollution Prevention Control (England and Wales) Regulations 2000 (revoked by the Regulations noted in 2 below);
 2. Regulations 48 to 56 of the Environmental Permitting (England and Wales) Regulations 2007 (revoked by the Regulations noted in 3 below); and
 3. Regulations 48 to 56 of the Environmental Permitting (England and Wales) Regulations 2010 (now in force).

7. All three sets of Regulations require the EA to gather information from Operators and place certain information on a public register. All three sets of Regulations provide exemptions for information that the provider believes, and the EA agrees, is commercially confidential.
8. It is for the EA to consider whether it believes the information is commercially confidential and it must consider whether it is so in line with the requirements of the Regulations. The original correspondence from the complainant was considered by the EA to be a challenge to its decision that the information was commercially confidential under the above Regulations. It failed to consider the requests under the EIR.
9. In this case the operator specifically requested the EA to keep this information confidential. The EA has explained that it accepts that the nature of the highly competitive market makes the information confidential and accordingly has allowed every company to withhold this information from the public register.

Original requests

10. The complainant has made a number of requests for relevant recorded information dating back to 2006. All of these requests concerned the named Landfill site. There was also a considerable volume of correspondence exchanged about the lack of disclosure of information about the Landfill site. There were two requests for information that the complainant asked the Commissioner to consider at the beginning of this case.
11. The first request was dated 7 July 2008. It asked for the following information in relation to a specific Permit reference number (the Commissioner has added the numbers for ease of reference):

'We have been reliably informed that the [Environment] Agency intends to grant a PPC Permit in respect of the above application. Since the financial provisions and associated matters have presumably been finalised, we would accordingly wish to make a formal request for copies of the following items of documentation:

- [i]** *The overall level of the agreed financial provisions;*
- [ii]** *The detailed breakdown of the level of agreed financial provisions;*
- [iii]** *The method by which the financial provisions will be made;*
- [iv]** *The Performance Agreement relating to the Financial Bond...; and*

[v] *The Expenditure Plan.*

12. The second request was dated 4 February 2010 and asked for:

[vi] *'Under the provisions of the Environmental Information Regulations 2004, would you please send us a copy of the Bond covering the current financial provisions for [Landfill site redacted] following the issue of the PPC Permit of the above reference [redacted].'*

13. The EA provided an answer for request **[iii]**. It explained on 13 August 2008 that it did not hold the information requested in request **[ii]** because the figures were yet to be agreed. It refused to provide the remaining information as it believed the information was 'commercially confidential'. These arguments refer to the statutory register explained above. The correspondence that the Commissioner has considered did not refer to the EIR or to any relevant exceptions.

14. On 18 October 2010 the EA admitted that it had failed to explain how it had considered the original requests under the EIR.

15. It was therefore apparent that:

- a. The original requests had not been appropriately considered under the EIR; and
- b. The EA did not hold all of the information requested on 7 July 2008, as the permit grant was not finalised until 8 December 2008, and this was when the final information came into being.

16. On 13 September 2010 the Commissioner and the complainant agreed that a new request (asking for the same information) would be made to the EA. This was to ensure that the relevant information was held in recorded form at the date of the request and that the public interest would be considered as it was in 2010. The EA agreed with the Commissioner that it would process this request in accordance with the EIR. The Commissioner considers it appropriate to note the procedural breaches in relation to the way the initial requests were handled. However, he will only consider the substantive issues in respect of the issues referred to him in relation to the new request for information.

The new request for information

17. On 16 September 2010 a new request was made for the following four items:

[1] *The exact overall level of the agreed financial provisions;*

- [2]** *The detailed breakdown of the financial provisions;*
- [3]** *The Performance Agreement relating to the Bond; and*
- [4]** *The Bond itself.'*

The Commissioner asked the EA to ensure that it provided an appropriate response in line with the EIR and explained what that response will need to cover.

18. On 18 October 2010 the EA issued a response. Firstly, it provided information about the process it went through when considering whether the information requested was commercially confidential. It then confirmed the information that it was withholding from disclosure:

For items [1] and [2]:

- 1. The exact amount of money that would be agreed to be available in default (contained in the bond);*
- 2. The Environmental monitoring figures;*
- 3. Operational year and landfill phase figures;*
- 4. Phase of site's life figures; and*
- 5. Site management figures.*

For item [3] it was withholding the performance agreement dated 9 December 2008.

For item [4] it was withholding the Bond dated 9 December 2008.

19. It then explained the exception that it was relying on. It explained that it believed that the exception found in regulation 12(5)(e) [disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest]¹. It explained that the system that allowed companies to opt out of the register presented prima facie evidence that the information withheld was commercially confidential. It then explained in detail the public interest factors it had taken into account when concluding that the public interest favoured the maintenance of the exception for all the information that it was withholding.

¹ A full copy of all of the statutory provisions cited in this Notice can be found in the Legal Annex attached at the end of it.

The Investigation

Scope of the case

20. On 7 June 2010 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 the following points:
- a. The EA had disclosed analogous information previously to him;
 - b. The EA has not offered any evidence about why all or some of the information is commercially confidential;
 - c. The EA appeared to not consider whether the information could be divided between exempt and disclosable elements; and
 - d. The EA should be required to disclose this information to the public.
21. After receiving redacted versions of the documents, the complainants agreed to narrow their complaint on 7 April 2011. They explained that they were content for the Commissioner to consider whether withheld information had been appropriately redacted from:
- a Performance Agreement between a named company and the EA dated 9 December 2008; and
 - a Bond also dated 9 December 2008, which specifies that money will be payable from the named company to the EA in specified circumstances.
22. For the sake of clarity, the Commissioner has considered:
1. Whether the information redacted in the two documents was appropriately withheld under regulation 12(5)(e) of the EIR; and
 2. The procedural issues that became apparent from the handling of the requests to which he was referred.
23. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of the EIR. The Commissioner cannot adjudicate on whether the EA was correct to exclude the information from its public register and whether the information could be regarded as commercially confidential for the purposes of the Environmental Permitting (England and Wales) Regulations 2010. This is because he does not regulate these Regulations.

Chronology

24. On 6 September 2010 the Commissioner wrote to the complainant. He explained that the correspondence indicated that his original request predated the time when the EA held relevant information. In addition, he noted that the responses provided by the EA appeared to fail to reference the EIR. He explained that he could consider the EA's compliance with the original requests, but this was likely to be frustrated by there being no relevant recorded information. He suggested that, in light of this, the complainant consider making a new request, and that the Commissioner could provide advice to the EA to ensure it provided an appropriate response to it. On 10 September 2010 the complainant telephoned the Commissioner and explained that he agreed it would be appropriate to resubmit the request.
25. The new request was submitted on 16 September 2010. The Commissioner reminded the EA exactly what he would expect to be contained within an appropriate response and asked for it to provide him with a copy of any withheld information. On 17 September 2010 the EA telephoned the Commissioner to seek clarification on one point.
26. On 18 October 2010 the EA issued its new response. It also provided the Commissioner with a copy of the information that it was withholding. The Commissioner then wrote to the complainant to ask whether he wanted the case to be considered substantively. The complainant telephoned the Commissioner on 20 October 2010 to confirm that he wished to complain about the EA's response to the new request. He also requested the opportunity to submit arguments to the Commissioner in support of his case.
27. On 5 November 2010 the Commissioner wrote the complainant a reminder. He explained the sort of arguments that would be helpful for him to consider this case substantively. On 23 November 2010 the Commissioner received a response from the complainant, which contained the arguments he wished to be considered.
28. On 22 December 2010 the Commissioner wrote a detailed set of enquiries to the EA.
29. On 3 February 2011 the EA approached the complainant and asked whether he wanted to have a three way meeting with it and the relevant Operator. On 8 February 2011 the complainant explained that he didn't wish to attend such a meeting.
30. On 17 February 2011 the Commissioner received a response to his enquiries dated 22 December 2010 from the EA. This included detailed submissions from the Landfill Operator and an overview of the process

in which permits were granted. The EA agreed that it would disclose redacted versions of the withheld information to the complainant.

31. On 28 February 2011 the Commissioner wrote to the EA to make further enquiries, in order to understand the nature of the redactions. He received a response on 25 March 2011. The EA explained that it would now provide the redacted copies of the withheld information to the complainant and the complainants received this information on 6 April 2011.
32. The Commissioner and the complainant had a number of conversations about the case on the telephone and on 7 April 2011 the complainant agreed to refine the scope of their complaint to include only the remaining withheld information. This was then confirmed in writing on the same day.

Analysis

Substantive Procedural Matters

33. It is important to re-iterate at the outset that the Commissioner is required to consider the way in which the EA processed the request at the time it was made. In this case he has considered the following:
 - What recorded information does the EA hold that falls within the scope of the request and subsequent complaint?
 - Is any, or all, of the information within the scope of the request environmental under the EIR?
 - Was the EA correct to rely upon the exceptions cited as a basis for refusing the request?

What is the relevant recorded information that is held within the scope of the complaint?

34. The Commissioner has considered unredacted versions of the two documents outlined in paragraph 22 above.

Does the information constitute environmental information?

35. Environmental information must be considered under the EIR and not the Act. The EIR has specific provisions particularly with regard to withholding information. Instead of exemptions under the Act, there are specified exceptions in the EIR that cover different areas and tend to have a narrower scope than the exemptions.

36. The EIR define what constitutes environmental information in Regulation 2(1). To summarise, the legislation provides six definitions which, if they can be applied, mean that information will constitute environmental information. The Commissioner has had sight of the withheld information and considers that all of the information relevant to this request falls within the definition given at regulation 2(1)(c) of the EIR:

'Information onmeasures (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 designed to protect those elements.'

37. The Commissioner considers that information concerning the conditions of granting a Landfill Permit and the financial calculations of the costs thereof is information on a measure likely to affect the state of the elements of the environment. This is because the Permit is required in order to place waste into the ground and it would directly affect the state of the land, landscape and air and atmosphere as referred to in regulation 2(1)(a). It also falls within the scope of Regulation 2(1)(b) on factors relating to waste.
38. 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 financial aspects of the information materially relates to, and is interlinked to, the overall reason for obtaining and maintaining a Landfill Permit to such an extent that it would be a false distinction to consider any residual information as not being environmental in nature. He considers that all of the information placed correctly in its context would relate to this measure. He has noted that neither the complainant nor the EA disputes that the information is environmental information. The Commissioner will therefore consider this case entirely under the EIR.

Is the EA allowed to rely on any exceptions in respect to this information?

39. The EA's refusal notice relied exclusively on Regulation 12(5)(e) [disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest].

Regulation 12(9)

40. It should be noted that Regulation 12(9) explains that Regulation 12(5)(e) cannot apply to 'the extent that the environmental information to be disclosed relates to information on emissions.' The Commissioner

therefore believes that it is prudent to consider whether any of the withheld information relates to emissions first.

41. The Commissioner is required to consider whether the redacted information relates to emissions. In making a decision he has noted the Information Tribunal's comments that emissions, "should be given its plain and natural meaning".²
42. In considering the 'plain and natural' meaning of the word emission the Commissioner has considered the definitions in the Oxford English Dictionary of the words emission and emit. It defines the word 'emission' as 'something emitted', and the verb 'emit' as (amongst other things): "Give off, send out from oneself or itself, (something imponderable, as light, sound, scent, flames, etc)".
43. The redacted information concerns the value of the bond at a landfill site and how and when some of that money becomes available in set circumstances. The details of the bond and performance agreement have been disclosed, except for the amounts of money. The Commissioner is not satisfied that they relate to information on emissions and thus Regulation 12(9) does not disapply the exception found in Regulation 12(5)(e) in this case.

Regulation 12(5)(e)

44. Regulation 12(5)(e) states:

'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...'

45. As with all exceptions, the exception must be engaged and then the public interest test must favour the maintenance of the exception (rather than the public interest favouring its disclosure). The Commissioner will first consider whether the exception is engaged, before going on to consider the public interest test, should it be necessary.
46. The criteria for section 12(5)(e) to be engaged are:

² *Ofcom v Information Commissioner & T-Mobile UK Limited* [EA/2006/0078] at paragraph 25.

- i) Is the information commercial or industrial in nature?
- ii) Is the information subject to a duty of confidence which is provided by law?
- iii) Is confidentiality required to protect a legitimate economic interest?
- iv) Would that confidentiality be adversely affected by disclosure?

47. The Commissioner has therefore considered the EA's submissions and the withheld information in relation to these criteria.

(i) Is the information commercial or industrial in nature?

48. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.

49. To summarise, the information in question is:

- a Performance Agreement between a named company and the EA; and
- a Bond, which specifies that money will be payable from the named company to the EA in specified circumstances.

50. The EA explained that the waste management industry is a very competitive business operating in the private sector. It explained that the Bond and Performance Agreements, which contain the agreed costs that were arrived at after detailed negotiation between the company and the EA, should certainly be regarded as commercial information in their context. This is because it is the key information of strategic relevance. The Commissioner agrees that the withheld information has been correctly designated as being commercial in nature.

(ii) Is the information subject to a duty of confidence which is provided by law?

51. As noted above, the EA is required by law to invite an operator to provide it with information, if it wants to make an application for a Permit. The operator can then apply to the EA to withhold the information from the register on grounds of commercial sensitivity.

52. The EA confirmed that the operator requested confidentiality in this case and argues that this imposed a duty of confidence. It also explained that the operator's ability to request confidentiality demonstrates that there was an expectation that the application information would be held in

confidence; and when the Permit is granted that the information that has been agreed to be commercially sensitive would remain confidential.

53. It supported its argument by explaining that information could only be designated as commercially confidential, if it satisfies the requirements of the Regulations. The EA is not allowed to publish information on its register that has agreed to be commercially confidential because it would breach the Regulations. The Regulations also give the operator a chance to appeal to the Secretary of State, if the EA believed that the information wasn't commercially confidential and the operator disagrees. They require the appeal to either be withdrawn or uphold the EA's position before the information is then published. The Commissioner accepts that the standard practice of obtaining the information would mean that both sides would reasonably expect that the information would be held in confidence.
54. The EA also argued that the common law of confidence would apply to the information that has not been placed on the public register (because either the EA agreed it was commercially confidential or it didn't and the appeal process was in train). The Commissioner has considered whether the information meets the criteria for a common law duty of confidence to exist. He is satisfied that the information was created or provided in circumstances giving rise to an obligation of confidence. He is further satisfied that the information is not trivial and that it is not widely known or in the public domain and therefore considers that the information has the necessary quality of confidence.
55. To add further support to this argument, the EA explained that it has accepted in relation to all landfill operators that their financial information was to be kept off the public register and no information is available to the public of this nature. This is because all operators are of the belief that the information is essential commercial information that would be of considerable value to their competitors. In addition, the EA's approach is the same in other sectors where operators are obliged to give financial provision information to it as Regulator – for example, radioactive substances and International Waste Shipments.
56. The Commissioner has also received careful and complete submissions from the operator who has explained clearly why it regards the requested information as being confidential and how it can be potentially used by its competitors. The Commissioner also finds these submissions persuasive.
57. The Commissioner has carefully considered the complainant's arguments about whether all the information requested could correctly be thought to be confidential. The public authority has now disclosed all the information that can be thought of as non-confidential information. He

has also considered that the complainant did obtain the previous information from the EA, but does not agree that this undermines the confidentiality of the requested current information. His decision is that the information is confidential for the purposes of Regulation 12(5)(e).

(iii) Is confidentiality required to protect a legitimate economic interest?

58. In the Commissioner's opinion, to satisfy this part of the test, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. The Commissioner also considers that the threshold to justify non-disclosure on the grounds of the possibility of an adverse effect is a high one. Regulation 12(5) is worded to suggest it is necessary for a public authority to show that on the balance of probabilities, disclosure "would" rather than could or might have the adverse effect envisaged by the relevant exception.
59. The EA explained that the confidentiality was required to protect the operator's legitimate economic interests. This is because the disclosure of this information could have very negative effects for the operator. This is because, if one has possession of the information, then one knows almost all of the agreed and anticipated costs of the company. The costs are a considerable component of what will be charged at the gate price (when waste is accepted to be disposed of). In the possession of a competitor, the company would be prejudiced for two main reasons. The first is that it would be possible to deduce its financial modelling. This would mean that competitors would be able to pitch their services in situations where the company could not compete, which could lead directly to bankruptcy and require public intervention. The second is that the competitor would understand the conditions and cost of the Bond. It is possible for larger companies to spread the liability of the cost of a Bond across many sites and there would be a comparative advantage in doing so. The company concerned does not have the scope of sites that would enable it to do the same. It would therefore be likely to suffer particular prejudice as the costs would obviously and entirely be in relation to the single site.
60. In addition, should its customers have possession of the information, then the company would also be placed in an asymmetrical bargaining position. The customer would be able to negotiate particularly hard in relation to the gate price, because it would be able to deduce the fixed costs that are payable and consequently the company's margin (the difference between the price and the costs). Furthermore, its pricing structure may be challenged by customers and the company may have further difficulties in ensuring that it was competitive.
61. As noted above, the information directly concerns how a commercial entity functions. The Commissioner accepts that there is real potential

for the disclosure to undermine its pricing structure and this may end the operator's viability. This is particularly so for the operator in question who competes directly with four other local companies. As this is so, the Commissioner has been satisfied that this it is necessary to keep the information confidential to protect the company's economic interests.

(iv) Would that confidentiality be adversely affected by disclosure?

62. Finally, the Commissioner is satisfied that the disclosure of any of the information would adversely affect the confidentiality of the information. This is because the expectation was that the information was confidential and its disclosure would create real commercial problems for the operator who was relying on that confidentiality. As a result, the disclosure of the information would entirely undermine the concept of confidentiality. He therefore is satisfied that the adverse affect would be more probable than not.
63. It follows that the Commissioner has been satisfied that the exception is engaged.
64. As stated above, even if regulation 12(5)(e) is engaged, as required by regulation 12(1)(b), the information must still be disclosed unless "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information." Regulation 12(2) provides that a public authority must apply a presumption in favour of disclosure. Mindful of the presumption in favour of disclosure, the Commissioner has considered the public interest in favour of maintaining the exception and whether, in all of the circumstances of this case, it outweighs the public interest in disclosing the information. The Commissioner is also mindful of the fact that there will always be some inherent public interest in preserving confidentiality but he must consider the weight to be applied considering the circumstances of the case.

Public interest arguments in favour of maintaining the exception

65. The EA argued that the reason the exception was engaged was a compelling public interest factor that favoured the maintenance of the exception. The disclosure of the withheld information would prejudice the operator's commercial interests and could effectively enable its competitors to undercut it with ease. It showed the Commissioner how the figures in context would provide a competitor with considerable information about how the operator functions. This could be very damaging in an environment where other operators receive a public subsidy which makes commercial waste only one stream of its revenue. In addition, it explained that the market was reducing as more recycling

is done leading to greater competition, that this site required substantial work to be done to bring it up to standard and this meant that a small reduction in business could lead to real damage. The loss of business could lead to the operator going out of business and make Regulatory action necessary when it would not otherwise be required. The EA explained that this would be a bad consequence for this site, because it would be required to find another reputable operator with the correct engineering experience, otherwise there would be a delay in protection which could itself have negative effects on the environment.

66. In addition, it confirmed that the EA compels operators to provide information because of European legislative requirements. It confirmed that all of the operators request that the withheld information is kept off the register as they believe that it is commercially confidential. The release of the information would prejudice this one operator and disrupt what was an even playing field. For all the reasons above, the Commissioner agrees that there is a strong public interest in maintaining a fair and competitive business environment.
67. The Commissioner has received two sets of detailed submissions from the operator themselves explaining the prejudice that they believed would be experienced if disclosure was ordered. These submissions confirmed that the operator had real worries about the impact the disclosure of this particular withheld information would have on its business. The Commissioner is satisfied that the operator has put its mind to this specific scenario and has been satisfied that the damage to it would be considerable. He accepts that the disclosure would afford private competitors a real commercial advantage to directly target the operator's customers by undercutting their gate prices and reducing its market share.
68. Furthermore, the EA explained that it is required to provide the public with appropriate protection when an operator is unable to fulfil their duties. The EA also argued that would find it much harder to regulate waste contractors if it is perceived to be untrustworthy or irresponsible in the handling of commercially sensitive information. The Commissioner has not given these broader arguments weight as they are not related to the protection the exception aims to provide for commercially confidential information and are not inherent to the exception.
69. It also explained that the passage of time does not mitigate the public interest in maintaining the public interest in this case. This is because the information relates to potential future expenditure in the event that the operator fails to satisfy its obligations. Its known practice is to uplift the figures in line with the General Index of Retail Prices annually and thus it would be possible for a competitor in possession of the withheld information to work out the operator's current liabilities.

Public interest arguments in favour of disclosing the requested information

70. The complainant explained that there were a considerable number of factors that he believed favoured the disclosure of the information. The Commissioner can summarise them into seven points:

- (1) That the ability to opt out of disclosure would mean that less open companies could be at an inequitable commercial advantage (so there would not be a level playing field as stated);
- (2) That the purpose of the bond was to provide the public with protection should things go seriously wrong. The withholding of the information fails to allow the public to understand the level of protection that is being provided to them and to have confidence that the provisions are sufficient to deal with potential difficulties;
- (3) It will also allow interested parties to help the EA in ensuring that the conditions in the bond are being complied with. Openness directly enables individuals to have sufficient information to be sure that the company do what they say;
- (4) For this site, this is necessary – for previously the EA had to bail out a previous company when they went out of business at the public expense;
- (5) There is considerable public concern about the resumption of waste services at this landfill site. Indeed there were over 150 letters of complaint about it. Together these show detailed and real concern about the landfill site in question;
- (6) That the information also needs to be disclosed in order to enable the public to see that a multinational company's approach to safety reflects that which is expected in this country; and
- (7) That the 'reasonable and proper person test' is restricted to UK convictions and this leaves further scope for the need for openness in this case.

71. The Commissioner has been satisfied that argument (1) should have no weight because it is not founded in fact. This is because other companies do not have the equivalent information disclosed to the public through the register.

72. However, the Commissioner can also see potential public interest arguments that the customers may benefit from cheaper waste management should the requested information be made available as a

matter of course. This is because it would restore the even playing field and mean that every company would be in the same situation. However, he is adjudicating on whether this single operator's information should be disclosed and thus he cannot put any weight on the materialisation of this possible advantage in competition. In any event, the Commissioner is also satisfied that the close proximity of competitors and the availability of their gate prices provides very real competition in this area already.

73. The Commissioner accepts that arguments (2), (3), (4) and (5) have significant weight in this case. He accepts that there is a clear public interest in the EA being open, transparent and accountable regarding its regulation of a set operator. This is particularly so because the placing of waste into a landfill site is a highly visible activity which has real impact on the environment. The provision of information will enable and enhance public understanding and participation in the public debate about the site. It would therefore provide the public with a 'greater awareness of environmental matters' which is the purpose of the European Directive 2003/4/EC (at paragraph 1) and therefore the EIR. The complainant has evidenced that there is very considerable and considered public debate about the operation of this site and have provided the Commissioner with copies of public comments about it.
74. The EA explained that it understood there were real concerns about the old operator that ran this site. It explained that it was aware that there were problems with noise, smells and increased traffic. In addition, it imposed a special condition on this site which required the previous user's problems to be rectified through engineered solutions. However, it explained that this was not reason to penalise the new operator through the disclosure of its confidential information just because of this history. The EA also explained in its view that the financial provisions provided very little additional transparency once the non-financial information had been provided to the public.
75. The Commissioner has also considered arguments (6) and (7). He is satisfied that the operator is registered at Companies House and is a UK registered company. It is clear that the EA have been rigorous in the guarantees that they have sought from the operator. The EA has ensured through detailed negotiation that the financial provisions are adequate for their needs. It has ensured that the operator fulfils the necessary competence criteria in accordance with legislation in England and Wales. The Commissioner sees no evidence that the operator has received lenient treatment in the granting of the permit. He has not therefore placed much additional weight on the need for transparency in respect to arguments (6) and (7).

Balance of the public interest arguments

76. The Commissioner as noted in paragraphs 73 and 74 above is aware that transparency and accountability are strong factors that favour disclosure. However, in this case, the Commissioner considers that the public interest in transparency has been addressed to a large extent by the disclosure of the redacted documents. These explain what the operator has signed up for and include everything except the financial elements. The most persuasive argument the complaint has presented for the specific disclosure of the financial information is at 70(2).
77. The Commissioner is also satisfied that the age of the information does not render it less sensitive in this case. He has come to the conclusion, that in all the circumstances of this case, it would not be in the public interest to disclose information that could substantially undermine the viability of an operator. He believes that the system that has been adopted for waste management permits is calibrated towards transparency wherever possible and that the competitive market in waste management means that the public interest favours the maintenance of the exemption to the financial information withheld.
78. It follows that he has found that Regulation 12(5)(e) has been applied appropriately to the remaining information withheld in the two documents. This information should not be disclosed to the public.

Procedural Requirements

79. The Commissioner has noted a considerable number of procedural breaches in this case.

Regulations 5 and 7

80. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of the request. Regulation 7(1) allows this time to be extended to 40 days, providing notice is provided in line with Regulation 7(3).
81. The EA apologised for falling short of these provisions. It accepted before the Commissioner that these timescales were far exceeded in relation to the original requests and that it was in breach of Regulation 5(2).
82. The Commissioner also notes that the EA did not notify the complainant that it needed more time as required in Regulation 7(3), which it had also breached. In mitigation, the EA said, and the Commissioner accepts, that its officers were in regular contact with the complainant

about whether the information was commercially confidential and it offered the complainant a meeting that he rejected.

83. The Commissioner notes that the EA also breached Regulation 5(2) in relation to the new request dated 16 September 2010 because it did not disclose the redacted versions of the withheld information within 20 working days either (it did not disclose this information until 6 April 2011). In mitigation, the request was at all times under consideration by the Commissioner and it had offered to disclose the information to the complainant on 17 February 2011.

Regulation 11

84. Regulation 11 imposes an obligation for a public authority to conduct an internal review if the applicant complains that their response did not comply with the Regulations. Regulation 11(4) explains that the public authority should notify the applicant of their decision within 40 working days.
85. The public authority failed to deal with the original requests within the correct process and failed to offer or conduct an internal review in line with the Regulations.
86. In the Commissioner's view this was a breach of Regulation 11(4).

Regulation 14

87. Regulation 14 explains what is required when issuing a refusal notice. Regulation 14(2) explains that it must be issued in twenty working days and Regulation 14(3) explains that it should specify the exception that is being relied upon. It also should specify the factors that it took into account in determining the public interest test.
88. The EA also breached Regulation 14(2) as it did not issue compliant refusal notices within 20 working days of the original requests for information.
89. Finally, it breached Regulation 14(3) because it failed to specify an exception that it later relied upon within 20 working days of the original requests for information and it also failed to explain the public interest factors that it had taken into account.
90. The refusal notice dated 18 October 2010 complied with Regulation 14 and the Commissioner regards these breaches as being remedied.

The Decision

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

- It applied the exception in Regulation 12(5)(e) appropriately to the remaining withheld information in this case.

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

- It breached Regulations 5(2) and 7(3) in failing to process the original requests under the EIR;
- It breached Regulation 11(4) in failing to conduct an appropriate internal review in relation to its handling of the original requests;
- It breached Regulation 14(2) and 14(3) in failing to specify an appropriate exception to those requests or why the public interest favoured the maintenance of the exception in relation to the original requests; and
- It breached Regulation 5(2) because it failed to disclose the redacted versions of the withheld information in twenty working days in relation to the new request.

Steps Required

93. The Commissioner requires no steps to be taken.

Right of Appeal

94. 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

95. 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.
96. 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 29 day of June 2011

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

* Environmental Information Regulations 2004

Regulation 2 - Interpretation

Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

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

“appropriate record 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(d) 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 elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

Regulation 3 – Application

Regulation 3(1) Subject to paragraphs (3) and (4), these Regulations apply to public authorities.

Regulation 3(2) For the purposes of these Regulations, environmental information is held by a public authority if the information –

- (a) is in the authority's possession and has been produced or received by the public authority; or
- (b) is held by another person on behalf of the public authority.

Regulation 5 - Duty to make available environmental information on request

Regulation 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.

Regulation 5(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.

Regulation 5(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.

Regulation 5(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.

Regulation 5(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 the standardised procedure used.

Regulation 5(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 7 - Extension of time

Regulation 7(1) provides that –

‘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.’

Regulation 7(2) provides that –

‘The provisions referred to in paragraph (1) are –

(a) regulation 5(2);

(b) regulation 6(2)(a); and

(c) regulation 14(2).'

Regulation 7(3) provides that –

‘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.’

Regulation 11 - Representations and reconsideration

Regulation 11(1) provides that

‘Subject to paragraph (2), an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request.’

Regulation 11(2) provides that –

‘Representations under paragraph (1) shall be made in writing to the public authority no later than 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement.’

Regulation 11(3) provides that –

‘The public authority shall on receipt of the representations and free of charge –

(a) consider them and any supporting evidence produced by the applicant; and

(b) decide if it has complied with the requirement.’

Regulation 11(4) provides that –

‘A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations.’

Regulation 11(5) provides that –

‘Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of -

(a) the failure to comply;

- (b) the action the authority has decided to take to comply with the requirement; and
- (c) the period within which that action is to be taken.'

Regulation 12 - Exceptions to the duty to disclose environmental information

Regulation 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.

Regulation 12(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 –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (f) the interests of the person who provided the information where that person –
 1. was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

2. did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

1. has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

Regulation 14 - Refusal to disclose information

Regulation 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.

Regulation 14(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.

Regulation 14(3)

The refusal shall specify the reasons not to disclose the information requested, including –

(h) any exception relied on under regulations 12(4), 12(5) or 13; and

(i) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).