

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

Date: 15 November 2021

Public Authority: Cumbria Waste Management Ltd
Address: Unit 5a Wavell Drive
Rosehill Industrial Estate
Carlisle
Cumbria CA1 2ST

Decision (including any steps ordered)

1. The complainant requested information about companies providing or potentially providing Refuse Derived Fuel (RDF) and/or Solid Recovered Fuel (SRF) services. Cumbria Waste Management Ltd (CWM) refused the request, withholding the information under the exception for commercial confidentiality (regulation 12(5)(e)).
2. The Commissioner's decision is that CWM initially failed to deal with the request under the EIR and breached regulation 5(1) and regulation 14(1) but that it correctly withheld the requested information under regulation 12(5)(e).
3. The Commissioner does not require CWM to take any steps.

Request and response

4. On 22 August 2020, the complainant wrote to CWM and requested the following information:

"1. The companies/organisations/other entities that Cumbria Waste Management Ltd has considered (and/or is considering) as actual or potential destinations of the Refuse Derived Fuel (RDF) and/or Solid Recovered Fuel (SRF) since 1 January 2015.

2. Please indicate which of the companies/organisations/other entities (from 1 above) Cumbria Waste Management Ltd have entered into communication with (for example to discuss possible pricing, destinations, volumes of waste or other details).

3. Please indicate which of the companies/organisation/other entities (from 1 above), Cumbria Waste Management Ltd has (and/or had) entered into a contract with since 1 January 2015 (including any pre-existing and continuing contracts) together with the contract date(s) and, if known, the contract duration."

5. CWF responded on 9 November 2020 and confirmed that it did not consider itself to be subject to the EIR and declined to answer the request.
6. CWF provided an internal review on 18 November 2020 in which it maintained its original position
7. Following the intervention of the Commissioner CWF reconsidered the request under the EIR. On 13 July 2021 CWF issued a new response to the complainant and confirmed that it was withholding the information under a range of exceptions.
8. On 12 September 2021 CWF issued an internal review response under the EIR. This confirmed that it was relying on the exception for commercial confidentiality (regulation 12(5)(e)) to withhold all the requested information.

Scope of the case

9. On 20 September 2021, following the internal review issued under the EIR, the complainant contacted the Commissioner to complain about the way their request for information had been handled.

10. The Commissioner confirmed with the complainant that her investigation would consider whether any of the requested information fell within the definition of "emissions", provided by regulation 2(1)(b), and whether CWM correctly applied the exception in regulation 12(5)(e).
11. During the Commissioner's investigation CWM confirmed that, in addition to regulation 12(5)(e), it also wished to rely on the exceptions for manifestly unreasonable (regulation 12(4)(b)), internal communications (regulation 12(4)(e)), intellectual property rights (regulation 12(5)(c)) and the interest of the information provider (regulation 12(5)(f)).

Reasons for decision

Public authorities under the EIR

12. Regulation 2(2)(b) of the EIR states

"(Subject to paragraph (3), "public authority" means -)

any other public authority as defined in section 3(1) of the Freedom of Information Act"

13. Section 3(1)(b) of the FOIA states:

"(In this Act "public authority" means—)

a publicly-owned company as defined by section 6."

14. Section 6(1)(b) of the FOIA states:

"(A company is a "publicly-owned company" for the purposes of section 3(1)(b) if)

it is wholly owned by....the wider public sector"

15. Section 6(2)(b)(i) of the FOIA states:

"(a company is wholly owned by the wider public sector if, and only if, every member is a person falling within sub-paragraph (i) or (ii)—)

a relevant public authority or a company wholly owned by the wider public sector."

16. In this instance, CWM initially considered that it was not a public authority for the purposes of the EIR. However, subsequent to the Commissioner's involvement it confirmed that it was wholly owned by a

public authority (Cumbria County Council). The Commissioner confirmed with CWM that it was, therefore, a public authority under the EIR and directed it to issue a response to the complainant under the EIR. CWM subsequently did this.

Is it environmental information?

17. During the course of her investigation the Commissioner advised CWM that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
18. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant part of the definition are found in 2(1)(a) to (c) which state that it is any information in any 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..."

19. The Commissioner considers that the phrase 'any information...on' should be interpreted widely in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact. In the Commissioner's opinion a broad interpretation of this phrase will usually include information concerning, about or relating to the measure, activity, factor, etc in question.
20. In this case the requested information is the names of companies which might be used for producing Refuse Derived Fuel (RDF)/ Solid Recovered Fuel (SRF).
21. The Commissioner considers that the information, therefore, falls within the category of information covered by regulation 2(1)(c) as the information can be considered to be a measure affecting or likely to affect the environment. This is in accordance with the decision of the

Information Tribunal in the case of Kirkaldie v IC and Thanet District Council (EA/2006/001) ("Kirkaldie").

22. In view of this, the Commissioner has concluded that CWM initially failed to handle the request under the EIR and breached regulation 5(1) of the EIR. As CWM subsequently corrected this the Commissioner does not require it to take any steps in this regard.

Regulation 14 – refusal to disclose information

23. In the circumstances of this case the Commissioner has found that CWM originally failed to consider the request under EIR. Therefore, in relation to the procedural requirements of the legislation, it is inevitable that CWM will have failed to comply with the provisions of the EIR.
24. In these circumstances the Commissioner believes that it is appropriate to find that CWM breached regulation 14(1) of EIR which requires a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying.
25. Since CWM has subsequently addressed this failing the Commissioner does not require it to take any steps in this regard.

Regulation 2(1)(b) and Regulation 12(9) - Emissions

26. Reference is first made to "emissions" in the definition of environmental information found in regulations 2(1)(a)–(f) of the EIR. Regulation 2(1)(b) states that environmental information includes information on "*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)*". Elements of the environment described at sub-paragraph 1(a) include air and atmosphere, water, soil, land, landscape, natural sites, and biological diversity.
27. Regulation 12(9) states:
- "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)."*
28. The complainant has argued that their request seeks information that relates to "emissions" as referenced in regulation 2(1)(b) of the EIR. The complainant considers that, if the information relates to emissions then, as provided by regulation 12(9), CWM is not entitled to withhold the information under the exception in regulation 12(5)(e).

29. The Commissioner has considered whether the requested information relates to emissions.
30. The complainant has argued that it is the nature of the process for creating RDFSRF that atoms are released into the atmosphere as emissions. For example, the complainant has proposed, if the RDF and SRF contain heavy metals then the emissions will contain heavy metals, if the RDF and SRF have a high carbon content, then more CO₂ will be released and so on. The complainant considers that in order for emissions to occur, there need to be sites and companies producing RDF and SRF. Therefore, information about companies involved with their production relates to emissions.
31. According to the argument proposed by the complainant, no plants exist that combust RDF and SRF without emissions nor will there be any such plants in the foreseeable future. Furthermore:

"Once RDF and SRF are created, emissions are inevitable. Most materials may be put to a variety of purposes and are not created for the sole purpose and intention that a significant proportion of the material will be dispersed as "emissions". Unlike most materials, RDF and SRF are created for the sole purpose of being combusted releasing much of the material into the atmosphere in an oxidised form."

32. Finally, regarding the relationship between information about companies potentially providing sites for RDF/SRF and emissions:

"Where the emissions arising from the RDF and SRF will occur is information "on" emissions. The emissions that do occur are directly related to where the RDF and SRF are sent and arise from the atoms in the RDF and SRF. The more RDF and SRF that is created and shipped, the more emissions there will be. If the RDF/SRF is sent to a local plant, then the emissions will occur locally. If the RDF/SRF is sent somewhere else, then the emissions will occur there."

33. The Commissioner's guidance on regulation 12(9) sets out when information can be considered to relate to emissions:

"Identical information can fall within several aspects of regulation 2(1). A lot of information is environmental because it is on a measure affecting, or likely to affect, the elements of the environment listed in regulation 2(1)(a) directly or via one of the factors mentioned in 2(1)(b). However, regulation 12(9) will only be relevant where information falls within the definition of environmental information"

directly under regulation 2(1)(b). In other words it will only apply where information is directly linked to emissions.”¹

34. In this case, the request asks for information regarding decisions CWM has taken regarding companies that are / might be used to provide RDF/SRF provision. In the Commissioner’s view this information constitutes environmental information by virtue of being a measure as defined in regulation 2(1)(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;”

35. The Commissioner considers that the complainant’s argument does not allow them to reach the conclusion that they have. The argument has the following construction:

First premise: RDF/SRF sites exist to produce emissions

Second premise: Information about location/company name of RDF/SRF site will deliver information about emissions

Conclusion: The name of an RDF/SRF site/company constitutes information on emissions.

36. However, in the Commissioner’s view, the second premise here is incorrect. To illustrate this the Commissioner has applied the same argument to an hypothetical request for information about supermarkets. If we accept that supermarkets exist to sell food, then according to the argument proposed, knowing the name of a supermarket and where it is located will provide us with information about food. However, this is clearly not the case. It would provide us with no information about food or information related to or otherwise linked to food. If the information is about anything it is about the engine which allows food to be made available but it tells us nothing about the food itself.

¹ <https://ico.org.uk/media/for-organisations/documents/1616/information-on-emissions-eir-guidance.pdf>

37. Having considered the complainant's arguments and CWM's submissions the Commissioner has concluded that the request does not ask for information on emissions and that regulation 12(9) is not applicable. She has gone on to consider whether CWM has correctly applied regulation 12(5)(e) in this case.

Regulation 12(5)(e) – commercial confidentiality

38. CWM has applied the exception in regulation 12(5)(e) to all the requested information.
39. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".
40. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
- 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?

41. For information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party.
42. CWM has confirmed that the requested information relates to its commercial arrangements with actual or potential customers. It has argued that, as CWM operates in a competitive trading environment, trading related information such as that requested about actual or potential customers, is commercial in nature.
43. The Commissioner agrees that information about prospective or actual customers is commercial in nature and she is satisfied that this element of the exception is satisfied.

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

44. CWM has argued that the requested information is confidential in nature under the common law of confidence. It has stated that the information has the necessary quality of confidence and that it is used subject to a legal obligation of confidence.
45. CWM has confirmed that the information is not in the public domain and that it reflects the work undertaken by its employees in identifying such businesses/organisations, is closely guarded and would never voluntarily be disclosed.
46. CWM has further argued that customer lists and potential customer/target lists are of vital importance and interest to a trading business and its competitors. CWM considers that the information, not least due to the time, cost and effort involved in building such a list, has great commercial value and is not trivial in nature.
47. Finally, CWM has argued that a reasonable person in receipt of the information would consider that the information had been provided in confidence. It has suggested that the majority of trading businesses treat their customer/target details, routes to market and commercial arrangements as confidential and would be able to take action against employees who leaked or stole such details with the intent of providing them to a competitor. CWM considers, therefore, that a reasonable person would consider that the requested information is commercially significant and confidential in nature.
48. Having considered CWM's submissions and the nature of the requested information, the Commissioner is satisfied that the information is subject to a duty of confidence provided by law.

Is the confidentiality provided to protect a legitimate economic interest and would confidentiality be adversely affected by disclosure?

49. In order to satisfy this element of the exception, it needs to be shown that disclosing the identified confidential information would adversely affect / harm CWM's legitimate economic interests.
50. The ICO's guidance clarifies that 'legitimate economic interests' could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially viable information or

avoiding disclosures which would otherwise result in a loss of revenue or income².

51. CWM has explained that it uses its customer lists and routes to market and commercial relationships to generate revenue. It has confirmed that it uses details of potential routes to market, customers and suppliers to grow its customers, sales and revenue. CWM has stated that the information is used to underpin its operating activities and to retain and grow its market position.
52. CWM has argued that competitors would wish to obtain lists of both actual and potential customers, suppliers and partners to try and take business away from CWM and gain competitive advantage. It confirmed that the information underpins its operating base and that it has been generated and developed as a result of many years of work in the market. It has stated that the information is integral to the maintenance of the relationships with customers, suppliers and partners and to CWM's reputation as a leading provider of commercial waste management solutions.
53. In view of the above, CWM considers that it is essential to its business that the information is treated as confidential and not disclosed to avoid a foreseeable loss of revenue from losing customers to competitors and valuable market intelligence which forms the basis of its customer proposition.
54. CWM has also highlighted that it has invested in the development of its customer list and in the identifying of suitable new customers over decades of operation in the industry, using staff time to do so, in order to obtain a competitive advantage in the market. It considers that disclosure would allow competitors to obtain the intended benefit of such lists without having to make the same investment in time and money and CWM would suffer an impact on market lead and wasted costs as a result.
55. In its submissions CWM made reference to previous decision notices issued by the Commissioner³. The decision notices in question related

² https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

³ See ICO decision notice references: FS50255081, FS50255079, published online here:

to requests to authorities for details of names and addresses of their commercial pre-paid waste sack customers. In the case of both decision notices, the Commissioner found that the names of the businesses were commercially confidential and could be withheld under regulation 12(5)(e).

56. CWM has confirmed that contracts they have with their clients operate in a similar manner to the pre-paid waste sack services which were the subject of the Commissioner's previous decisions. CWM clarified that these contracts are non-exclusive, ad-hoc and that they can be terminated at any time. As such, CWM has argued, disclosure of information relating to customers or potential customers in response to an EIR request would allow competitors to use the information to attempt to entice clients away from them.
57. Having considered CWM's arguments and referred to previous decision notices issued in relation to comparable requests, the Commissioner considers that disclosure of the information would cause a degree of harm to CWM's legitimate economic interests. She has, therefore, concluded that the exception is engaged.

Public interest test

58. Regulation 12(5)(e) is subject to the public interest test. This means that even when the exception is engaged, public authorities have to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Under regulation 12(2) of the EIR, public authorities are required to apply a presumption in favour of disclosure. Even where the exception is engaged, the information may still be disclosed if the public interest in disclosing the information is not outweighed by the public interest in maintaining the exception.

Public interest in disclosing the information

59. CWM has acknowledged that there is an inherent public interest in transparency and accountability, especially in relation to decisions by public authorities affecting the public / using publicly funded monies.

https://ico.org.uk/media/action-weve-taken/decision-notices/2010/545986/FS_50255081.pdf and https://ico.org.uk/media/action-weve-taken/decision-notices/2010/570094/fs_50255079.pdf

60. The complainant has argued that there is public mistrust in Cumbria County Council (the "council"), which owns CWM. They have pointed to potential conflicts of interest between the council as planning authority and as owner of CWM. They have also raised concerns about the relationship between the council and CWM regarding the operation of Household Waste Recycling Centres (HWRC) in Cumbria.
61. Disclosing the information, the complainant has argued, would allow the public to determine whether the council has assisted CWM in obtaining a commercial advantage or whether its practice has been otherwise appropriate.
62. The complainant has also argued that there is a public interest in knowing whether authorities are meeting their obligations in relation to the environment and that disclosing information relating to RDF/SRF activities would assist with this.
63. The complainant has also provided arguments which are predicated on the withheld information about or relating to emissions. As the Commissioner has already determined above that the information does not fall into this category she has not considered these arguments further.

Public interest in maintaining the exception

64. CWM has argued that, whilst it acknowledges there is an inherent public interest in transparency and accountability, especially in relation to decisions made by public authorities affecting the public / using publicly funded money, it considers that the unusual nature of its role means that these factors have less relevance.
65. CWM has argued that it does not perform the functions of a public authority and that the request relates to commercial waste treatment activities in which the local authority has no legal obligation to provide, so it argues this information falls outside the local authority's statutory functions.
66. CWM has explained that it has:

"...no statutory decision making powers, has no statutory obligation to sell RDF or SDF, it is not funded by grants or other means provided by taxpayer funds, operates on an independent arm's length basis from the council, operates as a self-funding profit making trading business, operates in competition with private profit making trading businesses... and competes with those competitors in respect of the same nature of potential sales."

67. CWM has explained that the information requested is not used for decision making affecting the public as such but rather for its private commercial customers for its business trading operations, and it is also not used by CWM for decision making using public funds.
68. CWM has emphasised that, were the information to be made publicly available, it would allow competitors to approach and poach its customers and/or to make use of valuable market intelligence and relationships for their own commercial advantage. Clearly, CWM has argued, this would be to the detriment of its commercial interests and detrimental to fair and effective operation of the waste management and treatment market. It considers that disclosure would also adversely affect CWM's ability to develop future commercial relationships with customers and suppliers.
69. CWM has argued that the effect of disclosure would be to undermine its credibility as a commercial partner, impact its revenue stream and ability to make a profit for its owner, the council (funds which are used to fund public services).
70. CWM has emphasised that disclosure would also mean that the time and money it has invested in researching and generating the information would have been wasted, whereas, competitors would have access to the information with no outlay.
71. CWM has further argued that disclosures which aid competitors would make the market less competitive and this would impact negatively on market pricing and distort local competition. It considers that there is a strong public interest in promoting fair competition in what it considers to be a highly competitive market. Fair competition, CWM has argued, means that public and private organisations should operate on a level playing field and have parity of opportunity and treatment.
72. CWM has also confirmed that its customer and supplier base and network of supply chain partners also expects CWM to treat their details, relationship and the nature of their commercial arrangements in confidence. Disclosure, CWM has stated, risks legal action by these bodies.

Balance of the public interest

73. In determining where the balance of the public interest lies the Commissioner has factored in the general public interest in transparency and accountability, particularly where information relates to the treatment of environmental waste.
74. The Commissioner is mindful that the purpose of the exception is to protect against unwarranted to harm to legitimate economic interests

which would not otherwise occur without information being disclosed in response to an EIR request. As she has determined in this case that harm would arise from disclosing the information she has considered whether there are specific public interest reasons why disclosure, in this instance, would offset the harm caused.

75. In relation to the complainant's arguments about the levels of trust in the council and its relationship with CWM, she can also see that a case could be made for transparency and accountability where a request probes this relationship. However, in relation to the specific points raised by the complainant in respect of HWRC, CWM has clarified that the withheld information relates to the handling of *commercial waste* so the Commissioner considers that these points are not relevant.
76. The Commissioner recognises that the complainant has genuine, legitimate concerns about the treatment of waste and particularly, the environmental impact of incinerating waste. She accepts that a public interest case for disclosure could be made where information directly relating to, for example, emissions or to proportions of waste used to generate RDF/SRF has been requested.
77. However, in this case, the Commissioner considers that the requested information would not assist the public in determining whether the council has acted in a trustworthy manner, nor would it provide any information about emissions made as a result of RDF/SRF processes.
78. The Commissioner accepts that disclosure would result in adverse effects to CWM's legitimate economic interests by providing competitors with information which would undermine CWM's market position. She accepts that there is a public interest in protecting a level playing field in this competitive market and she does not consider that the arguments provided by the complainant or the public interest in disclosure in this case justify the adverse effects which making the information public would generate.
79. The Commissioner has concluded that, in this case, CWM has correctly applied regulation 12(5)(e) and that the public interest favours maintaining the exception.
80. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*, "*If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...*" and "*the presumption serves two purposes: (1) to provide the default position in*

the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).

81. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(e) was applied correctly.
82. As she has concluded that all the requested information has been correctly withheld under regulation 12(5)(e) the Commissioner has not gone on to consider the additional exceptions relied on by CWM.

Right of appeal

83. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

84. 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.
85. 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

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