

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

**Date:** 3 August 2017

**Public Authority:** Horsham District Council  
**Address:** Parkside  
Chart Way  
Horsham  
West Sussex  
RH12 1RL

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to waste collection. Horsham District Council disclosed some information and withheld other information under the FOIA exemption for prejudice to commercial interests (section 43(2)). During the Commissioner's investigation the public authority reconsidered the request under the EIR and withheld the same information under the exception for commercial confidentiality - regulation 12(5)(e).
2. The Commissioner's decision is that Horsham District Council has breached regulation 5(1) and regulation 14(1) and failed to demonstrate that regulation 12(5)(e) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld modelling information to the complainant.
4. The public authority 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 November 2016, the complainant wrote to Horsham District Council (the "council") and requested information in the following terms:

*"Based on a report in the West Sussex County Times, I note that the council proposes to switch to alternate weekly collection of residual waste from April 2018.*

*(1) I presume that this decision is supported by modelling of the switch of materials from the residual to the recycling stream. Please provide me with a copy of this modelling.*

*(2) Given that the Council provides a 120 litre residual bin as standard please provide modelling data that demonstrates that, on average, there will be sufficient capacity within the standard bin to support the switch to alternate weekly collection.*

*(3) Similarly please provide modelling data that demonstrates that the standard recycling bin will, on average, have sufficient capacity to cope with the service switch.*

*(4) Has the council considered the introduction of a separate weekly food waste collection service? If so please provide a copy of the appraisal.*

*(5) Has the council undertaken a risk assessment of the public health implications of storing food waste in residual bins for up to an additional week. If so, please provide a copy."*

6. The council responded on 14 December 2016. It disclosed some information and withheld other information under the exemption for commercial interests – section 43(2) of the FOIA.
7. Following an internal review the council wrote to the complainant on 16 January 2017. It stated that it was maintaining its position.

## Scope of the case

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8. On 12 February 2017 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner advised the complainant that, in her initial view, the request identified environmental information and fell to be considered under the EIR. The Commissioner directed the council to reconsider the request under the EIR and, following this process, the council issued a new response, confirming that it was applying the exception for commercial confidentiality (regulation 12(5)(e)) to withhold some of the requested information.
10. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied regulation 12(5)(e) to withhold the information.

## Reasons for decision

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### Is it Environmental Information?

11. During the course of her investigation the Commissioner advised the council that she considered the requested information fell to be considered under the EIR. The Commissioner has set down below her reasoning in this matter.
12. 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 as 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...'*

13. 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.
14. In this case the withheld information relates to the provision of waste collection services, specifically policies or measures which would have an impact on this provision.
15. 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 or a measure designed to protect 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").
16. In view of this, the Commissioner has concluded that the council wrongly handled the request under the FOIA and breached regulation 5(1) of the EIR.

#### **Regulation 14 – refusal to disclose information**

17. In the circumstances of this case the Commissioner has found that although the council originally considered this request under FOIA it is the EIR that actually apply to the requested information. Therefore where the procedural requirements of the two pieces of legislation differ it is inevitable that the council will have failed to comply with the provisions of the EIR.
18. In these circumstances the Commissioner believes that it is appropriate to find that the council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying. This is because the refusal notice which the council issued (and indeed its internal review) failed to cite any exception contained within the EIR because the council actually dealt with the request under FOIA.
19. As the council addressed this failing during the course of his investigation the Commissioner does not require it to take any steps in this regard.

## **Regulation 12(5)(e) – commercial confidentiality**

20. The council has withheld the information specified in part (1) of the request, namely:

*"I presume that this decision is supported by modelling of the switch of materials from the residual to the recycling stream. Please provide me with a copy of this modelling."*

21. 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".

22. 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?*

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

24. The council has explained that the withheld information is part of an agreement between itself and Ricardo Energy and Environment ("Ricardo"). It has stated that the information takes the form of detailed modelling about the future waste collection service to be provided by the council. The council has argued that the information is relevant to the commercial interests of both parties.

25. Having considered the council's submissions and the withheld information the Commissioner agrees that the information is commercial in nature and satisfies this element of the exception.

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

26. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
27. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
28. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*, Megarry J, suggested that the 'reasonable person' test may be a useful one. He explained:

*"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence."*<sup>1</sup>

29. In *Bristol City Council v Information Commissioner and Portland and Brunswick Square Association* (EA/2010/0012) the Tribunal accepted evidence that it was 'usual practice' for all documents containing costings to be provided to a planning authority on a confidential basis, even though planning guidance meant that the developer was actually obliged to provide the information in that case as part of the public planning process.

30. In applying the 'reasonable person' test the Tribunal stated:

*"In view of our findings... that at the relevant time the usual practice of the Council was that viability reports and cost estimates like those in question were accepted in confidence (apparently without regard to the particular purpose for which they were being approved)... the developer did have reasonable grounds for providing the information to the Council in confidence and that any reasonable man standing in the shoes of the Council would have realised that that was what the developer was doing."*<sup>2</sup>

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<sup>1</sup> *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

<sup>2</sup>

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol\\_CC\\_v\\_IC\\_&\\_PBSA\\_\(0012\)\\_Decision\\_24-05-2010\\_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

31. In relation to the 'reasonable person' test, another relevant question is whether the information was shared in circumstances creating an obligation of confidence. The Commissioner considers that this can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
32. The council confirmed to the Commissioner that the information is not trivial and has not been placed in the public domain. It explained that the information is considered important by both parties because it is the council's intention to use it to make decisions about how its waste collection service will operate in the future. It confirmed that the explicit intention at the time of its contract with Ricardo was that the information should remain confidential.
33. Having considered the council's submissions the Commissioner is satisfied that the withheld information is not trivial in nature and that a reasonable person would accept that the information was provided in confidence. She also notes that there was an explicit understanding between the council and Ricardo that the information should be considered confidential.

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

34. In order to satisfy this element of the exception, disclosure of the withheld information would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
35. In the Commissioner's view it is not enough that some harm might be caused by disclosure. Rather it is necessary to establish that, on the balance of probabilities, some harm would be caused by the disclosure.
36. The Commissioner has been assisted by the Tribunal in determining how "would" needs to be interpreted. He accepts that "would" means "more probably than not". In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

*"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".*

37. By way of background, the council has explained that:

*"...local authorities who currently operate a weekly collection of residual waste are likely to consider switching to fortnightly collection when the 5 year grant received from central government to support weekly residual waste collections ends in November 2017. Those authorities will be looking at using the services of consultants like Ricardo Energy to provide waste modelling for their organisation."*

38. The council has argued that disclosure would harm both its own legitimate economic interests and those of Ricardo.

*The council's legitimate economic interests*

39. The council has stated that the:

*"...long term commercial interests of the council could also be damaged if companies decided not to enter into contracts with the council, due to the risk that confidential commercial information shared with the council would be released into the public domain as part of a response to an FOI or EIR request."*

40. Firstly, since the passing of the EIR, the Commissioner considers that it is the duty of public authorities to advise contractors and potential partners that any information held can be subject to disclosure. This is not to say that information cannot legitimately be withheld should it be shown to engage an exception but parties liaising with authorities should be aware of the possibility that information might be disclosed.

41. The Commissioner is not persuaded by the argument, often advanced by public authorities, that third parties would be dissuaded from pursuing potentially lucrative public sector contracts because of the possibility of information disclosure. In the absence of concrete evidence that this could be or has been a consequence, the Commissioner considers that this argument remains highly speculative and not sufficient to engage the exception.

42. In relation to the council's interests, therefore, the Commissioner has concluded that the council has failed to demonstrate that disclosure would adversely affect its legitimate economic interest. It follows, therefore, that the confidentiality would not be adversely affected by disclosure. In view of this, the Commissioner has concluded that, in relation to the council's own economic interests, the exception is not engaged.



*Ricardo's legitimate economic interests*

43. In relation to Ricardo's interests, the council has stated that the company used its knowledge and expertise to create the information and disclosing the information would damage its commercial interests. It argued that the information could benefit competitors who might use the information to bid for future contracts with other public authorities without having to invest in the staff or other resources required to generate the information in their own right.
44. The council has argued that the modelling information belongs to Ricardo *"...which retains the intellectual property rights to this data; the council does not hold details of their modelling formula/process."*
45. The council further stated that Ricardo *"...applied their modelling to the data received from the council to produce the....reports."* The council confirmed that it considered the information to be "commercially sensitive".
46. The Commissioner understands that the withheld information does not directly identify the commercial activities of Ricardo, rather, it uses details of the council's residual waste situation to model its potential future handling of this activity. The commercial activity in respect of Ricardo is its generation of the specific report and its broader creation of reports for other local authorities or other organisations.
47. The council confirmed that the report is contingent on data it provided to Ricardo regarding its residual waste activities. The Commissioner considers that it is reasonable to conclude, therefore, that the modelling provided is specific to the council's own situation. In the Commissioner's view, it follows, therefore, that the information is not directly transferable to other local authorities. The Commissioner, therefore, considers that it is unlikely that disclosing the information would benefit rival modelling consultancies who might bid for similar local authority contracts.
48. In relation to the "intellectual property rights" which the council has argued apply to the information, there is an exception within the EIR (regulation 12(5)(c)) which is relevant where it can be shown that information falls into this category. In this case, the council has neither applied regulation 12(5)(c), nor has it explained why the information is subject to intellectual property rights.
49. The Commissioner accepts that an argument can be made that formulae or other unique methodologies which might be used to generate modelling represent a specific commercial tool unique to a company. She acknowledges that a case could be made that disclosing such information would reveal its method to competitors and undermine its competitiveness in a given market.

50. However, in this case, the council has stated that the withheld information does not contain the formulae which sit behind the modelling. It is not clear to the Commissioner, therefore, what benefit the information would be to potential competitors of Ricardo. The council has not provided the Commissioner with specific reasons why disclosure would result in adverse effects to Ricardo's legitimate economic interests. The arguments provided are largely generic or, in the case of references to intellectual property rights, do not stand up to scrutiny.
51. The Commissioner asked the council whether, in dealing with the request, it sought Ricardo's views as to whether disclosure would result in any potential harm to its interests. The council confirmed that it approached Ricardo in this regard but did not receive a response.
52. The Commissioner has consistently maintained in her investigations that she will not generally accept speculation by public authorities as to the potential effects of disclosure on third parties. The absence of any input from Ricardo in this instance further confirms the Commissioner's view that the council's submissions are speculative and not founded on accurate assumptions about the effects of disclosure.
53. The Commissioner considers that the council has had ample opportunity to justify its position both during its initial handling of the request and during her investigation. In cases where a public authority fails to provide adequate submissions the Commissioner does not consider it to be her duty to generate submissions on its behalf or to otherwise facilitate the withholding of information.
54. In this instance, the Commissioner has decided that the council has failed to demonstrate that disclosure would adversely affect a legitimate economic interest of any person the confidentiality is designed to protect. It follows, therefore, that the confidentiality would not be adversely affected by disclosure. In view of this, the Commissioner has concluded that the exception is not engaged.
55. As she has found that the exception is not engaged the Commissioner has not gone on to consider the public interest in this case.

## Right of appeal

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56. 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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

57. 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.
58. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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