

**REVIEW OF FREEDOM OF INFORMATION FRAMEWORK AND
CONFIDENTIALITY PROTOCOL IN RELATION TO PROCUREMENT
WDA/30/08**

Recommendation

That:

1. Members note the most recent findings of the Information Commissioner in relation to East Riding of Yorkshire Council and South Downs Waste Services Ltd; and
2. Members review and accept the revised Merseyside Waste Disposal Authority Publication Scheme (June 2008)

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Report of the Director

1. Purpose of the Report

The purpose of this report is to inform Members of the implications of recent rulings by the Information Commissioner in relation to Freedom of Information and Environmental Information Regulation matters, and how those matters relate to Merseyside Waste Disposal Authority's Procurement Process.

2. Background

- 2.1 As a public body, Merseyside Waste Disposal Authority (and Mersey Waste Holdings as a Local Authority Waste Company) are subject to requirements under the Freedom Of Information Act 2000 (FOIA) and Environmental Information Regulations 2004 (EIRs). The FOIA applies to public bodies and requires MWDA (and MWHL) to provide access to official information held by the Authority. This requirement is subject to a number of exemptions and exceptions. The EIRs requests are made in relation to FOIA. Applications to receive information can be made under the FOIA or EIRs but, due to the nature of the Authority and its responsibilities, most applications are likely to be made under EIRs.
- 2.2 The EIRs applies to public bodies and '*any body or person carrying out the function of public administration, or any person under the control of a public authority who has responsibility in relation to the environment*'. The EIRs also have a number of exemptions under which information cannot be provided. In considering whether an exemption to disclosure applies under EIRs, the Authority must consider not only whether an exemption is applicable but also whether the public interest in using the exemption outweighs the public interest in disclosing the information.
- 2.3. There is a different definition to the information that can be requested in relation to EIRs as opposed to FOIA. The definition given in the Regulations must be followed and is as follows:

Any information in written, visual, aural, electronic or any other material form on:

(i) 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;

(ii) 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 (i);

(iii) 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 (i) and (ii) as well as measures or activities designed to protect those elements;

(iv) reports on the implementation of environmental legislation;

(v) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (iii); and

(vi) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (i) or, through those elements, by any of the matters referred to in (ii) and (iii).

2.4 Two recent decisions ruled on by the Information Commissioner in relation to requests by individuals under the EIRs have highlighted the need for the Authority to review and amend its FOIA Publication Scheme and provide guidance for requests under EIRs. In these recent cases both contractual and procurement information was requested.

2.5. The Freedom of Information Act 2000 requires all public authorities to make information available proactively by virtue of the Publication Scheme provisions set out in section 19 of the Act. Publication Schemes give details of the classes of information that an authority makes available proactively and how they are accessible. In addition Merseyside Waste Disposal Authority has

added guidance to its Publication Scheme in relation to requesting information under EIRs.

- 2.6. The Authority, as part of its information management systems relating to the Procurement Process, has also produced a Confidentiality Protocol. Although not a legally binding document, the Protocol provides stakeholders of the Procurement Process with an indication of the type and public release of information as part of the Competitive Dialogue.

3. Implications for the Waste Disposal Authority

- 3.1. MWDA needs to be able to respond to FOIA and EIRs requests in relation to information generated as part of its Procurement Process and deal with subsequent requests for similar information once the contracts are awarded. These would be in addition to any requests about the Authority's existing work and services.
- 3.2. In order to do this the Authority has taken into account two recent decisions of the Information Commissioner, namely, East Riding of Yorkshire Council made on 12 February 2008 and South Downs Waste Services Ltd made on 18 March 2008.
- 3.3. East Riding of Yorkshire Council: The EIRs request was for a copy of a waste management contract the Council had entered into with an independent waste management contractor. The Council withheld some sections of the contract on the basis that Regulation 12(5) 2 – Confidentiality of Information applied.

The Information Commissioner decided that the entire contract, including the pricing and financial aspects of the contract was environmental in nature and therefore fell within the scope of EIRs. Even where information has been given in confidence, information is only exempt from disclosure where there is clear evidence that the information is confidential and that the public interest in maintaining confidence outweighs the public interest in disclosing the information.

- 3.4. The Information Commissioner decided that the following classes of information contained in a waste contract should be disclosed:
 - (i) Pricing, other than that highlighting specific costs or profits of the contractor.

(ii) Operational information, other than the names of preferred subcontractors for the supply of equipment and services which are not already known.

(iii) Emissions levels, or likely emission levels and descriptions of intended methods of dealing with the bi-products of the waste management process.

(iv) Planning and development information, other than that containing specific systems and technical information which is not otherwise in the public domain.

(v) The names and positions of individuals who were proposed to run particular facilities, other than where they were not in fact put in charge of those facilities in actuality, or where they no longer ran those facilities at the time the request was received by the council.

3.5. The Information Commissioner decided that the following classes of information were exempt from disclosure because as well as being confidential in nature, the public interest in maintaining confidentiality outweighed the public interest in disclosing the information:

(i) Specific systems and technical information which are not otherwise in the public domain.

(ii) Specific information on the costs and profits of the contractor held in the contract.

(iii) Specific information on the likely clawback of costs through the sale of bi-products of the waste management system which help to lower the overall cost to the contractor.

3.4. South Downs Waste Services Ltd.: The EIRs request was made to Veolia ES Downs Ltd and South Downs Waste Ltd to request information regarding a Best Practice Environmental Option assessment in respect of the East Sussex and Brighton and Hove Integrated Waste Management Contract. Both companies refused the request on the grounds that they were not obliged to comply with requests for information under the EIRs because they were not public authorities and were not therefore subject to EIRs or FOIA.

3.5. Even though South Downs Waste Services Ltd was a private company, the Information Commissioner held that it was a public authority for FOI and EIRs purposes by virtue of the integrated waste management contract it entered into with the two public authorities. This was because the company was

undertaking a function of the public authority and the public authority retained control over how the company performed its contractual duties by virtue of the performance levels contained in the contract.

3.6. The consequences of the above mentioned decisions for the Authority are as follows. The contractors appointed by MWDA as part of its procurement will therefore be considered public authorities for the purposes of FOI Act and EIRs. When considering FOI and EIRs requests, MWDA cannot simply rely on confidentiality provisions within the contract. Each section of the contract must be considered separately and a judgment made as to whether, on the facts of each section, the confidentiality exemption should apply. In particular the following information will be liable to disclosure: -

(i) Pricing, other than that highlighting specific costs or profits of the contractor.

(ii) Operational information, other than the names of preferred subcontractors for the supply of equipment and services which are not already known.

(iii) Emissions levels, or likely emission levels and descriptions of intended methods of dealing with the bi-products of the waste management process.

(iv) Planning and development information, other than that containing specific systems and technical information which is not otherwise in the public domain.

(v) The names and positions of individuals who were proposed to run particular facilities, other than where they were not in fact put in charge of those facilities in actuality, or where they no longer ran those facilities at the time the request was received by the council.

3.7. The information that can be exempt from disclosure is specific information such as costs and profits of the contractor, where it can be shown that release of the information would be damaging to the commercial interests of the contractor and that it is in the public interest that confidentiality is maintained

4. Risk Implications

Identified Risk	Likelihood Rating	Consequence Rating	Risk Value	Mitigation
FOI and EIRs requests are not	1	2	2	MWDA publishes an approved

answered in accordance with legislation				Publications Scheme and Guidance in relation to EIRs requests. It has a recognised administrative system to deal with requests.
Rulings and decisions made by the Information Commissioner are not reflected in the Authority's policy	2	2	4	Regular monitoring of the legal framework surrounding the FOIA and EIRs and any rulings by the information Commissioner
Information that should be available is not published in the Publication Scheme	2	2	4	The Authority's Publication Scheme is reviewed regularly to ensure that the relevant classes of information are public
The Procurement Process may give rise to requests for information of such quantity and complexity that MWDA resources are stretched. Risk of MWDA failing to provide information that it is obliged to or, disclosing confidential information	2	2	4	Ensure that the Authority's administrative system to deal with requests is adequate and that senior managers are aware of the obligation, importance and timescales in relation to responding to EIRs and FOIA requests.

5. HR Implications

5.1 There are no HR implications associated with this report.

6. Environmental Implications

- 6.1. There are no environmental implications associated with this report.

7. Financial Implications

- 7.1. There are no financial implications associated with this report.

8. Conclusion

- 8.1. The current Protocol on confidentiality, which has been given to participants in the Procurement Process, does not need revising in the light of the Information Commissioner's decisions.
- 8.2. Regulation 18(21) (c) of the Public Contracts Regulations 2006, precludes the Authority from revealing to other Bidders '*solutions proposed or any confidential information communicated by a participant without that participant's agreement*' during competitive dialogue.
- 8.3. It is in the public interest that, during the Procurement Process, confidential information is protected, as disclosure could cause commercial damage to MWDA and to participants. This would discourage companies from tendering for public contracts, which would not be in the public interest.
- 8.4. The Information Commissioner's decision in East Riding related to a signed waste management contract. From the guidance given in that decision, confidential information given as part of the Procurement Process would still be exempt from disclosure. An FOIA or EIRs request relating to the procurement is, therefore, likely to relate, not to confidential information of participants, but to the process itself with a view to challenging a contract award. The Authority has a full audit trail of information of all stages of the Procurement Process and confidential and disclosable information can be identified quickly.
- 8.5. Planning will be conducted according to, and governed by planning regulations. Current policy regarding disclosure will therefore be unaffected. A request for information is likely to come as part of a challenge to the planning process. MWDA is liaising closely with Frances Patterson QC to ensure that MWDA's Planning Strategy is conducted correctly thus reducing the risk of a successful challenge. A full audit trail of information regarding planning and the site selection process is robustly maintained by the Authority.

- 8.6. The impact of the East Ridings decision and the East Sussex decision relates to the period following the contractor being appointed. Contractors need to be aware that in the light of these decisions they may be considered to be public authorities for the purpose of FOIA and EIRs and that members of the public may approach them direct for information regarding waste contracts. It is important to ensure that any future contractors and MWDA agree on a joint approach for dealing with FOIA and EIRs requests. The contracts between MWDA and the new contractors should contain provision for co-operation on FOIA and EIRs and a joint policy to be agreed.
- 8.7. The East Riding case provides clarification on which parts of a waste contract should be disclosed under a request made under FOIA and EIRs and it is important that MWDA and the contractors are aware of these disclosure requirements.
- 8.9. Information about the procurement is, where appropriate, published as part of the Authority's Publication Scheme. As the procurement progresses, consideration needs to be given as to additional information that can be published thus reducing the need to consider FOIA and EIRs requests. Ultimately, this could include those sections of the waste contracts that are liable to disclosure. A review of the Authority's Publication Scheme has taken place and a revised and amended version can be seen at Appendix One. This will also be sent to the Information Commissioners Office for approval.
- 8.10. In summary the following sections have been amended and added to the MWDA Publication Scheme:

* some information might be confidential or exempt from publication by law

** Information is available on our website: Merseyside Waste Disposal Authority maintains a website at www.merseysidewda.gov.uk and has an ongoing commitment to make as much information available on our website as possible.

Class	Sub-Heading	Format of Information	Availability and Cost
Existing Waste Contract	Contract with Mersey Waste Holdings Ltd	Document – paper/electronically	Contracts Manager Local Libraries

information (existing waste contracts up to 2009) * and **	Contract Monitoring Reports	Authority Reports – paper/electronically or via Authority website www.merseysidewda.gov.uk	Cost - Free
Future Waste Contracts and Waste Procurement information (new waste contracts from 2009 onwards) * and **	Official Journal of the European Union Notices, Outline Business Case, Pre-Qualification Questionnaire, Descriptive Document, Lists of Qualified Bidders, Contract Award Decision, Procurement Strategy Documents	Document – paper electronically	Contracts Manager Cost - Free

8.11. The Information Commissioner has issued new guidance on the way the local and statutory authorities produce Publications Scheme. Specifically it has now published a new Model Scheme that must be adopted by all authorities before the 1 January 2009. MWDA will be reviewing its scheme later in 2008 to comply with the Commissioners requirements.

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The background documents to this report are open to inspection in accordance with Section 100D of The Local Government Act 1972:

(i) Merseyside Waste Disposal Authority Publication Scheme (Revised June 2008)