



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2006/0087**  
**Information Commissioners reference: FER0102126**

**Heard in Chambers**  
**Date: 9<sup>th</sup> October 2007**

**Decision promulgated**  
**6 November 2007**

**Before**

**Deputy Chairman**  
**MR H FORREST**

**and members**

**Mr H FIZHUGH**  
**Mr D WILKINSON**

**Between**

**MR MP FOWLER**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**AND BRIGHTON AND HOVE CITY COUNCIL**

**Additional Party**

**Decision**

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 17 October 2006.

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

**SUBSTITUTED DECISION NOTICE**

**Date**

**Public Authority:** Brighton & Hove City Council  
**Address:** Kings House  
Grand Avenue  
Hove  
BN3 2LS

**Complainant:** Mr M Fowler  
**Address:** Little Hintock  
42 Overhill Way  
Brighton  
BN1 8WP

**Summary**

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This Decision Notice was substituted by the Information Tribunal, following its decision in appeal no EA/2006/0087, in place of the Decision Notice originally published by the Information Commissioner on 17 October 2006.

The complainant made a request for information related to refuse collection. After the initial Decision Notice was appealed, it was agreed that this complaint would be re-investigated and the Notice would be amended as necessary. This Notice sets out the conclusions formed by the Information Commissioner, which were largely agreed by the parties to the appeal, save for 3 disputed points. Paragraphs 34, 50 and 51, and 104 of the Decision Notice reflect the Tribunal's findings on these three points.

**The Commissioner's Role**

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1. The Environmental Information Regulations (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.

## The Request

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2. On 19 June 2005, the complainant requested the following information:

(a) *"Would the Council recommend or permit that any wheeled bin stored on the pavement should be securely shackled in an upright position at the edge of the pavement?"*

(b) *"Does the Council consider that it owes a duty of care to residents when requiring that those residents transport wheeled bins to and from a roadside refuse collection point?"*

(c) *"In my particular case, given that I already re-use or recycle wherever practical, what benefits accrue, and to whom, as a consequence of the Council requiring me to use a wheeled bin?"*

(d) *"May I ask how that increase in efficiency [of the refuse collection service] was achieved, and how it was measured?"*

(e) *"What did RNIB say about the storage of wheeled bins on the pavement, and did they have any comment to pass on the colour of those bins?"*

(f) *"How much pollution do the refuse trucks that hoist wheeled bins cause, in comparison to those that do not?"*

(g) *"Has the Council considered introducing a policy of keeping its refuse collection vehicles away from arterial routes between 08:00 and 09:00?"*

(h) *"How should the prudent householder deal with a modestly-sized item of landfill refuse that will not fit inside a wheeled bin?"*

(i) *"Where is enshrined the Council's right to impose a quantum limit on the volume of refuse that it is prepared to collect?"*

(j) *"In short, does the Council have the legal right to impose a quantum limit to its obligation to collect refuse, or does the legislation give the Council the obligation to collect only, say, 'a reasonable quantity'? In the latter case, should not 'a reasonable quantity' be reckoned in a reasonable way?"*

(k) *"Does the Council have plans to introduce a scheme for the recycling of garden waste?"*

(l) *"If the Council is faced with a straight choice between either a wheeled bin being used or refuse being reused or recycled wherever possible, for which will it opt?"*

3. The public authority responded to this request on 29 September 2005. The public authority responded to each aspect of the information request as follows:

(a) *"If an individual wishes to secure or house their wheeled bin from the weather or passers by, the council permits this..."*

(b) The public authority cited duty of care imposed by Environmental Protection Act and Disability Discrimination Act.

(c) *"It improves street cleansing service in that it takes less time to clean as more waste contained, therefore further financial savings for the Council and those who fund it."*

(d) *"As above."*

(e) *"Consultation with disability groups has confirmed that the wheeled bins should not add on any extra concern to wheelchair users, partially sighted or blind residents."*

(f) No response

(g) *"This is not operationally possible due to the volume of collections per day and the time of closure of landfill sites."*

(h) *"The wheeled bin is for standard household waste. Other items, such as the ones given, can be taken free of charge to either Household Waste Recycling Site."*

(i) *"Under the Environmental Protection Act 1990 (Section 46) the Council is entitled to specify any reasonable receptacle to be used for refuse collection. This includes its size."*

(j) As above

(k) *"As the Council has a limited amount of money to spend on recycling it decided to prioritise dry recyclables (paper, glass cans, card, plastic, etc) in preference to green and putrescible waste."*

(l) *"This is not an option that the Council faces. The refuse collection service needed to be made more efficient, and containment by wheeled bin is the most viable option. However, the Council encourages residents to reduce, reuse and recycle as much as possible."*

4. Following the intervention of the Commissioner, the public authority responded to request (f) on 10 August 2006. This response was as follows:

(f) *"The difference in emissions from the vehicles that hoist wheeled bins is negligible. Further information is not held by the Council regarding this and the*

*manufacturers would have to be contacted to ascertain the required information.”*

5. In a letter to the public authority of 9 October 2005, the complainant asked a number of questions of the public authority concerning its refuse collection service. In a letter to the Commissioner of 9 July 2006 and in the complainant’s grounds of appeal document dated 9 November 2006, the complainant specified 8 information requests he had made to the public authority and in connection with which he was dissatisfied with the information provided. The initial investigation and Decision Notice focussed on the complainant’s request of 19 June 2005. The request of 9 October 2005 was not considered at that time.
6. In his letter of 9 October 2005, the complainant asked approximately 39 questions. The wording of these questions is not identical to that used in the complainant’s grounds of appeal document.
7. The 8 information requests specified in the complainant’s letter of 9 July 2006 to the Commissioner and confirmed in the grounds of appeal document of 9 November 2006 were aggregated versions of questions asked in the letter of 9 October 2005. In the interests of clarity and ensuring that this notice covers the issues that the complainant has specified, this notice uses the wording specified in the complainant’s grounds of appeal document.
8. The 8 information requests specified in the complainant’s letter to the Commissioner of 9 July 2006 and confirmed in the complainant’s grounds of appeal document of 9 November 2006 are as follows:

*(m) “I asked the Council to provide from its records details of why it had not addressed my several requests...within the prescribed time scale”*

*(n) “I asked the Council to provide from its records details of the information it had received on the subject of public liability that the Council might have sought from or received from insurers, loss adjusters and any other party; and why the question of a householder’s liability to the public was not mentioned in the leaflet ‘Think inside the Box’?”*

*(o) “I asked the Council to provide from its records details of the noise that had been produced by refuse and recycling collection vehicles; and what advice had been received from the Council’s officers regarding the acceptability at 06.00 of the noise produced by such vehicles.”*

*(p) “I asked the Council to provide from its records details of any duty of care that the council might owe to residents when those residents are acting in accordance with the stated requirements of the Council; and to explain why it had sought to avoid addressing that issue.”*

*(q) “I asked the Council to provide from its records details of why it considered that the system of working that it had introduced was more efficient, when that system of working appeared to be less efficient.”*

(r) *“The Council agreed to provide information concerning the cost of street cleaning in Patcham; and the frequency with which dog waste bins are emptied.”*

(s) *“I asked the Council to provide from its records details of how it had calculated the size of wheeled bins that it would provide; and how it would approach the matter of over-filled wheeled bins.”*

(t) *“I asked the Council to provide from its records details of how the success or otherwise of the wheeled bin scheme was measured, to include ancillary costs, both financial and non – financial.”*

9. The public authority responded to the complainant’s letter of 9 October 2005 on 7 November 2005. This letter responded to the above requests as follows:

(m) Addressed briefly, did not confirm whether recorded information is held

(n) Addressed briefly, did not confirm whether recorded information is held

(o) *“...it is not possible to give a definitive answer...”*

(p) Referred to previous responses given to the complainant on the issue of duty of care and stated that there was nothing to add to these.

(q) Not addressed

(r) Request acknowledged, but the information requested was not provided.

(s) Not addressed

(t) *“I am pleased to confirm that Brighton & Hove is currently bucking that national trend of which is a 3% growth – our current growth is 0.2%”*

## **The Investigation**

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### **Scope of the case**

10. The requested information in this case relates to waste, thus it is environmental information falling within the scope of Regulation 2(b). This case has, therefore, been considered under the EIR.

11. Following the issuing of a previous Decision Notice referring to the complainant’s information request to the public authority of 19 June 2005, the Commissioner agreed to reinvestigate. This investigation was to focus on the issues specified in the complainant’s grounds of appeal document of 9 November 2006, as well as the information requests made on 19 June 2005.

12. The complainant has confirmed that request (e) is resolved. This request is not considered further in this notice.

## **Chronology**

13. The Commissioner contacted the public authority on 11 December 2006. In this letter, the public authority was asked to confirm or deny whether recorded information was held on the issues specified in (m), (n), (o), (p), (r), and (t) above. The public authority was also asked to provide the Commissioner with any information that it did hold.
14. The public authority responded to this on 19 December 2006. The response in relation to each question asked was as follows:

(m) *"We do not hold any recorded information as to why the council did not address Mr Fowler's requests within 20 working days."*

(n) *"No"*

(o) *"There is no legislation to state what are acceptable collection times. We have spoken to environmental health noise pollution officers and they advise that we would assess each complaint on each individual merit, i.e volume of complaints in affected area, scale of complaint, etc. Mr. Fowler is only one to complain in this area and therefore not considered a widespread complaint, given the volume of collections that need to be made in working hours (tips close at 4pm)."*

(p) *"We have sought legal advice from council lawyers who confirm each case judged on own merit. We consider this information to be exempt under s42 (Legal professional privilege) of the Freedom of Information Act 2000."*

(r) *"Our budgets are not broken down on an area by area basis as this would be impractical. We also move resources around depending on need, so it is not straightforward to identify street cleansing resources within relatively small geographical areas."*

(t) *"One of the reasons for introducing wheelie bins was the realisation of efficiency savings (as well as improved recycling rates, reduced manual handling and cleaner streets). Financial information is available from the business case for the introduction of wheelie bins."*

15. The Commissioner contacted the public authority further on 8 February 2007. In this letter the public authority was asked firstly to clarify its stance with regard to request (p) above. It was asked to confirm if information falling within the scope of this request was held and was considered exempt under section 42. If this information was considered exempt under section 42, the public authority was asked to give a detailed description of its reasoning.
16. Secondly, the public authority was asked to clarify its stance in relation to request (r) above. The public authority was asked to clarify what information it

held about the cost of street cleaning and to clarify why it was not possible to pick out information about the cost of street cleaning for a small area, such as Patcham.

17. Thirdly, in connection with (t) above, the public authority was asked to either provide the information it had confirmed was held to the complainant or provide a detailed explanation as to why this information would not be disclosed to the complainant.
18. The public authority responded to this on 21 February 2007. In this response, the public authority stated that its response of 19 December 2006 in which it had stated that information about duty of care was exempt under section 42 was not intended to suggest that recorded information falling within the scope of the complainant's request (p) was held. The public authority stated it held no recorded information falling within the scope of request (p).
19. Secondly, in relation to request (r), the public authority stated that it does not hold recorded information about the cost of street cleaning in Patcham. It stated that information about the overall cost of the street cleaning service was held, but that *"the allocation of resources to particular areas is not fixed and resources are moved around according to the greatest need."*
20. Thirdly, the public authority stated that it did hold recorded information about the budget for the introduction of the wheeled bin scheme, as requested by the complainant at request (t) above and that this had been sent to the complainant on 21 February 2007. The public authority enclosed a copy of correspondence showing this disclosure to the complainant.
21. Fourthly, the public authority stated that, despite its previous assertion, it did hold information relating to the complainant's request for information about public liability, request (n) above. The public authority acknowledged that this information should have been disclosed to the complainant previously. The public authority confirmed to the Commissioner that the recorded information held here had been disclosed to the complainant on 21 February 2007.
22. The Commissioner contacted the public authority again on 23 February 2007. In this correspondence the public authority was asked firstly to clarify its stance in relation to request (p), in connection with which it had stated both that section 42 applied and that such information was not held. The public authority was also asked for further information about its position in relation to request (r).
23. The public authority responded to this on 28 February 2007. In this response, the public authority stated that legal advice had been disclosed to the complainant in connection with public liability, request (n). In connection with the duty of care question, request (p), the public authority stated that it had verified that no recorded information exists and that there was no reason to consider section 42. The public authority did not respond to the question asked about the cost of street cleaning in Pitchman.



24. On 27 March 2007, the Commissioner sent to the public authority a schedule of the requests made on 19 June 2005. This schedule gave the wording of each request and the wording of the public authority's response to each request.
25. The public authority was advised that in relation to each information request it should confirm or deny whether it holds recorded information that falls within the scope of the request. Where it did hold recorded information within the scope of any of the requests, the public authority was advised that this information should be communicated to the complainant, if this had not been done previously.
26. The public authority was advised that where its position was that no recorded information falling within the scope of the request is held, it should provide to the Commissioner positive evidence of this. This could be in the form of, for example, a signed statement from the relevant official at the public authority stating that no relevant recorded information is held and describing the efforts that were made to locate this information.
27. The public authority was also advised that where an exception from the EIR applies, the public authority should explain why it is believed that the exception in question applies to the information withheld. This explanation should be sufficient to satisfy the Commissioner that it does apply to the information in question.
28. The Commissioner further explained that Regulation 12(4)(c) provides that a public authority may refuse to comply with a request where it has been formulated in too general a manner. The public authority was advised that it should give consideration as to whether this exception applied here in relation to any of the requests. The public authority was also advised that, where it considered that a request was too general in nature to be complied with, the Commissioner would consider whether the public authority should have sought to narrow the request in accordance with the requirement to provide advice and assistance imposed by Regulation (i).

## **Analysis**

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29. The public authority responded initially on 20 April 2007, providing witness statements given by two officials within the public authority that had dealt with the task of responding to the complainant's information requests. The Commissioner responded to the public authority on 24 April 2007, indicating where further clarification was necessary from the public authority. The public authority responded on 27 April 2007, providing further witness statements from council officials, which were intended to provide the further clarification necessary.
30. The Commissioner responded to this on 30 April 2007, again indicating where the public authority had yet to provide sufficient clarity. The public authority responded with a third witness statement on 2 May 2007.

31. The public authority has provided six witness statements in total. These witness statements are referred to as 1(i) and 1(ii), 2(i) and 2(ii) and 3(i) and 3(ii).
32. The public authority has stated that it has no record of receiving the information request on 19 June 2005, the date on which it was sent to the public authority by e mail. The public authority states that it did not receive the information request until the complainant sent this for a second time, on 29 August 2005.
33. The public authority has referred to the copy e mail provided by the complainant to all parties containing no details of the date it was sent or of the recipient. The Commissioner acknowledges this, but also notes that the public authority has not at any previous time during the handling of this case denied that it received the request on 19 June 2005. Also, as acknowledged in witness statement 1(ii), the public authority failed to respond within 20 working days of its receipt of the complainant's e mail of 29 August 2005.
34. The Commissioner finds that the public authority failed to respond to the request of 19 June 2005 within 20 working days of receipt. The public authority has, therefore, breached Regulation 5(2).
35. On a further overall issue, the public authority has advanced no argument concerning Regulation 12(4)(c). The Commissioner does not, therefore, conclude that any of the complainant's requests were formulated in too general a manner and does not find that the exception provided by Regulation 12(4)(c) applies.
36. Based on the clarification provided by the public authority in its six witness statements and in its previous correspondence with the Commissioner, the Commissioner has formed the following conclusions in relation to each aspect of the information request:

#### **Request (a)**

37. In witness statement 3(ii), the public authority states no recorded information is held by it that falls within the scope of this request. The public authority also described the efforts undertaken to locate relevant information.

#### **Conclusion**

38. The Commissioner accepts the representations of the public authority about the steps taken by it to locate information falling within the scope of the request. The Commissioner therefore finds that the exception provided by Regulation 12(4)(a) applies as the Council does not hold information pertaining to this aspect of the complainant's request.
39. However, the Commissioner also finds that the public authority failed to comply with the requirement of Regulation 14(1) that a public authority provide a written refusal to a request for environmental information, specifying the exception that is relied on. As the requirement to issue a written refusal is superseded by the outcome of this notice, no steps are required in connection with this breach.

## **Request (b)**

40. In witness statements 1(i) and 1(ii), the public authority confirmed that information falling within the scope of this request was held. In statement 1(i), the public authority stated that this information had been disclosed to the complainant. Having been informed previously by the public authority that information was not held that fell within the scope of this request, the Commissioner asked the public authority to clarify this point.
41. In witness statement 2(i), the public authority stated that information falling within the scope of this request had been disclosed to the complainant on 21 February 2007. The Commissioner noted that the letter of 21 February 2007 from the public authority to the complainant attached to witness statement 1(i) did not appear to address the request for information about any duty of care owed by the public authority to residents in respect to wheeled bins.
42. In witness statement 3(i), the public authority stated that the information disclosed to the complainant on 21 February 2007 related to 'passers by' rather than to residents. In witness statement 3(ii), the public authority referred to an e mail from an official at the public authority that had been disclosed to the complainant on 21 February 2007. Witness statement 3(ii) also states that no further information, aside from this e mail, is held that falls within the scope of this request.

## **Conclusion**

43. The public authority has been particularly unclear as to whether recorded information is held in connection with this request and whether, if recorded information is held, this has been disclosed to the complainant. At various stages, the public authority has stated that relevant recorded information is not held, has suggested that it is held, but that it is exempt by virtue of section 42 of the Freedom of Information Act 2000 and that it is held and has been provided to the complainant. Most recently, the public authority has reverted to the position that no recorded information is held that falls within the scope of this request.
44. Given the apparent uncertainty within the public authority over whether information falling within the scope of this request is held, the Commissioner believes that the public authority should deal afresh with this request. The decision here is that, if the public authority establishes that information falling within the scope of this request is not held, it has breached Regulation 14(1) in that it failed to communicate this to the complainant.
45. Alternatively, if the public authority establishes that information falling within the scope of this request is held, it has failed to comply with Regulation 5(1) in that it failed to communicate this information to the complainant.
46. As stated above, the public authority should consider this request afresh. In doing so, the public authority should undertake thorough efforts to establish if it

does hold recorded information falling within the scope of this request. If such information is held, it should be communicated to the complainant, subject to the exceptions. If the public authority does not locate information falling within the scope of this request, it should communicate this finding to the complainant.

### **Request (c)**

47. In witness statement 2(ii), the public authority stated that no recorded information falling within the scope of this request is held by it. In this statement, the public authority also refers to a '*committee report*' that supported the answer originally given on 29 September 2005.
48. The Commissioner requested further clarification as to whether the committee report referred to included recorded information falling within the scope of this request. In witness statement 3(ii), the public authority clarified that the committee report referred to previously was dated 3 March 2004, prior to the introduction of wheeled bins and gives details of the intended future benefits of the introduction of the wheeled bins.
49. The public authority asserted that the contents of this committee report do not constitute information falling within the scope of this request. The public authority's grounds for this argument are that the benefits shown in this report do not relate specifically to the complainant's request. The public authority also states that it holds no further information falling within the scope of this request.

### **Conclusion**

50. The Council's reply that they do not hold information which would answer Mr Fowler's particular request (which was for information "in my particular case" about the benefits accruing from Mr Fowler's use of a wheelie bin) is entirely credible. It would be surprising if the Council did hold information on the benefits accruing from individual use of a wheelie bin. The public authority has established that the exception provided by Regulation 12(4)(a) applies here. However, the public authority failed to comply with Regulation 14(1) in that it did not issue a refusal notice stating which exception applied. The public authority has since provided the complainant with a written refusal of this request. No further action is required in connection with this breach.
51. As the Council has on a number of occasions in the past provided information to Mr Fowler about the benefits accruing generally from the use of wheelie bins, it would not be reasonable to expect the Council to offer to provide further information on this occasion. The Council are not therefore in breach of their obligation, under Regulation 9, to provide advice and assistance on this occasion.

### **Request (d)**

52. In witness statement 2(ii), the public authority states that no recorded information falling within the scope of this request is held by it. However, it also

refers to a disclosure of information having been made in the committee report referred to above.

53. In witness statement 3(ii), the public authority clarified that the report referred to in statement 2(ii) was written prior to implementation and that no measurements of the efficiency of the service had been taken since implementation. The public authority also provided a brief description of the efforts undertaken to locate information falling within the scope of the request, stating that the appropriate senior staff member within the public authority had confirmed that recorded information falling within the scope of this request is not held.

### **Conclusion**

54. The Commissioner accepts that the committee report referred to does not contain information about how an increase in the efficiency of the refuse collection service was achieved and how this was measured, given that this report was produced prior to the implementation of the wheeled bin service. The Commissioner also accepts the representations of the public authority that no information is held by it that falls within the scope of this request.
55. The Commissioner finds that the exception provided by Regulation 12(4)(a) applies here. However, the Commissioner also finds that the public authority failed to comply with Regulation 14(1) in that it did not issue a refusal notice stating which exception applied.
56. The requirement to issue a written refusal notice has been superseded by the outcome of this notice. No further action is required in connection with this breach.

### **Request (e)**

57. As referred to above, this request is not considered in this notice.

### **Request (f)**

58. The public authority failed to address this request when responding to the complainant on 29 September 2005. Following the intervention of the Commissioner, the public authority responded to the complainant 10 August 2006, as quoted above.
59. Following this response, the Commissioner clarified with the public authority whether it held any recorded information falling within the scope of this request. The public authority stated that it did not hold recorded information falling within the scope of this request and that the answer provided to the complainant on 10 August 2006 was not based on recorded information.
60. In witness statement 1(ii), the public authority stated again that it does not hold recorded information falling within the scope of the request. The public authority also acknowledged that it should have responded to the complainant specifying that it did not hold recorded information falling within the scope of this request.

## **Conclusion**

61. The Commissioner accepts the representations of the public authority that no recorded information falling within the scope of this request is held. In coming to this conclusion, the Commissioner notes the previous investigation of the response to this request and the assurances given by the public authority, at that time that recorded information falling within the scope of this request is not held.
62. The Commissioner finds that the exception provided by Regulation 12(4)(a) applies here. However, the Commissioner also finds that the public authority failed to comply with Regulation 14(1) in that it did not issue a refusal notice stating which exception applied.
63. The public authority has since provided the complainant with a written refusal of this request. No further action is required in connection with this breach.

## **Request (g)**

64. In witness statement 2(ii), the public authority states no recorded information is held by it that falls within the scope of this request. The public authority also described the efforts undertaken to locate relevant information, stating that the appropriate senior staff member within the public authority had confirmed that recorded information falling within the scope of this request is not held.

## **Conclusion**

65. The Commissioner accepts the representations of the public authority about the steps taken by it to locate information falling within the scope of the request. The Commissioner therefore finds that the exception provided by Regulation 12(4)(a) applies here.
66. However, the Commissioner also finds that the public authority failed to comply with the requirement of Regulation 14(1) that a public authority provide a written response to any request for environmental information, specifying the exception that is relied on. As the requirement to issue a written refusal is superseded by the outcome of this notice, no steps are required in connection with this breach.

## **Request (h)**

67. In witness statement 2(ii), the public authority stated that it does not hold information falling within the scope of this request, but also referred to a leaflet produced by it. The Commissioner asked for clarification as to whether the public authority's position is that the recorded information held by it, and falling within the scope of the request is that associated with this leaflet.
68. In witness statement 3(ii), the public authority clarified that the leaflet it had referred to did not specifically answer the question asked by the complainant, but had been provided "*in an attempt to answer the question as much as*

*possible*". The public authority described the steps undertaken to locate information falling within the scope of this request, stating that the appropriate senior staff members within the public authority had confirmed that recorded information falling within the scope of this request is not held.

### **Conclusion**

69. Having viewed the leaflet in question, the Commissioner accepts that the leaflet does not contain information relevant to this aspect of the complainant's request. The Commissioner also accepts the representations of the public authority about the steps taken by it to locate information falling within the scope of the request. The Commissioner therefore finds that the exception provided by Regulation 12(4)(a) applies here.
70. However, the Commissioner also finds that the public authority failed to comply with the requirement of Regulation 14(1) that a public authority provide a written refusal to a request for environmental information, specifying the exception that is relied on. As the requirement to issue a written refusal is superseded by the outcome of this notice, no steps are required in connection with this breach.

### **Requests (i) & (j)**

71. When responding to these questions on 29 September 2005, the public authority provided what appears to be a thorough response to these questions.

### **Conclusion**

72. The Commissioner finds that the public authority responded to these requests appropriately and concludes that the public authority complied with Regulation 5(1) here.

### **Request (k)**

73. In witness statement 3(ii), the public authority states no recorded information is held by it that falls within the scope of this request. The public authority also described the efforts undertaken to locate relevant information, stating that the appropriate senior staff member within the public authority had confirmed that recorded information falling within the scope of this request is not held.

### **Conclusion**

74. The Commissioner accepts the representations of the public authority about the steps taken by it to locate information falling within the scope of the request. The Commissioner therefore finds that the exception provided by Regulation 12(4)(a) applies here.
75. However, the Commissioner also finds that the public authority failed to comply with the requirement of Regulation 14(1) that a public authority provide a written refusal to a request for environmental information, specifying the exception that

is relied on. As the requirement to issue a written refusal is superseded by the outcome of this notice, no steps are required in connection with this breach.

### **Request (l)**

76. In witness statement 3(ii), the public authority states no recorded information is held by it that falls within the scope of this request. The public authority also described the efforts undertaken to locate relevant information, stating that the appropriate senior staff member within the public authority had confirmed that recorded information falling within the scope of this request is not held.

### **Conclusion**

77. The Commissioner accepts the representations of the public authority about the steps taken by it to locate information falling within the scope of the request. The Commissioner therefore finds that the exception provided by Regulation 12(4)(a) applies here.
78. However, the Commissioner also finds that the public authority failed to comply with the requirement of Regulation 14(1) that a public authority provide a written refusal to a request for environmental information, specifying the exception that is relied on. As the requirement to issue a written refusal is superseded by the outcome of this notice, no steps are required in connection with this breach.

### **Request (m)**

79. In witness statement 1(ii), the public authority stated that no recorded information falling within the scope of this request was held.

### **Conclusion**

80. Whilst the public authority has failed to provide any confirmation of the efforts made to locate recorded information falling within the scope of the request, the Commissioner would not expect that recorded information relating to the failure to comply with previous information requests would be held. The Commissioner therefore finds that the exception provided by Regulation 12(4)(a) is applicable here.
81. However, the Commissioner finds that the public authority failed to comply with Regulation 14(1) in that it did not respond to this request specifying which exception applied. No steps are required by the public authority in connection with this breach as the requirement to issue a written refusal of a request has been superseded by the outcome of this notice.

### **Request (n)**

82. Witness statements 1(i) and 1(ii) confirm that recorded information falling within the scope of this request was held at the time that the request was made and that this should have been communicated to the complainant at that time. The public authority has stated that the disclosure made to the complainant on 21



February 2007 constitutes all recorded information held that falls within the scope of this request.

83. In witness statement 1(ii), an answer to the question about the 'Think inside the Box' leaflet is given, although this answer did not confirm or deny whether recorded information falling within the scope of this request is held. In witness statement 2(ii), the public authority denies that recorded information relating to the question about the 'Think inside the Box' leaflet is held. In witness statement 3(ii), the public authority confirms that its answer to the 'Think inside the Box' leaflet question provided in 1(ii) and its denial that recorded information is held will be communicated to the complainant.

### **Conclusion**

84. The Commissioner finds that the public authority failed to comply with Regulation 5(1) in that it failed to provide recorded information falling within the scope of the request at the time that this request was made. As the recorded information held relating to the public liability question has since been disclosed to the complainant, as referred to above at paragraph 21, no further action is required in connection with this breach.
85. In connection with the question about the 'Think inside the Box' leaflet, following the answer to this question in witness statement 1(ii) and the denial that recorded information falling within the scope of this request is held given in witness statement 2(ii), the Commissioner accepts the representations of the public authority that recorded information falling within the scope of this request is not held. The Commissioner therefore finds that the exception provided by Regulation 12(4)(a) is applicable here.
86. However, the Commissioner finds that the public authority failed to comply with Regulation 14(1) in that it did not respond to this request specifying which exception applied. The public authority is required to provide to the complainant the response to the 'Think inside the Box' leaflet question that was provided at paragraph 26 in witness statement 1(ii).

### **Request (o)**

87. In witness statement 1(ii), the public authority states that no information falling within the scope of this request is held. Following further questioning on this point from the Commissioner, witness statements 2(ii) and 3(ii) state that recorded information falling within the scope of this request is not held and provides some description of the efforts made to locate relevant recorded information. Specifically, the public authority stated that this request was discussed between those officials at the public authority with responsibility for the areas of the public authority most relevant to this request and that these officials had confirmed that no relevant recorded information is held.

### **Conclusion**

88. The public authority has provided a description of the efforts made to locate information falling within the scope of this request and the Commissioner notes this. The Commissioner finds that the exception provided by Regulation 12(4)(a) is applicable here.
89. However, the Commissioner finds that the public authority failed to comply with Regulation 14(1) in that it did not respond to this request specifying which exception applied. No steps are required by the public authority in connection with this breach as the requirement to issue a written refusal of this request has been superseded by the outcome of this notice.

### **Request (p)**

90. In witness statements 1(i) and 1(ii), the public authority confirmed that information falling within the scope of this request was held. In statement 1(i), the public authority stated that this information had been disclosed to the complainant. Having been informed previously by the public authority that information was not held that fell within the scope of this request, the Commissioner asked the public authority to clarify this point.
91. In witness statement 2(i), the public authority stated that information falling within the scope of this request had been disclosed to the complainant on 21 February 2007. The Commissioner noted that the letter of 21 February 2007 from the public authority to the complainant attached to witness statement 1(i) did not appear to address request (p), instead the public authority had stated that this provided a response to requests (n) and (t).
92. In witness statement 3(i), the public authority stated that the information disclosed to the complainant on 21 February 2007 related to 'passers by' rather than to residents. In witness statement 3(ii), the public authority referred to an e mail from an official at the public authority that had been disclosed to the complainant on 21 February 2007. Witness statement 3(ii) also states that no further information, aside from this e mail, is held that falls within the scope of this request.

### **Conclusion**

93. The public authority has been particularly unclear as to whether recorded information is held in connection with this request and whether, if recorded information is held, this has been disclosed to the complainant. At various stages the public authority has stated that relevant recorded information is not held, has suggested that it is held and that it is exempt by virtue of section 42 of the Freedom of Information Act 2000 and that it is held and has been provided to the complainant. Most recently, the public authority has reverted to the position that no recorded information is held that falls within the scope of this request.
94. Given the apparent uncertainty within the public authority over whether information falling within the scope of this request is held, the Commissioner believes that the public authority should deal afresh with this request. The

decision here is that, if the public authority establishes that information falling within the scope of this request is not held, it has breached Regulation 14(1) in that it failed to communicate this to the complainant.

95. Alternatively, if the public authority establishes that information falling within the scope of this request is held, it has failed to comply with Regulation 5(1) in that it failed to communicate this information to the complainant.
96. As stated above, the public authority should consider this request afresh. In doing so, the public authority should undertake thorough efforts to establish if it does hold recorded information falling within the scope of this request. If such information is held, it should be communicated to the complainant, subject to the exceptions. If the public authority does not locate information falling within the scope of this request, it should communicate this finding to the complainant.

### **Request (q)**

97. In witness statement 2(ii), the public authority states that no information falling within the scope of this request is held and provides a description of the efforts made to locate relevant recorded information. Specifically, the public authority stated that checks had been carried out with senior officials in those parts of the public authority where information falling within the scope of this request would be held. The public authority denies that it holds recorded information falling within the scope of this request.

### **Conclusion**

98. The public authority has provided a description of the efforts made to locate information falling within the scope of this request and the Commissioner notes this. The Commissioner finds that the exception provided by Regulation 12(4)(a) is applicable here.
99. However, the Commissioner finds that the public authority failed to comply with Regulation 14(1) in that it did not respond to this request specifying which exception applied. No steps are required by the public authority in connection with this breach as the requirement to issue a written refusal of this request has been superseded by the outcome of this notice.

### **Request (r)**

100. As referred to above, the Commissioner had been in correspondence with the public authority in connection with this request previously. The public authority had specified at that time that it did hold recorded information about the total cost of street cleaning for the area covered by the public authority. The Commissioner had asked for confirmation as to why it was not possible to provide information about the cost of street cleaning for small areas, but the public authority did not respond to this.
101. In witness statement 1(ii), the public authority gave an explanation as to why it is not possible to provide a breakdown of the cost of street cleaning for a small

area. This explains that resources are not allocated per small area, but are used more widely. The public authority denies that it holds recorded information falling within the scope of this request.

## **Conclusion**

102. The public authority has acknowledged that it does hold information about the cost of street cleaning for the larger area and has explained why it is not possible to break this down by smaller area. The Commissioner accepts the representations of the public authority in this regard. The Commissioner finds that the exception provided by Regulation 12(4)(a) is applicable here.
103. However, the Commissioner finds that the public authority failed to comply with Regulation 14(1) in that it did not respond to this request specifying which exception applied. No steps are required by the public authority in connection with this breach as the requirement to issue a written refusal of this request has been superseded by the outcome of this notice.
104. In the light of the past history of correspondence between Mr Fowler and the public authority on this and related topics, (in particular, noting a number of occasions when information to answer specific requests has not been held, but answers on a wider basis have been provided, but have only served to generate further requests), the public authority were not in breach of their obligation under Regulation 9 to provide advice and assistance on this occasion. In the circumstances, it would not have been reasonable for them to offer, for example, to disclose to the complainant the cost information for street cleaning in the wider area. Information on the capital cost of street cleaning in the wider area had already been provided.

## **Request (s)**

105. In connection with the first part of this question, about calculation of bin size, the public authority stated in witness statement 1(ii) that it did hold information falling within the scope of this request and that this had been disclosed to the complainant.
106. In connection with the second part of this request, about overfilled bins, the public authority confirmed that it held information that fell within the scope of the request as the public authority had, in 2005, employed 2 people to deal with the issue of overfilled bins. The Commissioner assumes that the recorded information that the public authority has acknowledged is held that is relevant to this request relates to the work carried out by the 2 people employed in this capacity. It did not specify whether this information had been disclosed to the complainant.
107. After the Commissioner indicated that the public authority should specify whether the information held about over filled bins had been disclosed to the complainant, witness statement 2(ii) specified that no information had been recorded about the work of the 2 people employed to address the issue of over filled bins. Witness statement 2(ii) also referred to information about the

approach taken to over filled bins being recorded by the Customer Service Team onto a database and referred to information that had been provided to the complainant in 2004, prior to the EIR coming into effect.

## **Conclusion**

108. In connection with both parts of this request, the Commissioner is not satisfied that the public authority has identified all the recorded information held by it that falls within the scope of this request or that the complainant has been provided with all recorded information held by the public authority that falls within the scope of this request.
109. It is not clear what relation the appendix to witness statement 1(ii) has to the calculation of the size of wheeled bins. Witness statement 2(ii) provided the details of an equation of how the size of wheeled bins is calculated. Witness statement 3(ii) states that this equation is the result of experience and expertise on the part of an employee of the public authority and is not based on recorded information.
110. In connection with the second part of the request, for information as to how the public authority would approach the matter of over filled bins, the public authority initially confirmed that recorded information was held in connection with work carried out by 2 employees in 2005. It then appeared to retract this. However, witness statement 2(ii) appears to suggest that recorded information about this is held, or was held previously, but that this was stored on the public authority's customer service data base, rather than being recorded separately.
111. Given the apparent uncertainty within the public authority over whether information falling within the scope of this request is held, the Commissioner believes that the public authority should deal afresh with this request. The decision here is that, if the public authority establishes that information falling within the scope of this request is not held, it has breached Regulation 14(1) in that it failed to communicate this to the complainant.
112. Alternatively, if the public authority establishes that information falling within the scope of this request is held, it has failed to comply with Regulation 5(1) in that it failed to communicate this information to the complainant.
113. As stated above, the public authority should consider this request afresh. In doing so, the public authority should undertake thorough efforts to establish if it does hold recorded information falling within the scope of this request. If such information is held, it should be communicated to the complainant. If the public authority does not locate information falling within the scope of this request, it should communicate this finding to the complainant.

## **Request (t)**

114. As referred to above at paragraph 14, in its letter to the Commissioner of 19 December 2006, the public authority confirmed that it held recorded information

falling within the scope of this request. This information was subsequently provided to the complainant on 21 February 2007.

### **Conclusion**

115. In witness statement 1(ii), the public authority confirms that all information held by it that falls within the scope of this request was provided to the complainant on 21 February 2007. The Commissioner accepts the representations of the public authority here and does not consider that it is necessary for the public authority to take any further action in connection with this request.

116. However, the Commissioner finds that the public authority breached Regulation 5(1) in that it failed to disclose this information to the complainant at the time that the request was made.

### **The Decision**

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117. The Commissioner's decision is that the public authority failed to respond to the complainant's requests in accordance with the EIR. The decision in relation to each request is as set out above.

### **Steps Required**

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118. The Commissioner requires the public authority to take steps in relation to requests (b), (n), (p) and (s). The details of the steps required are as set out above.

### **Failure to comply**

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119. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Dated this 6<sup>th</sup> day of November 2007

Humphrey Forrest

Deputy Chairman, Information Tribunal

## **Reasons for Decision**

### **Background**

1. In December 2003 a road sign, erected by contractors acting on behalf of Brighton and Hove Council (the Council) fell on Mr Fowler's car. The manner in which the Council dealt with his subsequent claim for compensation left him with a grievance. When, in October 2004, the Council introduced a new scheme to collect and re-cycle rubbish, Mr Fowler decided to challenge the Council over its reasons for introducing the new scheme, and its practical implementation.
2. Over the following year Mr Fowler engaged various Council officials in lengthy correspondence raising numerous questions. By and large, these questions were answered fully and fairly, although not to Mr Fowler's satisfaction. Several of the answers provided were used by Mr Fowler as a spring board to generate further queries. Mr Fowler remained dissatisfied with the answers provided. He raised formal complaints under the Council's complaints procedure; he referred some of the correspondence to the local Government Ombudsman who declined to intervene.

### **The Requests for Information**

3. One of Mr Fowler's letters to the Council, of 19<sup>th</sup> June 2005, was expressed as a request for information under the Freedom of Information legislation. Mr Fowler set out twelve queries. Mr Fowler sent a chasing reminder on 25<sup>th</sup> July, and a further reminder on 29<sup>th</sup> August 2005. Eventually, a substantive reply was provided by the Council on 29<sup>th</sup> September. On 9<sup>th</sup> October 2005 Mr Fowler sent a 17 page letter to the Council, rehearsing a history of the correspondence and disputing the replies provided by the Council, raising further questions. On 7<sup>th</sup> November 2005, the Council sent Mr Fowler a lengthy and detailed reply to the current range of queries he was then pursuing; and informed him that the decision had been taken "that future correspondence from you regarding the matters detailed below or any matters that are closely inter-linked will not be replied to. This decision has been made in line with the Brighton and Hove City Council's policy on continuous complaints. Continual correspondence on the same issues does not help you and reduces the Council's efficiency in dealing with other complaints and correspondence."

### **The Complaint to the Information Commissioner**

4. Mr Fowler was dissatisfied with this reply and submitted his complaint to the Information Commissioner on 3<sup>rd</sup> December 2005. The Commissioner summarised Mr Fowler's various questions as follows:
  - 4.1. would the Council recommend or permit that any wheeled bins stored on the pavement stored on the pavement should be securely shackled in an upright position at the edge of the pavement?

- 4.2. does the Council consider that it has a duty of care to residents when requiring that those residents transport wheeled bins to and from a roadside refuse collection point?
- 4.3. in my particular case, given that I already re-use or re-cycle wherever practical, will benefits accrue, and to whom, as a consequence of the Council requiring me to use a wheeled bin?
- 4.4. may I ask how that increase in efficiency [*of the refuse collection service*] was achieved, and how it was measured.
- 4.5. what did RNIB say about the storage of wheeled bins on the pavement, and did they have any comment to pass on the colour of those bins?
- 4.6. how much pollution did the refuse trucks that hoist wheeled bins cause, in comparison to those that do not?
- 4.7. has the Council considered introducing a policy of keeping its refuse collection vehicles away from arterial roads between 08:00 hours and 09:00 hours?
- 4.8. how should the prudent householder deal with a modestly-sized item of landfill refuse that will not fit inside a wheeled bin?
- 4.9. where is enshrined the Council's right to impose a quantum limit on the volume of refuse that it is prepared to collect?
- 4.10. in short, does the Council have the legal right to impose a quantum limit to its obligation to collect refuse, or does the legislation give the Council the obligation to collect only, say, "a reasonable quantity"? In the latter case, should not "a reasonable quantity" be reckoned in a reasonable way?
- 4.11. does the Council have plans to introduce a scheme for the re-cycling of garden waste?
- If the Council is faced with a straight choice between either a wheeled bin being used or refuse being re-used or re-cycled wherever possible, for which will it opt?

5. The Commissioner's investigation, not surprisingly, was protracted. The investigation was difficult because of the range and style of Mr Fowler's queries. Few if any of these queries are straightforward requests for information. Many of them had already been put, and answered by the Council, at different times in the past, with a slightly different format or focus. Untangling the various questions and answers took time and persistence. Eventually, on 17<sup>th</sup> October 2006 the Commissioner published his Decision Notice. The summary reads:



The Commissioner agreed that a response had not been given within the time scale provided by the Act. He also found that although a good deal of information had been provided to the complainant, one part of the request had not been properly answered. Following the intervention of the Commissioner, the public authority responded to the aspect of the information requested that it had previously failed to address. There is no evidence available to the Commissioner that says that further relevant recorded information has been withheld from the complainant. As there is no outstanding breach of the Environmental Information Regulations 2004 ("EIR"), remedial action by the Public Authority is not required.

### **The Complaint to the Tribunal**

6. Mr Fowler was dissatisfied with that Decision Notice and appealed to the Tribunal. He did not accept that the Commissioner had adequately or accurately summarised his request for information. He contested the finding in several respects that the Council had satisfactorily answered his request for information and he set out a number of "remaining issues" which he wanted the Commissioner to address. At a Directions Hearing on 19<sup>th</sup> March 2007, he agreed that these were the issues he wished the Tribunal to determine in the appeal. They were:
  - 6.1. why the Council had not addressed my several requests under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004 ("FoIL") within the prescribed timescale; and why it had apparently failed to deal with the FoIL request sent on 29<sup>th</sup> August 2005 in an efficient manner.
  - 6.2. details of the information the Council had received on the subject of public liability that it might have sought from or received from insurers, loss adjusters, other local authorities, and any other parties; and why the question of the householder's liability to the public was not mentioned in the leaflet "Think Inside the Box"?
  - 6.3. details of the noise produced by refuse and re-cycling collection vehicles; and what advice had been received from the Council's officers regarding the acceptability at 06:00 hours of the noise produced by such vehicles.
  - 6.4. details of any duty of care that the Council might owe to residents when those residents are acting in accordance with the stated requirements of the Council; and to explain why it had sought to avoid addressing that issue.
  - 6.5. details of why the Council considered that the system of working that it had introduced was more efficient, when that system of working appeared to be less efficient.
  - 6.6. information concerning the cost of street cleaning in Patcham; and the frequency with which dog waste bins are emptied: note that the Council agreed to provide this information in its e-mail dated 07 November 2005 (appendix 2, page 3), but has yet to provide it.

- 6.7. details of how the Council had calculated the size of the wheeled bin that it would provide; and how it approached the matter of overfilled wheeled bins.
- 6.8. details of how the success or otherwise of the wheeled bins scheme was measured, to include ancillary costs, both financial and non-financial.
- 6.9. The Information Commissioner should obtain from the Council either the information required: or an unequivocal assurance from an appropriately senior official that the Council does not hold the required information in its records.

## **Legal Framework**

7. Mr Fowler's requests were, essentially, about rubbish. They therefore fall within the Environmental Information Regulations 2004 (EIR), rather than the Freedom of Information Act (FOIA). The principal relevant provisions of the Regulations are as follows:

### **Interpretation**

*2 (1) in these Regulations –*

*“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 –*

*(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....*

### ***Duty to make available environmental information on request***

*5(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) under the remaining provisions of this Part and Part 3 of these regulations, a Public Authority that holds environment information shall make it available on request.*

*(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of the receipt of the request.*

### ***Advice and Assistance***

*9(1) A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants.*

*(2) Where a public authority decides that an applicant has formulated a request in too general a manner, it shall –*

- (a) ask the applicant as soon as possible and in any event no later than 20 working days after the date of receipt of the request, to provide more particulars in relation to the request; and
- (b) assist the applicant in providing those particulars.

### **Representations and Reconsideration**

11(1) 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 the requirement of these regulations in relation to the request.

### **Part 3**

#### **Exceptions to the duty to disclose environmental information**

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 act outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

(4) for the purpose of paragraph (1)(a) a public authority may refuse to disclose information to the extent that –

- (a) it does not hold that information when an applicant's request is received;
- (b) the request for information is manifestly unreasonable;
- (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

#### **Refusal to Disclose Information**

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.

(2) The refusal should be made as soon as possible and no later than 20 working days after the date of receipt of the request.

*(3) The refusal shall specify the reasons not to disclose the information requested, including*

*(a) any exception relied on under Regulations 12(4), 12(5) or 13;*

*(b) any 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).*

*(5) The refusal shall inform the applicant –*

*(a) that he may make representations to the public authority under Regulation 11; and*

*(b) of the enforcement of appeal provisions of the Act [FOIA] applied by Regulation 18.*

8. Regulation 18 of EIR sets out the enforcement and appeal provisions for the regulations, providing that enforcement and appeals will be dealt with under the provisions of the Freedom of Information Act, appropriately modified. Thus, Section 50 of FOIA provides that a complainant may apply to the Commissioner for a decision whether a request for information made by the complainant to a public authority has been dealt with accordance with the requirements of Parts 2 and 3 of the EIR. Section 57 of FOIA provides for appeals to the Tribunal against the Commissioner's Decision Notice. Section 58 of FOIA sets out the Tribunal's powers on an appeal:

*58(1) if on an appeal under Section 57 the Tribunal considers –*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved in exercising discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

### **Consideration**

9. Against that legal background, we considered the evidence in this case, set out in 3 substantial ring binders, and whether the analysis and conclusions of the decision notice were in accordance with the law. A first point to note from the interpretation section is that information is defined to mean information in a "material form". We refer this to as recorded information, a definition similar to that in the Freedom of Information Act.

10. We set out some general observations on how public authorities might approach requests for information such as Mr Fowler's, against a background where the public authority has already replied to numerous similarly phrased requests in the past, and provided substantial advice and assistance to the complainant.
11. Some of the requests made by Mr Fowler are relatively straightforward requests for recorded information: for example: (c) "details of the noise provided by refuse and re-cycling collection vehicles". If the information is held, it should be disclosed; if it is not held, the appropriate exemption should be claimed (Regulation 12(4)(a)), and the information required by Regulation 14 should be given.
12. Other parts of the request address the merits of a particular policy or issue, rather than requesting information, for example (e): "details of why the Council considered that the system of working that it had introduced was more efficient, when that system of working appeared to be less efficient". It is always possible that the Council may hold recorded information which answers that question: there may have been a report prepared for the Council setting out the pros and cons of different proposals, reaching a reasoned conclusion. However, in most such cases an individual reply will have to be drafted to answer the question, particularly when, as here, the question rests on a disputed premise: Mr Fowler asserts that the "system of working appeared to be less efficient"; the Council have a different view.
13. Neither EIR nor FOIA require public authorities to go to such lengths. The obligation is to provide recorded information, not to create a record so that an answer may be given. The public authority may voluntarily provide a full answer, but it is not obliged to do so. If the public authority does hold information in recorded form which answers the question, it should provide it; if it does not hold the information in recorded form, it should say so, as the Council eventually did in response to this question (see paragraphs 97-99 of the attached, substitute decision notice).
14. An alternative approach to such a request might be to treat it as falling within Regulation 9(2), "a request [formulated] in too general a manner". In such a case the authority is obliged to ask the applicant to provide more particulars in relation to the request, and to assist the applicant in providing those particulars. In practice, on the facts of this case, that approach had been tried by the Council on numerous occasions in the past, although Regulation 9 was never expressly referred to. What the Council had done where it could not answer the precise question posed was to provide an individual, reasoned reply, referring where appropriate to information that was held.
15. Such an approach also conforms to the general duty on public authorities in Regulation 9(1) to provide advice and assistance "so far as it would be reasonable to expect the authority to do so". Where an authority has previously provided a helpful reply of the sort indicated above, it will not normally be reasonable to expect the authority to provide further advice and assistance in connection with the same request.

16. Another approach open to a public authority to take, in an extreme case, would be to invoke Regulation 12(4)(b) and refuse to disclose information where the request is “manifestly unreasonable”. A similar provision is found in Section 14 FOIA:

*Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.*

The Council did not seek to argue in this case that any of Mr Fowler’s requests fell into this category. Certainly, there is nothing on their face that indicates manifest unreasonableness. However, in context, given the history of the lengthy and persistent correspondence, bordering on the obsessive, the Council have shown remarkable forbearance in not developing such an argument in relation to some of Mr Fowler’s later requests, for example where similar requests had been made and answered in the past.

17. There are therefore a variety of approaches open to public authorities within the EIR to deal with applications such as Mr Fowler’s, where it has already provided reasoned replies and substantial advice and assistance in dealing with similar queries in the past. The Freedom of Information legislation does not automatically provide an opportunity for disgruntled complainants to generate an endless paper chase. The legislation, properly applied, does not require public authorities to enter into protracted correspondence; or to generate answers to questions which chiefly debate merits rather than request recorded information.

18. However, the legislation must be applied properly, and the appropriate procedures followed. What a public authority cannot do it simply refuse to engage in further correspondence, as this Council did, at least until it has applied the regulatory framework.

19. We have sympathy with Council’s response on 5 November 2005 to Mr Fowler, in which they tried to close the correspondence with him. In considering that response, we bear in mind that there are a number of ways in which Councils and council officers can be held to account for their actions. Ultimately of course, through the electoral process: they are responsible to the electorate; and on a daily basis, to elected Councillors. The Councillors’ internal supervisory role is supplemented by such external bodies as the Local Government Ombudsman and the District Auditor. The Council is not answerable for its policies, or their implementation, to individual residents. There has to be a limit on how much time and effort it is appropriate for the Council to spend on answering queries from individuals. In the Council’s view they had reached that limit on 7<sup>th</sup> November 2005. We are not surprised that they came to that conclusion.

20. But that response did not comply with their obligations under the freedom of information legislation, under EIR in this instance. The Council’s failings under the Regulations are set out in detail in the substitute decision notice, which is largely now agreed by all parties. In broad terms, the failings of the Council were procedural, rather than substantive. It is not that the Council failed to reply in substance to Mr Fowler’s queries, or to provide him with advice and assistance, but that they did not set out clearly whether they held, or did not hold, the

required information; and in cases where they did not hold the required information, did not comply with the formalities required. Regulation 14 of EIR requires them to state the exemption relied on and to inform the complainant of his right to ask for reconsideration under Regulation 11, and to appeal to the Information Commissioner under Regulation 18.

### **Was the Decision Notice in Accordance with the Law?**

21. We have referred above to the difficulties incurred by the Commissioner in investigating the complaint, and in drawing his protracted investigation to a conclusion. We quoted above the summary of findings in the decision notice.
22. During the course of the appeal, the Commissioner conceded that the decision notice was legally flawed and did not seek to support it. We share that view. The decision notice includes a number of findings to the effect that the Council had “addressed” Mr Fowler’s request for information. That is true but it is not sufficient under the legislation. On a complaint under Section 50, the Commissioner has to decide whether the request has been dealt with in accordance with Parts 2 and 3 of the EIR. That requires him to consider not merely whether the requests for information have been addressed, but whether they have been dealt with properly, in accordance with Parts 2 and 3: have the obligations in Regulations 5, 9, 11, 12 and 14, for example, been complied with? Did the authority hold recorded information which answers the request? If so, has the information held been disclosed? If not, has an exception been claimed? Has the authority explained which exception applies? Has the authority complied with the formal requirements of Regulation 14 to inform the complainant of his right to reconsideration and to appeal? None of these points were satisfactorily dealt with in the decision notice.
23. Moreover, in those cases where the Authority had stated that information was not held the Commissioner accepted this on the basis that: “there is no evidence available to the Commissioner that suggests that the public authority has withheld any further relevant recorded information from the complainant”. Such a finding ignores the presumption of disclosure in Regulation 12(2). Under the EIR, a claim that information is not held is treated as an exception to the duty to disclose information: see Regulation 12(1) (a). Under 12(4) a public authority may refuse to disclose information to the extent that it does not hold the information. But the public authority must apply a presumption in favour of disclosure under 12(2). If an authority wishes to claim that it does not hold the information, it must provide enough evidence to displace the presumption.
24. A finding that “there is no evidence available to the Commissioner that suggests that the public authority has withheld information” effectively places the burden on proof of this point on the complainant, to provide evidence to the contrary. Applying the presumption correctly places the burden of showing that information is not held on the authority. They might do this in a number of ways; for example they could provide evidence of a search for the information, which had proved unsuccessful; or provide some other explanation for why the information was not held. This might be evidence of destruction, or evidence that the information was never recorded in the first place. This the Council have now done, as set out in

the substitute decision notice. The Commissioner applied the wrong legal test in the decision notice in accepting the Council's claim that they did not hold recorded information.

25. Having conceded that the decision notice could not be supported, the Commissioner made further, extensive enquiries of the Council, obtaining a total of 6 witness statements from the Council which eventually set out the Council's position in terms of the EIR framework, more or less clearly. This enabled the Commissioner to produce a draft substitute decision notice, for the parties and the Tribunal to consider. This has been largely accepted and agreed by the parties, save for three specific points which are disputed by the Council. We deal with these below.
26. Subject to the three disputed points, since the contents of the decision notice are now agreed by the parties, we propose to say very little further about its contents, save that we agree with them, and under section 58 we adopt them. We therefore allow the appeal and substitute the attached, amended substitute decision notice for the decision notice originally produced by the Commissioner. We are grateful to the Commissioner for the considerable efforts made in drafting the substitute notice, during the course of the appeal.

### **The Disputed Points**

27. The Council disputes the Commissioner's finding, at paragraph 34, that they "failed to respond to the request of 19 June 2005 within 20 working days of receipt. The public authority has therefore breached Regulation 5(2)." The Council argue that they have no record of ever receiving the email of 19 June 2005, and did not receive the request until it was reproduced with an email of 29 August 2005. They concede that the reply they then sent, on 29 September 2005 was itself outside the 20 working day limit (by two days) and therefore was in breach of Regulation 5(2) in any event.
28. It is surprising that this claim not to have received the email was first made in June 2007, as part of an amended reply for this appeal; the point was not taken during the complaint to the Commissioner, the correspondence leading up to the Decision Notice, or in their first response to this appeal. Moreover, Mr Fowler sent a chasing email, asking when he might expect a reply to his 19 June email, to the Council on 26 July 2005; and he refers us to other contemporaneous emails referring to the 19 June email. If it had never been received by the Council, the Council had every opportunity to say so at the time. We draw the obvious inference from that silence that they did receive the email on 19 June, and uphold the Commissioner's findings in this respect.
29. Secondly, the Commissioner found that the Council had failed to comply with their duty in Regulation 9 to provide advice and assistance in relation to Mr Fowler's request: "in my particular case, given that I already re-use or recycle wherever practical, what benefits accrue and to whom, as a consequence of the Council requiring me to use a wheelie bin?" The reply given at the time, on 29 September 2005 was: "It improves street cleansing service in that it takes less time to clean as more waste contained, therefore further financial savings for the Council and



those who fund it". A second reply, given in October 05 was: "citiclean has been able to make savings with public money – your money – by introducing a wheeled bin service for the reasons given above. Less staff operate on a wheeled bin round which means staff can be redeployed to a recycling service. It improves street cleansing service in that it takes less time to clean as more waste contained, therefore further financial savings for the council and those who fund it. citiclean is working to make efficiencies to prevent any unnecessary increase in council tax." Earlier, in response to a question from Mr Fowler about the success of a trial scheme, the Council had replied, on 14 October 2004, "The wheelie bin scheme is no longer a trial, the trial was completed in the Rottingdean area earlier this year and as a result of the success of the trial, it is currently being rolled out across the city. We found that the trial in Rottingdean greatly increased recycling, increased the efficiency of our refuse collection service and also contributed to the general appearance of the area. For these reasons we consider the trial to have been a success."

30. Prompted by the IC during this appeal, to say whether they held recorded information or not, the Council replied that they did not. They later clarified this by explaining that they held no recorded information as to the particular benefits derived from Mr Fowler's use of the wheelie bin scheme, which is what he requested.
31. The IC did not dispute the accuracy of this reply, but concluded "the Commissioner believes it is likely that the intention of the complainant in making this request was to access information concerning the wider benefits accrued through use of wheelie bins in the area covered by the public authority, not just benefits resulting from his own use of a wheelie bin. The Commissioner believes that the public authority should have sought to clarify the nature of the complaint's request here in line with the obligation to provide advice and assistance imposed by Regulation 9".
32. In our view, that imposes much too high a burden on the authority. Firstly, Regulation 9 only imposes a duty to provide advice and assistance so far as reasonable to do so. What is reasonable cannot be looked at in isolation: it has to be considered against the history of Mr Fowler's repeated requests on the subject and in the context of the numerous other requests made at the time. Mr Fowler is a man who chooses his words carefully. It is apparent that, having made a general request, he then makes a particular one. Faced with a practised interlocutor making successive requests, sometimes carefully framed so that they do not identically replicate earlier requests, it is not reasonable to expect the Council to offer further advice and assistance.
33. Secondly, it is unreasonable to expect the Council to provide advice and assistance when they have already three times provided information about the general benefits that the Commissioner believes Mr Fowler may be seeking. As we observed above, the freedom of information legislation must not be used as an engine to generate a paper chase. There are limits to the obligations on public authorities.

34. The third point where the Council disputes the Commissioner's substitute decision notice is his finding that they failed to offer advice and assistance, in breach of regulation 9, to Mr Fowler when answering his question: "The Council agreed to provide information concerning the cost of street cleaning in Patcham; and the frequency with which dog waste bins are emptied". (The query about dog waste bins does not arise in this appeal: it is being pursued as part of a separate complaint, one of five currently before the Information Commissioner.) The answer given on 7 November 2005 was: "All streets in Patcham should receive at least one street sweeping a week and an inspection by street cleansing operatives who will litter pick as required. This includes six operatives (including two drivers) a caged vehicle, and a Scarab sweeper. I understand you have requested additional information regarding dog litter bins and have asked for financial information to be included in that response." The financial information was never provided. Prompted by the Commissioner during this appeal, the Council explained that while it held information about the cost of street cleaning for the whole of its area, it did not hold information on costs incurred in respect of small areas, such as Patcham.
35. The Commissioner accepted that the exception in 12(4)(a) therefore applied, but found that the Council should have offered to disclose to Mr Fowler the cost of street cleaning for the wider area, information which it did hold. The Council argue that it is not reasonable to expect them to provide that further advice and assistance. We agree, for the reason set out in above in paragraph 32.
36. Moreover, we note that at some stage the Council have provided Mr Fowler with a report on their Strategic Investment Fund which went to the Council's Policy and Resources Committee on 3 March 2004, setting out in detail the anticipated capital costs of introducing the wheelie bin scheme across the Council. No doubt, there are similar reports, readily publicly available in line with Councils' obligations to publish their Committee reports and agenda papers, which set out revenue costs for the council as a whole. The information as to the costs of cleaning in the Council's area has either therefore already been provided to Mr Fowler (capital costs) or is already available publicly. In either event, it would be unreasonable to expect the Council to have offered further advice and assistance on this occasion.
37. On these points therefore, we disagree with the Commissioner's conclusion in the substitute decision notice he prepared, and have amended the substitute decision notice (in paragraphs 50 and 51, and 104) to find no breach of section 9 by the Council, and no further action required, in respect of these requests.

### **Costs Application: refusal of a settlement offer**

38. On 1 June 2007, in the lead up to our hearing, the Council made an open offer to Mr Fowler to settle the appeal on the basis that the appeal be stayed and the Council would carry out the various steps required of them by the IC's draft substitute decision notice. They were not prepared to agree the draft notice (since they contested the disputed points set out above) but they were willing to make the further enquiries, and provide the information indicated in respect of requests b, n, p, r and s (or state which exception applied if they were unable or unwilling to do so) within a specified period. They argued that they were therefore

offering to do everything they could be ordered to do by the substitute decision notice, if Mr Fowler succeeded on every point, and there was therefore nothing to be gained by his continuing the appeal. In those circumstances, they argued, since nothing could be gained, to continue the appeal would be an unreasonable action on Mr Fowler's part. That is one of the circumstances in which the Tribunal has a discretion to award costs against a party under Rule 29(1) of the Information Tribunal Enforcement (Appeals Rules) 2005. Mr Fowler had rejected that offer, and therefore, argued the Council, we should order him to pay all the Council's costs incurred in defending the appeal since the date of the offer.

39. The short answer to the Council's application is that if Mr Fowler had accepted the offer, he would not have gained everything he could from pursuing the appeal to a tribunal. He would have lost the right to complain to the Information Commissioner if the Council subsequently failed to carry out their promise to provide the information as agreed. If a party fails to comply with a decision notice, on a complaint to the Commissioner, the Commissioner may certify that to the High Court, who may enquire into the matter and may deal with the authority as if it had committed a contempt of court: see section 54 FOIA. That is a potentially unlimited sanction. By agreeing to stay the proceedings, Mr Fowler would have lost his chance of invoking this sanction, and a private agreement between the parties could not have the same force.
40. More fundamentally, if Mr Fowler had agreed to stay proceedings, the flawed decision notice would have remained in place, publicly confirming, "As there is no outstanding breach of the EIR, remedial action by the public authority is not required." Since all parties agree the notice is flawed, and that remedial action by the Council is required, Mr Fowler is not acting unreasonably if he continues the appeal so that a decision notice, which is correct in law, can be substituted. These proceedings are tripartite: they have a public law element; the Commissioner's view on a stay would have to be heard.
41. We would always encourage the parties to agree a settlement: had the Council agreed to the settlement effectively proposed by the IC and Mr Fowler, that the draft substitute decision notice be accepted, the appeal would have been over, and we would have ordered substitution. Just as the Council cannot be criticised for continuing to fight the appeal (indeed, they have "won" on 2 of the 3 disputed points), neither can Mr Fowler.
42. The parties have also made submissions on the question of costs more generally. As is apparent from our reasons above, we have sympathy for the Council's position, and the costs they have incurred in defending the appeal. Mr Fowler's protestations that he is concerned not to incur public expenditure unnecessarily ring increasingly hollow. An indication of the lengths the Council went to answer his queries is given in paragraph 29 above. Their fair and reasonable attempts to provide him with information (way beyond the requirements of freedom of information legislation since much of it was unrecorded) were often met by sarcasm and ridicule, and used as a springboard for further requests.
43. However, as explained above and apparent from the substitute decision notice, the Council repeatedly failed to comply with their own obligations under EIR in

answering Mr Fowler. Where one party is themselves in breach, it must considerably weaken the force of any argument that the other party is acting unreasonably in pursuing an appeal. Moreover, it is important that parties should not be deterred from accessing the Tribunal by a threat of costs, especially where the threat is made by a public authority with infinitely larger resources (financial and in terms of legal expertise) than available to the individual complainant. We decline to make any orders for costs. Mr Fowler has been saved from a costs award on this occasion because the Council were themselves in breach of their obligations: he should be aware that further pursuit of requests properly dealt with by the Council would invite consideration of our powers to make a costs award.

Humphrey Forrest

Deputy Chairman

Date: 6 November 2007