



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2018/0227

**Field House, London
On 24 September 2019 and
13 January 2020**

Before:

**JUDGE PAUL HOLMES
MIKE JONES
ROSALIND TATAM**

Between:

GILLIAN WESTON

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

ISLINGTON BOROUGH COUNCIL

Second Respondent

DECISION AND REASONS

Appearances: -

Appellant: In Person

First Respondent: Written Representations

Second Respondent : Ms R Parekh, Counsel

DECISION

The Tribunal allows the appeal. It finds that the Second Respondent holds, or did hold, the requested information set out in Items 1, 3, 4, 8, 9, 10, 11, 13, 17, 18 and 19 of Document 11 in the Additional Documents bundle, and substitutes the following Decision Notice:

1. Para. 2 of the Decision Notice FS50651501 dated 25 September 2018 that Islington Council had breached Regulations 5(2) and 11(4) of the EIR by failing to respond to the initial and internal review requests within the statutory time limits is upheld.
2. The public authority is required within 42 calendar days of the date of the sending of this Decision to take the steps of disclosing to the Appellant the requested information set out in the Schedule hereto, or, where the Council is unable to do so by reason of the information no longer being held, informing the Appellant that is so, and when , and how, it ceased to hold the information
3. In the event that the public authority is, by reason of the limitations upon its operations by reason of the restrictions arising from the Covid- 19 pandemic, unable to comply fully with this Notice , it may apply, before expiry of the specified period, for an extension of time to comply with any part of this Notice. Any such application shall specify what steps the Council has been able to take in order to comply, what steps remain to be taken, why they could not be taken within the specified period, and when it is expected that the steps can be taken.

REASONS

1. In this appeal the Appellant , Ms Weston, appeals against a Decision Notice issued by the Information Commissioner on 25 September 2018, in which she determined that the public authority, Islington Borough Council (“the Council”) , whilst it breached Regulations 5(2) and 11(4) of the Environmental Information Regulations 2004 (the “EIR”) by failing to respond within the statutory time limits, did not hold any further information falling within the scope of the Appellant’s request of 30 September 2015, and did not require the Council to take any steps to ensure compliance with the legislation.

2. The Appellant appealed the Decision Notice by a Notice of Appeal dated 21 October 2018. The Appellant indicated that she was content with a decision on the papers.

3. The Commissioner filed her response to the appeal on 10 December 2018. She too was content with a determination on paper. The Appellant filed a response to the Commissioner’s response dated 27 December 2018.

4. The Tribunal held a hearing, on paper, on 27 February 2019. That Panel, however, considered that this was a case which required input from the relevant public authority, and could not be determined fairly without a hearing. Consequently, the Registrar on 21 March 2019 made Case Management Directions, whereby the appeal was to be determined at a hearing, and the Council was made a party to the appeal as Second Respondent . Consequential directions were made for the Council to file a

response, for the Appellant to file a reply to that response, for service of any witness evidence, and for further submissions to be made by the First Respondent, the Commissioner.

5. The Registrar also identified the issues to be determined by the Tribunal as:

What information was provided by Islington Council to Ms Weston as their response to the request made by her on 30 September 2015?

Was the information provided all the information held by Islington Council?

6. The Council's response to the appeal was contained in an email of 26 March 2019, sent to the Tribunal. The response was to the effect that the Council did not propose to call any witnesses, that it had made several responses to the Appellant's request, and that the information provided was all the information held by the Council in relation to her request. It requested that "all its response to date" (i.e. the material that was provided to the Appellant) should be put before the Tribunal.

7. The Commissioner responded to the Directions by email of 1 April 2019, to the effect that she did not intend to be represented at the oral hearing, and that she had considered that the Appellant had received all the recorded information held by the Council that was within scope of the Appellant's request. Whilst there was some issue, raised by the Appellant in her reply, as to whether the provisions of the FOIA or EIR were applicable, she submitted that this would have made no material difference to her decision.

8. By email of 4 April 2019 the Appellant, amongst other things, stated that she would like the previous Capital Project Manager to attend as a witness. He was the project lead in Housing and Adult Social Services at the time of her request, and would be aware of what information was held by the Council. He had since moved projects, and his attendance was out of her control.

9. By email of 4 April 2019, the Council confirmed that Antoinette Carter, Data Protection Lead, would be the only witness for the Council.

10. The Registrar made further Case Management Directions on 9 April 2019. She granted the Council's request for the information provided to the Appellant to be before the Tribunal. She declined the Appellant's application that the previous Capital Project Manager be required to attend as a witness, pointing out that the Council did not seek to rely upon witness evidence (with respect, it did, from Antoinette Carter, but not the Capital Project Manager), that the Tribunal was not a "board of enquiry", and that the Appellant would have the opportunity to make submissions or give evidence in the course of the proceedings as to why she believed that the Capital Project Manager would be able to personally remember what information the Council held on the date of her request.

11. On 10 May 2019 the Council sent a further email confirming that the Appellant had now received all the information that she had sought from the Council. It had nothing to add to the current hearing bundle.

12. The Appellant filed a reply to the Council's response on 22 May 2019. This is a 14 page document, with three attachments. In it she details what she had received from the Council, on pages 1 and 2, in some 25 bullet points. After addressing , in pages 2 to 4 , of this document whether the Council had denied the existence of any information, but had later released it, she then at pages 5 to 12 addresses whether the Council had (i.e. held) further information that it had not disclosed, with her conclusions set out in pages 12 to 14 of this document.

13. The Second Respondent at some juncture served a witness statement of Antoinette Carter, signed and dated 5 June 2019.

14. On 12 June 2019 the Commissioner served Further Submissions, in which her position that she would not be represented at the oral hearing was maintained, and she set out her further submissions in the light of the further material supplied by the Second Respondent and the Appellant.

15. The Appellant made a final written submission dated 10 September 2019, rather in the format of a witness statement.

16. The documents referred to in paragraphs 4 to 15 above are not in the hearing bundle, but are to be found in a bundle of Additional Open Documents, which is unfortunately not paginated, but the documents are enumerated 1 to 10. There was an open bundle, but, given the circumstances, no closed bundle. References to page numbers are therefore to pages in the open bundle.

17. The Appellant appeared in person at the hearing, the Commissioner was not represented, and Ms Parekh of Counsel appeared for the Second Respondent . The Appellant gave evidence, in effect confirming the contents of her submission of 10 September 2019. The Tribunal was unable to conclude the hearing of the appeal in the one day listed, and it was accordingly adjourned at conclusion of the sitting on 24 September 2019. The Second Respondent had started its case, and had called Antoinette Carter, whose evidence was not concluded at that stage.

18. In the interim, the Second Respondent gave further consideration as to whether to call the Capital Project Manager, and indeed whether a witness order was required to secure his attendance. Whilst the Second Respondent in subsequent correspondence suggested that the Tribunal should decide whether his evidence was required, the Judge informed the Second Respondent that it was a matter for it, not the Tribunal, to decide what evidence it wished to adduce in support of its case. In the event, whilst providing an account, by letter of 6 November 2019, of what the Capital Project Manager had said in response to its enquiries, the Second Respondent did not call him at the resumed hearing.

19. The hearing resumed on 13 January 2020. Antoinette Carter continued and concluded her evidence. The parties then made their closing submissions.

20. The Judge apologises for the delay in promulgation, occasioned initially by pressure of judicial business, and more latterly, by the restrictions occasioned by the Covid - 19 emergency , which has limited access to judicial premises and resources .

The Background and the Facts.

21. The Appellant lives on Packington Street, Islington, London N1. In 2015 a proposal was made by the Council to develop land at Windsor Street, which had previously been used as garages and a car park, to build three storey accommodation for adults with learning difficulties and autism, as part of a Supported Housing scheme. Windsor Street is a street which runs off Packington Street, and the proposed development would have been at the rear of the properties on the north side of Packington Street.

22. A public meeting was held in September 2015 (probably on 3 September) at the Town Hall, which the Appellant and other residents of Packington Street attended . The Capital Project Manager presented the proposal for the Council. He was, and had been since at least October 2014, involved in the project, and was (whether formally given this title or not) the project manager for this project.

23. The scheme that was proposed was for a three storey building, to accommodate 14 adults with disabilities. The Appellant's unchallenged evidence was that the Project Manager said in this meeting that he expected opposition to the scheme, but it would go ahead anyway. The Appellant and her neighbours who attended the meeting pressed the Capital Project Manager for more information as to how the viability of the scheme had been determined, but he refused to provide any, or any adequate, response.

The request , the response of the Council, and the internal review.

24. The Appellant , accordingly, by a request ("the request" , pages 36 to 37 of the bundle) dated 30 September 2015 sought from the Council the following information relating to the land at Windsor Street, London, N1 :

- *"Whether the land in question appears on a schedule of council assets for development, 'exploitation' or disposal and a copy of the information/status for the site and identified opportunity that may be retained by the council.*
- *Whether the site has been the subject of either a formal or informal pre-application inquiry by either a council department , a third party, potentially acting on the council's behalf or an independent third party. If so, a copy of the information submitted as part of that request and a copy of the Council's response.*

- *Whether the council has prepared any planning or development or internal briefs for the site and copies of such documents.*
- *Any reports relating to the proposed development of the site that have been presented to planning committee and/or other members such as but not restricted to: site surveys ; tree surveys ; daylight/sunlight reports ; viability assessments; heritage reports; design/architect reports & plans; quantity surveyor reports."*

The Appellant expressly referred to this being a Freedom of Information Request, and invited the Council to seek clarification from her if the request was too wide or unclear. She also explained what she meant by "correspondence/documents" , which she defined widely, as follows:

"In the context of this request "correspondence/documents" include , but are not limited to, written letters, email, file notes, notes of meeting/telephone calls, memorandum or other recorded communications that may be employed by the LPA to communicate between officers and/or members and external parties; reports to committees or other LBI decision making/review groups (documents referred to or relied upon in those reports) and any minutes."

25. The request was acknowledged on 2 October 2015 (not apparently in the bundle) , and the Appellant then received, following chasing emails from her , further emails from the Council apologising for the delay on 29 October and 6 November 2015 (also not in the bundle) . She eventually received the Council's substantive response on 23 November 2015 (page 38 of the bundle). In that response the Council stated that its responses were:

- *The land only appears on a schedule of garages and car spaces.*
- *Copies of the application and planners response are attached.*
- *Feasibility report attached.*
- *Please see attached.*

Four pdf. files were then attached in the email. They were entitled "Heritage Windsor Street", "Asbestos Demolition Windsor Street" , "Extended Phase 1 Habitat Survey" and "Geotechnical Survey Part 3" .

26. The Appellant replied to the Council by email of 16 December 2015 (pages 39 to 40 of the bundle) . She raised a number of queries. At para. 4 she set out in detail precisely what she had received in each of the attachments to the Council's email. She went on to state that she was unable to find any viability statement, a document bearing the label "06" was referred to as a feasibility report, but subsequent pages bore the reference "05", and she sought previous versions of that report. Further, reference had been made to a brief , which led her to believe that there was a brief for plans for general rent apartments on the site. She therefore asked for these, and expressed her disappointment at the delay in her request being answered, and her hope that she would receive a quicker response to these points.

27. The Appellant was dissatisfied with the Council's response, so she complained, in effect, seeking an internal review , by email of 15 December 2015 (page 41 of the bundle) .

28. The Council responded by letter of 24 May 2016 (pages 42 to 45 of the bundle). Whilst that is the date of the review, it appears that it was not sent until 10 June 2016 (pages 69 to 70 of the bundle). The review was conducted by Antoinette Carter, who had been appointed Interim Information Compliance Manager, following the maternity leave of the previous incumbent.

29. Her first response was to state that the Council had been incorrect to deal with the request under the FOIA, she considered that the EIR regime was applicable, and had dealt with the review request on that basis.

30. Ms Carter then went through the Appellant's request, setting out each of the queries that she had raised, and responding to them. The Appellant's letter of 16 December 2015 had raised her queries by bullet points. The first two appear in para. 1, and the last three in para. 4. Ms Carter's response listed them as (a) to (f) , save that she treats para. 2 as (c) , and para. 3 as (d) , in her response, but unfortunately omits one of them, so they should in fact have gone (a) to (g)

31. The first queries relate to the absence of the land in question from any schedule of Council assets for development, and how, given that, it was identified as suitable for development. Ms Carter explained how the land had not been on a schedule, but should have been, and this was an oversight. The land had been identified from a "Site Finder".

32. In relation to (c) - para. 2 in the Appellant's letter - relating to any pre-application inquiry, copies of which were meant to have to been attached to the original response , but were not, Ms Carter replied that under the EIR the Council should have refused the request under reg. 12(5)(f), and that the public interest did not require disclosure.

33. In relation to (d) , the Appellant's question 3, in which she had asked if the brief that she had been provided with dated 24 April 2013 was the only information which had been prepared for planning, development or internal briefing in the preceding 20 months, Ms Carter confirmed that the document in question was the most recent design brief.

34. Dealing with para (e) - the Appellant's query about any viability assessment which she contended the Capital Project Manager had assured the residents at the meeting had been prepared , Antoinette Carter stated that this was the document "report 2264_Site_Response06.pdf" which had been provided to the Appellant.

35. She went on to deal with the Appellant's further contention from her email in which she, the Appellant, referred to that report, and pointed out that this was dated

July 2014. Although referred to as a “feasibility report”, it did not address whether the scheme was logical or likely. She also pointed out that although “06” appeared on the front page, subsequent pages labelled the report “05”. She therefore sought copies of versions “01” through to “04” of this report.

36. Antoinette Carter replied that all versions of this document were attached to that response.

37. Finally, she responded to what she had termed point (f), the final bullet point in the Appellant’s email. This related again to the report referred to above, document 2264. This contained a reference to another document “Accommodation Brief – Windsor Street Car park – 24 April 2013”. The Appellant pointed out that whilst the brief did not ask for a scheme for “general rent”, the report provides commentary upon the site being used for general rent, and provided plans as to how the proposed building could be converted into apartments. She asked therefore for a copy of the brief which set out the requirement for plans for general rent apartments, and any other copies of the brief that differed from the one dated 24 April 2013.

38. Antoinette Carter’s response was that there was no such brief in existence, as there were no plans to convert the building into apartments. She concluded by informing the Appellant of her right, if dissatisfied with the response, to escalate the matter to the Information Commissioner.

40. It is unfortunate that it is not totally clear from the bundle what further documents were actually enclosed with this response to the Appellant at this juncture. It is clear that versions “02” and “03” of the 2264_response document were then, or subsequently, on or about 10 June 2016, provided to the Appellant, who agrees she has them.

39. On 5 July 2016 the Appellant wrote further to Antoinette Carter (pages 54 to 59 of the bundle). She acknowledged receipt of the two further versions of the report document, but expressed her concern at the absence of other documents that she considered should be disclosed. She found the responses in relation to paras. (a), (b) and (f) unsatisfactory. She considered that there must be further documents relating to the identification of the site for development, and relating to the proposal for general rent housing.

40. She then went on to discuss the claim that had been made to exempt pre-planning advice on the basis of the application of the EIR. This discussion is quite lengthy, and need not be rehearsed here. The Appellant then asked for a further review of her outstanding requests, which she then set out again (this time enumerating them 1 to 4, whilst her original request was bulleted), together with the Council’s responses, and then her responses to those responses.

41. Generally, the Appellant continued to seek clarity, and repeated points that she had made before. In particular, under request 4, where the Council’s response had been

to disclose a document which it referred to as a “feasibility report”, she had replied that she could not find a viability assessment. She said that the Capital Project Manager had assured the meeting on 3 September that a viability report had been prepared. The Council had replied to this by stating that the viability report was the same document – report_2264_Site_Response06.pdf – which had been supplied to her.

42. The Appellant responded that this report was dated July 2014, and was referred to as a feasibility report, which did not address whether the scheme was logical or likely. She had now received versions “02” and “03”, but was still seeking versions “01” and “04”. She went on to ask if this report was the viability report referred to by the Capital Project Manager, where was the feasibility report? She said the two were not the same thing, and asked what reports had actually been prepared to make the case for the development. She went on to refer to a meeting in June 2016 at the Town Hall in which Maxine Holdsworth, the Service Director for Housing Needs and Strategy, had stated that a viability report for the capital costs of the project had been prepared and would be sent to the residents.

43. She ended with the Council’s statement that no brief for general rent proposals existed, which she challenged, and asked why, if that was so, the architects had included drawings for general rent apartments in the 2264_Site_Response document?

The subsequent history, and the involvement of the Information Commissioner.

44. The Appellant the same day, 5 July 2016, reported her concerns to the Information Commissioner (pages 60 to 64 of the bundle). In the body of the report from the Appellant set out the history of her request and the responses to it. She included references to further enquiries she had made during February 2016 directly to the Housing and Adult Social Services (“HASS”) team, and the delays in her request being replied to. She referred to the response she eventually received from Antoinette Carter on 10 June 2016, and how this was inadequate. It would seem that this complaint was not initially acknowledged by the ICO, as the Appellant chased an acknowledgement on 9 August 2016.

45. Antoinette Carter wrote to the Appellant on 8 July 2016 (page 68 of the bundle). In this email she set out the Council’s position, which was that the Council did not hold any further information, despite the Appellant suspecting that it did, and was deliberately withholding it (although the Appellant had not, as far as the Tribunal can see, made any such assertion). In relation to identification of the site as suitable for development, the Council had never recorded who did so, or in what circumstances, and so was not in a position to provide any more information.

46. She went on to discuss the pre-planning advice, the withholding of which she justified by reference to previous decisions of the Commissioner.

47. She went on to suggest that the Appellant referred the matter to the Commissioner, whilst expressing confidence that any such referral would lead to the

Commissioner providing her with much the same response. She did undertake to ask Maxine Holdsworth to comment upon provision of the report that she had promised.

48. The Appellant sent further documents to the ICO on 11 October 2016 (page 60 of the bundle) and, it seems after a telephone message on 3 November 2016, finally received acknowledgment of her complaint on 4 November 2016 (pages 65 to 66 of the bundle), when she was informed of the appointment of a case officer. In this letter the case officer set out the parameters of the investigation, and explained how a public authority was not obliged to create information to answer a question in a request.

49. On 13 November 2016 the Appellant sent the ICO a copy of the Council's response to her email of 5 July 2016. The ICO wrote to the Appellant on 17 November 2016 (page 74 of the bundle). The case officer stated that he assumed her complaint was only in relation to Council's response to her second request relating to pre-planning advice, where the request had been refused on the grounds of Reg.12(5)(f) of the EIR. He went on to cite, and provide links to, other Decision Notices relating to pre-planning advice.

50. The Appellant replied (page 75 of the bundle) on 18 November 2016 to the effect that her complaint was not limited to that sole request, but to all her requests. She went on to explain how the response that there were no other briefs had been contradicted by disclosure to others that had turned up, and had been disclosed to others. She apparently attached one, but what was attached was not a brief as such, it was an email dated 21 October 2015 from the Capital Project Manager to Maxine Holdsworth and Greg Warren (pages 76 to 79 of the bundle). This was not a "brief" as such, but was the Capital Project Manager responding to a request from Maxine Holdsworth on 20 October 2015 for him to prepare a short briefing for use at a meeting.

51. He replied, in his email, that the briefing he sent out previously was "as follows", and then (page 76 of the bundle), in the body of the email and not, it would seem, as any attachment, or as cut and pasted, or otherwise imported content into the text, he set out 15 lines of what looks like the information that constituted the "brief" that he is referring to. His email then resumes a narrative, as it sets out the invitation sent out to residents to the first consultation meeting on 22 June 2015, their attendance at that meeting, and the views that they expressed. He goes on to refer to a request from the planners that he (and the architects it seems) attend a members' briefing on 21 July 2015, which he and the architects duly attended and described the scheme. He also explains how a number of changes were made to the overlooking elevation in response to comments from residents. The email continues to describe the next stage in the process, a further feedback meeting of 3 September 2015. He continues on to describe the revisions that were made, at two or more stages, it would seem, to the drawings, and the planning process that was to be followed. He ended by explaining how he was arranging more detailed surveys in residents' gardens so that daylight/sunlight reports could be updated prior to a further consultation meeting.

52. Returning to the Appellant's email of 18 November 2016, she also made reference to a meeting of Members on 21 July 2015 at which the proposals were discussed, for which, she contended, there should be minutes. She ended by pointing out that the follow up of the report that Maxine Holdsworth had promised had not occurred, and she had heard nothing further.

53. The ICO replied to the Appellant on 21 November 2016 (page 80 of the bundle). It was pointed out that the attachment to her email, i.e the email from the Capital Project Manager, was dated 21 October 2015 and was outside the scope of her request, made on 30 September 2015. The case worker went on to set out the test that would be applied as to whether the information was held by the Council, which was that of the balance of probabilities. Reference was made to *Bromley v I C and the Environment Agency EA/2006/0072*. The Appellant was informed that the ICO would contact the Council to request a copy of all (emphasised) the recorded information it held falling within the scope of the request, together with details of the searches and enquiries made to identify and locate it. The Council would also be asked to provide any additional arguments it may wish to raise in relation to the Reg.12(5)(f) EIR issue.

54. The ICO accordingly contacted Antoinette Carter on 30 November 2016 (pages 81 to 82 of the bundle). After reciting the request the case worker set out a request to provide the ICO with a copy of all the recorded information falling within the scope of the request, including that which had already been disclosed to the Appellant, and including any information which had been withheld on the basis of Reg. 12(5)(f) of the EIR, which would be held in confidence. Further, the Council was requested to provide details of all the searches and enquiries undertaken by the Council to identify, locate and extract all the recorded information requested. Additionally, any further argument on the EIR exception was invited, and the Council was asked to explain the delays in dealing with both the initial request and the internal review.

55. Antoinette Carter sought and was granted a short extension of time for the Council's response, which was then provided on 6 January 2017 (pages 86 to 88 of the bundle). In that response Antoinette Carter set out the background of the proposed development, and local opposition to it. She enclosed copies of the information that had been provided from the HASS directorate, and how the Capital Project Manager had been the main point of contact. Consultation had also taken place with Sean McLaughlin, the Corporate Director of HASS, and Maxine Holdsworth, as well as with various senior managers of the Planning and Development Division.

56. She went on to say that the Council had conducted "thorough and appropriate" searches within those divisions, and that the Appellant was challenging why certain types of report had not been undertaken, rather than believing that the Council may have reports that it was unable or unwilling to locate.

57. She went on to give the example of the terms "feasibility report" and "viability report", which had been used in relation to the same report, and this had caused confusion. The fact that a document did not contain elements that the Appellant

expected it would did not mean that anything had been withheld. She confirmed that there were no further reports or documents held by the Council which had not been provided to the Appellant .

58. Antoinette Carter then went on to refer to the pre-planning advice, a copy of which she had included. She had not appreciated previously that this had not been sought by external design consultants, but had been sought by the Capital Project Manager, internally. On that basis the Council had incorrectly applied the exception under Reg. 12(5)(f) of the EIR, but should instead have applied Reg. 12(4)(e), which relates to internal communications. The Council did now rely upon that exception, which is a qualified exception, thus subject to the public interest test. This had been relied upon in response to requests from other requesters, and Antoinette Carter set out the Council's arguments that disclosure would not be in the public interest, in essence relying upon a "safe space" argument, and contending that the matter was still very much "live."

59. Antoinette Carter then explained how the fact that the Appellant had been engaging directly with the Capital Project Manager and other members of his team may have led to some delay and confusion in answering her FOIA request, as it would sometimes be the case that the information requested had already been provided directly to the Appellant. Additionally, there had been approximately 12 requesters seeking this information, and they had been exchanging information between each other. She accepted that there had been a lack of consistency, and some delay, which may have caused confusion and elevated the Appellant's lack of trust in some of the responses. She went on to describe how further training had been arranged within the Council to improve responses to such requests and avoid errors in future.

60. Amongst the documents she included was a letter dated 28 October 2014 (pages 89 to 95 of the bundle). This is from Nathaniel Baker, Principal Planning Officer to the Capital Project Manager, and makes reference to his "pre - application submission documentation submitted on 7th October 2014".

61. On 9 January 2017 the ICO wrote to the Appellant informing her that the Council had responded to the investigation, but not copying to her Antoinette Carter's letter or its enclosures. She was, however, informed of the Council's change of position in relation to the pre-planning advice , the only information which the Council agreed it held, but had withheld. It was explained how the Council was now relying upon the Reg. 12(4)(e) exception in relation to this. The ICO went on to summarise the searches that the Council had undertaken. The next step was to ask the Council to provide a detailed schedule of all the information it held falling within the scope of the request. Once this was received, the ICO would contact the Appellant further.

62. The same day the ICO sent an email to the Council seeking , in schedule form, details of what was held or not held, whether it had been disclosed , redacted or withheld, and details of any EIR exception relied upon. Antoinette Carter replied the following day (page 89 of the bundle) , 10 January 2017. She sent copies of emails sent

to the Appellant , which appear to be at pages 99 to 119 of the bundle. Antoinette Carter has made comments in between these various emails which she has set out in this document.

63. This set of email communications goes back to November 2015, after the Appellant first made her request. The Appellant was communicating directly with Yemi (short for Adeyemi) Tihamiyu, the Information Governance Officer for HASS. She in turn was communicating with Sean McLaughlin, and he with others in the HASS directorate.

64. This email chain shows that there was a dialogue taking place in November and December 2015 in relation to the Appellant's request, and the Council's response to it. On 16 December 2015 she emailed Yemi Tihamiyu seeking explanation and clarification of what she had been sent (pages 112 to 113 of the bundle, also at pages 39 to 40, as referred to above) . The Capital Project Manager it was, however, who replied directly to the Appellant (page 110 of the bundle) on 7 January 2016.

65. He explained how the site had appeared on the Council's "site finder". He enclosed the informal pre-application and response (it is unclear to the Tribunal exactly what this was) and said that all information relating to internal briefs had been previously forwarded.

66. In relation to point 4 in the Appellant's email, which related to the feasibility and viability of the scheme, and the "06" report that the Appellant had received, he said this:

"4. You list the 23 documents previously sent under the FOI requests which are predominantly constituent parts of the viability of the scheme and include a statement on its financial viability. I hope you will accept that we would not be proceeding thus far had the scheme not been logical or likely. You state you are missing sections of the feasibility report and this is now attached again in full. The version numbering is 06, the numbering internally has not been amended in all cases but is still version 6. The previous versions have now been superceded and developed into what is still version 6. There was a previous request that any scheme should be capable of being converted into general need housing should the need for LD accommodation diminish in the future. However unlikely this is, given the current level of need , should the necessity arise for a change of use in the future, any proposals will need planning permission and to [sc. "go"] through the same processes as are currently being undertaken."

67. On 7 February 2016 the Appellant wrote further to Sean McLaughlin (pages 106 to 110 of the bundle). This email was copied to many persons, including the Capital Project Manager and Yemi Tihamiyu.

68. The version of this document at this juncture in the bundle was most unhelpful, as it is clearly a composition of several persons. Comments have been added at different times by different persons. The Tribunal expected that the original has different colours for the different contributors to it, and this proved the case, for a colour version was subsequently produced to the hearing with the comments in black,

blue and red text . In essence the document provides the Appellant's comments upon the information that had been provided to her, the Capital Project Manager's comments upon her comments, and her comments upon those comments. Most importantly, the Capital Project Manager's last comments are in red, his previous ones, from his 7 January 2016 email, being in blue. In particular he states in this document (page 109 of the bundle in monochrome) in red in the original :

"Your advice on feasibility and viability is appreciated but there is no missing information, much has been supplied to date to fully justify the feasibility and viability.

The viability as you rightly say is a combination of the requirements of the client group which has already been well documented and developed over a period of time and the financial appraisal document is attached again."

He continues, in response to the Appellant's point 4b in her original email, relating to a financial viability statement , which she says the Capital Project Manager had stated at the meeting on 3 September 2015 had been prepared :

"Please see comment above"

In response to the Appellant's query, in relation to a previous response from the Capital Project Manager about a "previous request" being made that any scheme should be capable of being converted into general needs housing , as to who had made that previous request, he said:

"The request was made by the previous head of strategy and development."

In relation to the Appellant's point 4e, which in part related to concerns that the Council may be trying to get approval for a large building , only to then convert it to general or residential use, or sell on to a developer, he said:

"It is not the council's intention to convert this building to general needs for the foreseeable future."

In this email, or his reply to the Appellant's email, he purported also to attach versions 02,03,04 and 05 of the 2264_Report06 document. The Appellant maintains that she has never received version 01 and 04.

69. This email chain continued into April 2016, with Leila Ridley the Information Compliance Manger communicating with the Appellant and Yemi Tihamiyu about the delay in responding to the Appellant's complaint. On 24 April 2016 the Appellant wrote to Leila Ridley (pages 101 to 102 of the bundle) referring to her complaint, and observing that she had heard nothing since the end of January. She went on to say that she had received some direct correspondence from the Capital Project Manager, but many of her concerns remained unanswered. She referred in particular to having no information as to whether the Council had prepared any planning briefs for the site, or any internal briefs for the site, and , if so, asking for copies. She referred to the brief

dated 23 April 2013 given to the architects, from which she would expect that there would have been a number of briefs , and an amount of correspondence updating colleagues and Council Members.

70. Leila Ridley replied on 29 April 2016 (page 101 of the bundle) , apologising for the delay, and explaining that there had been a misunderstanding as to who was responding to the Appellant . She had asked for a speedy response, and hoped to be able to provide one soon. In due course, in May 2016, Antoinette Carter then became involved.

71. The Capital Project Manager sent an email to Maxine Holdsworth on 11 May 2016 (pages 104 to 105 of the bundle) , copied to Yemi Tiamiyu , in which he referred to his “response” to the Appellant . Unfortunately he makes no reference to the date of this response, which he highlighted in red. Again, any rather frustratingly, no colour copy of this document is included in the bundle at this (or as far as the Tribunal can tell) or any other juncture. The Tribunal presumes that he is probably referring to the email at pages 107 to 110 referred to above, or at least one iteration of it, with many of the comments made being his.

72. In this email of 11 May 2016 the Capital Project Manager said that he would need to add “the financial appraisal” , and two other attachments which were too large to attach. He asked Yemi Tiamiyu not to send anything to the Appellant until Maxine Holdsworth had seen the material and agreed it.

73. The response that ultimately came was that dated 24 May 2016, but not sent until 10 June 2016, in other words, the internal review letter at pages 42 to 45 of the bundle discussed above.

74. The same day as Antoinette Carter was providing this information to the ICO, 10 January 2017, the Appellant sent an email (page 120 of the bundle) to the ICO informing the case worker that HTA consultants had been appointed to help with the project. She had not seen any documents passing between HASS and HTA, which she thought would have been within the scope of her request, and would not have fallen within Reg.12(4)(e) of the EIR. This was acknowledged by the ICO, who then raised it with the Council on 11 January 2017 (pages 121 and 122 of the bundle).

75. On 16 January 2017 Antoinette Carter replied to the ICO (page 123 of the bundle) and informed the ICO that the Capital Project Manager had not returned to the office after the Christmas break due to “personal reasons”. She was in contact with Maxine Holdsworth, who had confirmed the involvement of HTA Consultants, but this was more recently, and not at the time of the Appellant’s request. She then said this:

“I am aware that [the Capital Project Manager]’s manager has requested that they may have access to the shared drive where the data about this project is held, but this has not yet happened as yet (sic.) . I will then be able to check at what point HTA Consultants became involved.”

76. After a chasing email from the Appellant , the ICO , which had heard nothing further from Antoinette Carter , informed her of the position on 21 March 2017 (page 125 of the bundle). The Appellant replied to the ICO on 21 March 2017 (page 126 of the bundle) with the information that HTA had been involved since August 2015, citing a reference to them in a report, a heritage report, dated 6 August 2015, which it appears she attached. She went on then to list five other consultants who had been involved as providing services in relation to the project up to September 2015.

77. The ICO duly on 22 March 2017 wrote further to Antoinette Carter , passing on the Appellant's comments and referring to the involvement of HTA as consultants (page 168 of the bundle), and identifying five other consultancies that the Appellant contended had been involved in the project prior to her request.

78. Antoinette Carter replied on 24 March 2017 (page 169 of the bundle) , apologising for any misleading impression that may have been given, but HTA had not themselves produced any reports in relation to the project. She was looking into the other consultancies referred to, and mentioned that the Capital Project Manager had been replaced as the project lead.

79. In a further email of 28 March 2017 (page 170 of the bundle) to the ICO Antoinette Carter commented upon the reports which had been prepared by the various consultancies, which, where they existed, had been supplied to the Appellant. She attached a List of Reports document (pages 171 to 172 of the bundle). She said that whilst HTA had commissioned reports, they had not produced any. These had all be provided on 23 November 2015.

80. The ICO provided this information to the Appellant on 3 April 2017 (page 173 of the bundle). She replied on 3 April 2017 (page 174 of the bundle) pointing out that the third element of the investigation that the ICO had indicated would be carried out, i.e whether the Council had prepared any planning or development or internal briefs for the site , had not been addressed. She made the point that the third party reports could not have been generated without some communication from the Council, which would usually be by the provision of briefs. She also the same day (page 175 of the bundle) pointed out that Antoinette Carter's statement that HTA had not produced any reports was not correct, as the documents showed that HTA had authored the Health Impact Assessment and Statement of Community Involvement. She also commented upon the delay.

81. The ICO wrote to the Appellant on 3 April 2017 (pages 176 and 177 of the bundle). The Appellant was informed of the Council's change of the exception relied upon in relation to the pre-planning advice to Reg.12(4)(e) of the EIR. The letter explained how the Council had provided the List of Reports, but had not yet confirmed to the ICO a full schedule of all the information that it held which fell within the scope of the Appellant's request. The Council had also been asked to consider whether it held any communications in relation to the reports generated by third parties, and whether these would fall within the scope of the request. Reference was made to the delay, and

Antoinette Carter's apologies for it. The ICO confirmed that any delays which resulted in breach of the EIR would be recorded in any Decision Notice.

82. The ICO wrote to Antoinette Carter on 4 April 2017 (pages 178 to 179 of the bundle), pointing out that a full schedule of all the information which the Council agreed it held falling within the scope of the request was still outstanding. The letter went on to note that the pre-planning advice of 28 October 2014 had been withheld pursuant to Reg.12(4)(e) of the EIR, but it was unclear whether the Council had disclosed a copy of the pre-planning documentation submitted by the Capital Project Manager dated 7 October 2014, which would appear to fall within the scope of the request. Finally, the Council was asked to address the point made by the Appellant as to whether there was any further correspondence in relation to the reports that had been commissioned by the Council, repeating the Appellant's question as to how these could be generated without some communication, such as the provision of briefs and letters of response.

83. Antoinette Carter replied on 11 May 2017 (pages 180 to 181 of the bundle). In the schedule she provided, under all of the headings of the request, save for item 2, the Council's response was that the information was held, and all of it had been disclosed. Under item 2, the pre-planning advice, the Council confirmed the information was held, but the internal communications exception under Reg.12(4)(e) was invoked.

84. In relation to this, Antoinette Carter went on specifically to confirm that not only was the advice of Nathaniel Baker withheld, but the Capital Project Manager's pre-planning documentation of 7 October 2014 was also being withheld, on the internal communication grounds, as both the Capital Project Manager and Nathaniel Baker were Council employees.

85. The only internal design briefs were the "Feasibility Reports" which had been supplied to the Appellant, originally version 06, but then versions 1- 5 had been provided at various later dates.

86. Finally, in relation to any other correspondence relating to the commissioning of third party reports, Antoinette Carter said this:

"There probably is correspondence in relation to the reports. However, this was not within scope of Ms Weston's request and therefore we never asked the Service Area to provide these to us."

87. The ICO replied on 18 May 2017 (page 182 of the bundle) pointing out that the withheld pre-planning documentation had not been disclosed to the ICO, and asked for a copy of it. Antoinette Carter replied on 26 May 2017 (page 183 of the bundle) enclosing a copy of that document, and its attachments, the latter having already been disclosed to the Appellant. The documents in question are at pages 184 to 210 of the bundle.

88. On 5 June 2017 the ICO wrote again to the Appellant (page 211 of the bundle) , updating her with the Council’s response, and its contentions that the pre-planning documentation was exempt, that it did not hold any other information , and that whilst there may be more correspondence relating to the commissioning of reports, the Council considered that this would be outside the scope of the request. The Appellant was asked whether she was prepared to restrict the scope of her complaint to the Council’s response to item 2 in her request.

89. The Appellant replied on 13 June 2017 (page 212 of the bundle) saying firstly that the Reg.12(4)(e) exception was subject to the public interest test, and the Council had to apply it to show that maintaining the exception was in the public interest. In relation to the other aspects of her request, she questioned why the Council would not have retained all records relating to the project in accordance with the Retention Guidelines for Local Authorities.

90. The ICO replied on 13 June 2017 (page 214 of the bundle) to the effect that the public interest test would be applied in any Decision Notice. It was noted that the Appellant believed that the Council still held further information in relation to other questions in her request. The ICO was then to revert back to the Council. The Appellant on 13 June 2017 wrote to expand upon what she meant by the term “brief”.

91. On 27 July 2017 the Appellant wrote to the ICO to provide further information. She had had sight of an email from Councillor Ward (sent to or obtained by a neighbour), from which she extracted the following:

“The scheme, now in its final design stage, has undergone a number of changes since the last viability report was produced in September 2015. The existing viability report is therefore no longer relevant as it is not reflective of the design or costs incurred on the project since that time. Now that design is being finalised we will begin the process of conducting a further financial viability to reflect these changes. We anticipate this process will be completed during the summer.”

The Appellant therefore asked why the financial viability report produced in September 2015 had not been provided in response to her request of 30 September 2015.

92. The ICO replied on 27 July 2017 suggesting that the disclosed document “Document 2264_Response06.pdf” may be a form of viability assessment, but the Appellant replied the same day saying that the report in question was an architect’s report regarding the viability of the use of the site, and what Cllr Ward was referring to was a financial viability report , which had not been disclosed to her.

93. The ICO duly raised this matter with Antoinette Carter on 28 July 2017 (page 222 of the bundle) , inviting her to either disclose any such financial viability report, or to cite any EIR exception relied upon to withhold it in whole or in part.

94. Antoinette Carter replied the same day (page 223 of the bundle) making reference to previous correspondence in which she had specifically addressed the use of the terms “feasibility report” and “viability report”, and had confirmed, as she did again, that there were no other reports of this nature. She also confirmed that there were no further internal briefing documents, neither in report form or emails. She went on to say that she was aware that briefing discussions were held face to face, and were not minuted, nor were any preparatory documents produced ahead of these meetings. The only output from these meetings was the site reports that had been disclosed, and many of the day to day discussions were conducted by phone.

95. The ICO duly reported this response to the Appellant on 28 July 2017 (pages 225 to 226 of the bundle). On 21 August 2017 the Appellant replied (page 22 of the bundle) to the effect that she did not know who was right, Antoinette Carter, or Cllr Ward, Ms Holdsworth and the Capital Project Manager, who had all made references to such a report. She remarked also that it would seem very unusual that there were no briefings, minutes, or other documents in respect of such a project.

96. On 25 August 2017 the ICO wrote further to the Appellant explaining the test that the Commissioner would apply, i.e the balance of probabilities test, as to whether any further information existed. It was suggested that the Appellant might show Cllr Ward the document that had been disclosed to the Appellant for him to comment as to whether this was the same report he was referring to. The ICO concluded by pointing out that, despite the Appellant’s scepticism, unless she had evidence of the existence and location of such information, it would be difficult for the Commissioner to ignore the Council’s contentions.

97. By a sequence of four emails and attachments on 2 October 2017 (pages 229 to 236 of the bundle) the Appellant sent further material to the ICO in relation to the feasibility report issue. That included (at page 236 of the bundle) an email exchange between Ian Fearnley (a resident in the same street) and Cllr Ward on 6 and 13 July 2017. That followed a Council meeting on 29 June 2017. A fellow resident had submitted a question to the meeting, which Cllr Ward answered in his email of 6 July 2017. It was from this email that the Appellant had quoted in her communications with the ICO. The full text reveals the question that was asked:

“Q) On the 7th June 2016 in a meeting between the council and some residents from Packington Street, the council promised to publish the financial viability report for the Windsor Street development. Now, over a year later, this promise has not been fulfilled. Why has the report not been made available as promised, and when will it be published?”

Cllr Ward’s response is as set out in para. 91 above. The resident’s reply to him on 13 July 2017 makes reference to the minutes of the meeting on 7 June 2016, and Maxine Holdsworth’s statement in that meeting, in which she said that a single document on the financial viability of the capital costs of the building and the social care costs of the services will be produced by the council and shared with residents. The resident

expressed his disbelief that the Council did not have a “current financial viability report”.

98. The other significant document submitted by the Appellant in this exchange was a letter to another neighbour in reply to his FOIA request, dated 3 December 2015 from Yemi Tiamiyu. His request, which is set out in the letter, included a request for any information “relating to an assessment of the ‘viability’ of such development (viability meaning both financial and practical deliverability)”.

99. The Council’s response included an attached “initial feasibility study with plans”. It is, however, unclear what this was, but it seems highly likely to have been the same “06” report document that was provided to the Appellant. Yemi Tiamiyu went on to say this:

“As regards financial viability we have appraised the scheme and over the long term it is deemed to represent value for money in other words over the long term the cost of the initial investment & day to day running costs are covered by the rental income.”

100. She went on to say how the scheme formed part of the current new build programme and had therefore been budgeted for. It was hoped to submit a planning application in December 2015, but that programme was now out of date due to the extended nature of resident consultation.

101. The ICO replied to the Appellant on 3 October 2017 (page 237 of the bundle) saying that the only way to resolve this confusion was to ask the Council to ask Cllr Ward for his comments. The ICO did so by letter of 9 October 2017 to Antoinette Carter (page 238 of the bundle). Copies of the minutes of the June 2016 meeting and the other documents submitted by the Appellant were provided with this letter.

102. Antoinette Carter replied on 9 October 2017 (page 244 of the bundle). She cited the extract from Cllr Ward’s email, and then said this:

“This is a clear and unequivocal statement from Councillor Ward that the last viability report was the report produced in September 2015 and this is the one that has been provided to Ms Weston.”

103. On 10 October 2017 (although in what sequence is not quite clear) the ICO wrote to Antoinette Carter and to the Appellant (pages 246 to 249 of the bundle). With the former he asked whether the Council was now prepared to disclose the preplanning correspondence which had been withheld and Reg. 12(4)(e), on the basis that the sensitivity attached to it had now diminished over the last three years. To the Appellant, the ICO informed her of the Council’s position, and that it would not be contacting Cllr Ward. The ICO suggested that the Appellant approached Cllr Ward in relation to the feasibility report. The Appellant replied that day (page 248 of the bundle) explaining that attempt had already been made to contact Cllr Ward but he had not responded. She therefore wished the ICO resolve the matter with the Council or with Cllr Ward directly.

104. A further letter from the ICO the same day repeated the test that the Commissioner would apply, and warned that in the absence of any further evidence she was likely to uphold the Council's position.

105. On 13 October 2017 Antoinette Carter wrote further to the ICO (page 250 of the bundle) to say that the Council was under the impression that the Commissioner had already accepted that the Council had correctly applied the exception under Reg.12(4)(e) to the preplanning internal correspondence between the Capital Project Manager and Nathaniel Baker. She went on to say the sensitivity of the project had not diminished over the last three years, and would argue that had in fact increased. The Council was accordingly not prepared to disclose the further information that it did have, the exception had been correctly applied at the time, and remained relevant.

106. The ICO replied the same day (page 251 of the bundle) stating that it had not been accepted that the Council had correctly applied that exception.

107. On 13 October 2017 the Appellant wrote further to the ICO, questioning why Council's position would be accepted on the balance of probabilities. Reference was again made to previous documents and statements which supported the likely existence of some form of viability report in September 2015. Noting the refusal of the Council to approach Cllr Ward directly, she asked why the ICO would not do so.

108. On 17 October 2017 the ICO caseworker wrote again to the Appellant. He had spoken with Antoinette Carter, and relayed to the Appellant what she had told him. This was, in essence, little more than a repetition of the points that had already been made. Antoinette Carter had clarified that the 2015 financial viability report referred to was the report that had been disclosed to the Appellant. In relation to Cllr Ward, as he was not a public authority and would be under no obligation to respond to any questions or queries the ICO may raise, no approach would be made to him. In any event the Council had provided an explanation regarding the 2015 report, and the one promised in 2016 which was never produced. As it was a "matter of speculation" as to whether the financial viability report produced in September 2015 was different to the feasibility report disclosed to the Appellant in November 2015, the ICO's position remained the same applying the balance of probabilities test. If, however, the Appellant were to obtain a statement from Cllr Ward confirming that he has seen a financial viability report produced in September 2015 which was not the same, the ICO would be happy to review the position.

109. The Appellant replied that day (page 255 of the bundle) saying that she would contact Cllr Ward. She attached to this email further documents (pages 255 to 271 of the bundle). These are largely emails and other documents that had already been provided to the ICO, pursuant to the Appellant's original request, and cover the period up until February 2016. This includes communications directly with the the Capital Project Manager and Sean McLaughlin, in late 2015 and early 2016. Amongst these documents, but it is not clear how, appears an email dated 7 October 2014, from

Geraldine Medrano, housing development project manager of HASS, to Nathaniel Baker, and Sarah Ricketts, which constitutes the request for pre-planning advice (page 265 of the bundle), which was forwarded for information to the Capital Project Manager on 27 October 2014. The report of RPA Architects (referred to as a "feasibility report") was attached. This therefore appears to be the pre-application documentation submitted on 7 October 2014 referred to in Nathaniel Baker's response to the Capital Project Manager on 28 October 2014 previously referred to above.

110. This was, however, information in respect of which the Council was still seeking to rely upon the exception under Reg.12(4)(e).

111. On 13 November 2017 the Appellant wrote further to the ICO (page 272 of the bundle). She enclosed an email that she had been sent by Cllr Ward on 10 November 2017, to which he attached a financial appraisal of the scheme. This was not however the most current one, but, the Appellant contended, was one that was written on 13 June 2014, by Madhav Acharya, who was then a finance officer. The document in question comprises of one-page, entitled "Financial Evaluation - Windsor Street (New Homes Scheme)". In para. 2, the author states "The total cost of the scheme is £2.298m, of which £0.424m (18.5%) is on cost.

112. Attached to it is a four-page Appendix in which various pieces of data have been entered and figures calculated under headings "VFM", which the Tribunal takes to be a reference to "value for money" (pages 273 to 277 of the bundle). There is no date on these documents, but the Appellant asserted that they were written on 13 June 2014. She pointed out that, whilst not the report dated September 2015 which had been referred to, this document did show that the Council had done a financial viability assessment which fell within the scope of her request.

113. The ICO duly raised this matter with Antoinette Carter by letter of 14 November 2017, and asked for an explanation as to why this had not been disclosed to the Appellant in 2015, or during the course of the investigation (page 280 of the bundle). Antoinette Carter responded by asking for clarification that the document was dated 13 June 2014, as she could find no date on the document. The ICO referred to the details under which the document had been saved, which the Appellant had contended showed the date upon which was created.

114. In January 2018 the Appellant made further enquiries in relation to the budgetary implications of the scheme. She received information from Steve Key, the Assistant Director of Service Finance, and Souad Akbur, the New Homes Development Manager. This was contained in an email to the Appellant of 19 January 2018, which she forwarded to the ICO on 21 January 2018 (pages 285 to 289 of the bundle). In this documentation there is reference to "the financial viability reports provided to finance, in 2015 for feasibility stage". A box in the body of the document refers to "Scheme costs Financial appraisal - September 2015", which are then compared with comparable figures from a Financial Appraisal in December 2017.

115. The Appellant pointed out to the ICO in her email that this was further evidence that the Council did assess the financial viability of the scheme in September 2015, and that there were at least two such reports which would have fallen within the scope of her request, i.e. one in June 2014 , and one in September 2015. Whilst the email from Steve Key was outside the scope of the Appellant's request, she was relying upon it to demonstrate what information the Council held at the time of her request.

116. This further communication from the Appellant was, with her consent, provided to Antoinette Carter by letter of 22 January 2018 (page 293 of the bundle), repeating the Appellant's point that both of these reports would fall within the scope of the Appellant's request. Antoinette Carter replied later the same day to ask where it was stated that a second report was produced in September 2015, as she could see no reference to a particular month. The ICO replied the same day , and referred her to the part of the Appellant's email which included the table which referred to "Scheme costs Financial Appraisal - September 2015", and the ensuing text (see pages 290 to 293 for this exchange) .

117. The ICO heard nothing further from Antoinette Carter in February 2018. The Appellant chased the ICO , and in turn the ICO chased Antoinette Carter for a response in February and then March 2018. During this period Antoinette Carter was making enquiries within the Council. She contacted Souad Akbur in January 2018 to check what financial viability report may have been in existence at the time of the Appellant's request in September 2015.

118. Souad Akbur had in fact responded to an enquiry made by Emily Thornberry, the local MP, submitted in fact on behalf of another resident . She did so by letter of 8 December 2017. That made reference to a value for money assessment that had been made in November 2017 , by Mark Hendricks .

119. On 16 March 2018 Antoinette Carter replied to the ICO (page 294 of the bundle), and enclosed the results of her enquiries with Souad Akbur, in the form of her email exchanges, and the documents that Souad Akbur had referred to (pages 294 to 299 of the bundle). Souad Akbur had referred to the information which she had provided to the Appellant , and others, but this was from 2017.

120. In her email to the ICO Antoinette Carter summarised what Souad Akbur had said, saying this:

"She (Souad Akbur) is of the opinion that Ms Weston, along with other Packington Street residents , had already been provided with a copy of the appraisal concerned , though not necessarily as part of their formal FOI/EIR applications, but through their direct contact with [] , the previous Project Lead."

And, after referring to the updated planning viability report that had been provided by Souad Akbur:

“.....Therefore, Ms Weston has definitely been provided with subsequently with the most up to date information, even if she did not at the time receive the September 2015 report.”

121. She went on to make further reference to Souad Akbur’s email exchange. She added, however, something that was not actually stated in any email, but may have been verbally mentioned to her. She said this:

“Ms Akbur also states that she feels that it is possible that the original report may not have been provided in response to Ms Weston’s September request as it was not widely distributed at that time, or as she puts it “Could it be that at the time of the request the two just crossed paths?” We are unable to give a definitive answer in this respect.”

122. In conclusion she informed the ICO , for the ICO’s information only, that the Planning Committee had approved the Windsor Street development at their meeting on 1 March 2018. The email exchange and copies of the documents referred to in it are at pages 295 to 302 of the bundle.

123. In her letter to Emily Thornberry MP (page 298 of the bundle) Souad Akbur said this:

“As mentioned in Sarah’s letter the financial viability for this site has not been submitted to planning as it was not required on this scheme as it is already 100% social rent.”

124. The Sarah referred to is Sarah Walker, Head of Development and Building Control for the Council. Her letter has not, unfortunately, been included in the papers for the appeal, which is regrettable as it appears she had some knowledge about this process.

125. Having obtained Antoinette Carter’s consent to doing so, the ICO on 22 March 2018 (page 306 of the bundle) sent the Appellant copies of the response and further documents that Antoinette Carter had sent to the ICO.

126. The Appellant responded by email of 11 April 2018 (pages 307 to 309 of the bundle). She commented extensively upon the Council’s position. To summarise, she emphasised that she had never been provided with any form of financial viability report from September 2015, and it was now apparent that at the time of her request there were two such documents, that which she had identified as being dated June 2014, and the one from September 2015. She found the Council’s explanations wholly unacceptable . She had not sought an update, she wanted the report from September 2015. She referred to the other material she had been provided with which clearly referred to a financial appraisal in September 2015. Whether that had been widely distributed or not was irrelevant. She then went on to address, as she said the Council had failed to, the considerable delays in responding to her request, why the response when it came was inadequate , and why the Council had failed to produce all the information she had requested and had then, as she put it, lied about the existence of materials , which she had been able to prove had existed at the time of her request.

Conclusion of the Investigation and its outcome.

127. On 1 June 2018 the ICO (it would seem in response to the Appellant enquiring on 31 May 2018 asking if there had been any progress) wrote to the Appellant informing her of its findings, which were that the Council was found to have breached its obligations under regulations 5 and 11 of the EIR, in respect of delays in responding to the initial request, and in carrying out its internal review. It appeared, the ICO letter stated, that the Appellant had received all the recorded information falling within the scope of her request (pages 310 to 311 of the bundle).

128. The ICO accordingly did not issue a Decision Notice at this stage. By letter of 4 June 2018 the Council was informed of these findings, reminded of its obligations under the EIR, and that the Commissioner's concerns would be logged in the "concerns log" (page 312 of the bundle).

129. On 17 July 2018 the Appellant wrote to the ICO pointing out that she could see no record on the website of the Council's breaches. She asked when the decision notice would be issued, and how any future failings would be monitored and corrected (page 313 of the bundle).

130. By letter of 20 July 2018 (pages 314 to 315 of the bundle) the ICO explained the action that had been taken, and what monitoring would take place in the future. By letter of 30 August 2018 the Appellant asked to be sent a formal ruling on her complaint (page 316 of the bundle). Clarification was sought as to what was required, and on 3 September 2018 the ICO asked the Appellant if she wished that a Decision Notice be drafted. She replied on 4 September 2018 asking that the decision notice be issued (pages 319 and 320 of the bundle).

131. The Information Commissioner then on 25 September 2018 issued the Decision Notice. This was to the effect that the Council had breached Regs. 5(11) and 11(4) of the EIR, but no steps were required to be taken to ensure compliance in the case.

The oral evidence at the hearings.

132. The Appellant gave evidence, adopting and confirming on affirmation her final submission document at document 10 of the Additional Documents bundle as her evidence in chief. She was not cross-examined by Counsel for the Second Respondent. In essence, her evidence confirmed the factual matters set out above which emerged during the ICO investigation. She answered clarificatory questions from the Tribunal. Nothing new emerged in her evidence. She confirmed that document 11 in the Additional Documents bundle was a list of the information that she believed the Council held at the time of her request that had not been provided.

133. Antoinette Carter was called as a witness for the Second Respondent. Her witness statement, dated 5 June 2019, document 8 in the Additional Documents bundle, was confirmed by her on affirmation. Supplementary questions in her evidence in chief

were permitted. She was taken to the Appellant's response to the Second Respondent's response to the appeal, document 7 in the Additional Documents bundle. She disagreed with the Appellant's contention at para. 4.15 that there had been three financial viability reports, there had only been two. She did agree that date of the Financial Evaluation document referred to at pages 272 and 273 of the bundle was, as the Appellant had contended, 13 June 2014.

134. She was taken through the items that the Appellant had identified as still outstanding, in supplementary questions, in cross-examination by the Appellant, and questions from the Tribunal.

135. In summary, the main points in her evidence were as follows.

136. All the documents that could be found on the shared drive had been shared with the Appellant. The June 2014 financial evaluation came to light during the ICO investigation, but she did not know why it had not been found previously. The Council had not covered itself in glory, and had botched the handling of the request. She had conducted all the searches, and was satisfied that they could find no more. She defined 'financial viability' reports as being required for planning purposes; they detail the likely profit for the developer, address s.106 considerations and the proportion of the development which will be affordable housing. In this case, the Council was the developer and all housing units would be 'affordable', so there was no need for a viability report.

137. "Feasibility" and "financial" terms for reports are generic. There was no one single document of this nature. She was not sure whether the architect attended the briefing meeting. Any reference to the "the briefing" that was sent out would be to Design Report 06. She had required the searching of the emails and the drives, but she could not find anything on them. She, however, was not herself in Housing, so she could not access that department's drive, and had to ask others for it to be done. Maxine Holdsworth's email account had been searched. She (Antoinette Carter) had access to the shared drive which contained the details of the project, and also the H drive. Sometimes drafts were on the H drive, some documents were put back onto the shared drive. The Council would have produced anything found. She had carried out the searches at least three times. She believed that version 1 of the Design Report had never been received by the Council, and had brought version 4 with her.

138. She went through the various items in the Appellant's list, effectively saying, that she had been unable to find any other documents, despite her searches. Much of the discussion of the project would have been by telephone, she surmised, and not minuted or noted. The Capital Project Manager's record keeping was dreadful, but she felt that she had collated all the available information from all the relevant and corporate documents. Other documents which were undated should have been dated, and the Council did not have an electronic document management system, which was "shoddy". The finance documents were there, she did not see what more she could do.

139. She had not seen Steve Key's email until she had seen the bundle for the Tribunal case. She was asked whether she had asked Steve Key what he was referring to in this document, but she could not remember if she had asked him. She was not sure that the bundle contained all her correspondence, and had not herself picked up on the difference in the total scheme cost figures from the June 2014 Financial Evaluation.

140. The Appellant put to Antoinette Carter a document, submitted with the Appellant's response document of 22 May 2019, at Item 7 of the Additional Open Documents bundle, which is undated, and probably post-dates the request (later confirmed by the Appellant to have been produced in early 2016), entitled Learning Disabilities Accommodation: Windsor Street. In particular, the Appellant put to Antoinette Carter para. 4.2 of that document, in which it is stated that a proposal was put forward to highlight the value for money benefits for Adult Social Care of the scheme. Those savings were identified as £115k per annum in this document. The Appellant asked where these figures came from, when they were not the figures in Steve Key's email, or the June 2014 document. Antoinette Carter could not say.

141. Ms Carter explained that planners and others with a 'need to know' could access documents and information on this project on the relevant shared drive. This could contain ephemeral information, which may only be kept on that drive for 12 months, and ordinarily emails are kept for a year then deleted. Some information may now have gone, and might have gone by September 2015. Each member of Council staff has their own H drive. S drives are organised by departments.

142. The Capital Project Manager was still in post at the time of the request. There was nothing now on his H drive as it was emptied (in 2017, though it was unclear whether by him or his Manager) when he was off work.. The Capital Project Manager assumed that all the checking of information in relation to this hearing would be cleared with Souad Akbur. The Capital Project Manager was at work when the review was carried out in May 2016, and had access to his records. He was the main point of contact, and would have been so for the planners for the briefing on 21 July 2015.

143. The Appellant asked about the Council's procurement rules, and the procedures and documents she had referred to at points 5.4.13 to 5.4.16 of her response document of 22 May 2019. She asked about the absence of any such documents in relation to the engagement of consultants for this project. Antoinette Carter had not looked for any procurement documents as she did not see their relevance.

144. Antoinette Carter was asked by the Appellant about page 181 of the bundle, and her statement to the ICO that there probably was correspondence in relation to the reports. This was, she said in that document, outside the scope of the request. The Appellant put to her that it would not be, but it had been searched for, Antoinette Carter replied, and she would not know where to look for more.

145. There was then questioning about the pre-planning advice, and the changing exemptions that had been applied to it. It had, however, been supplied to others who had sought it. Antoinette Carter also indicated that her stance was that public consultation on such a project was appropriate at the planning stage. The Appellant contended that the planning stage was often too late, and public involvement at a much earlier stage was recognised by the Localism Act 2011.

Adjournment, and matters arising during it.

146. At this point the hearing had to be adjourned and resumed part heard. In the meantime, the Council gave consideration as to whether it would or would not call Capital Project Manager.

147. The Second Respondent considered further whether call the Capital Project Manager. By letter of 6 November 2019 it purported to leave the decision to the Tribunal. The Tribunal responded to the effect that it was not the Tribunal's decision, it was a matter for the Second Respondent. It was then confirmed to the Tribunal by email of 3 December 2019 that the Second Respondent would not be calling the Capital Project Manager, or adducing any evidence from him in any form. It reiterated that it remained satisfied that all possible searches had been made and no further documentation would be uncovered.

148. During the adjournment, the Appellant also wrote to the Tribunal, on 13 December 2019, firstly noting the position of the Second Respondent in relation to the Capital Project Manager, and secondly, providing more information. She confirmed that the Learning disability accommodation document referred to above had been created in January 2016, and then modified in March 2016; it contains some financial data and refers to earlier report (and those reports may have been in scope).

149. In this email she goes on to make reference to a pre-tender report template of 8 May 2015 (which was not provided to her by the Council, but a revised version is to be found on its website), and an email she received from Greg Warren dated 18 March 2016, which she enclosed in her email. That incorporates exchanges with the Capital Project Manager, and, whilst this material post-dates her request, she relies upon it to demonstrate that the Capital Project Manager did communicate by email and attached other documents, so as to make it likely that, as at the time of her request, there was more information in existence than has been disclosed.

150. She goes on to make reference to the briefing of specific consultants, BRE, directly by the Capital Project Manager, referred to in Greg Warren's email, and the likelihood that he would have issued briefs in written format. She suggests that even if the Second Respondent had not retained these documents, the Second Respondent's searches should have included the consultants to see if they had retained copies. She went on to refer to another document, prepared and available online, for the consultation meeting in June 2015. She argues from this that there must have been other reports, briefs and documents prepared before this consultation. In particular, she

picks up a reference in Greg Warren's email to a transport consultant for the project, suggestive again of more documentation being in existence prior to the meeting in June 2015, and her request in September 2015. She posed the question whether the Second Respondent had cast its net widely enough, to paraphrase her, in only confining its searches to the two departments of Housing and Adult Social Care.

The resumed hearing.

151. The hearing accordingly resumed with continuation of cross examination of Antoinette Carter .

152. Returning to the question of "briefs", she reiterated that the Appellant had been provided with the most recent, but there may well have been earlier versions, as they would continually be amended. In overall terms she challenged that there would be more than one actual document, but there could have been several iterations of it.

153. The Appellant questioned Antoinette Carter why there was no documentation from Social Services or Highways. She replied that she did not know what Highways could have contributed, but every single department had been approached in connection with the request, not merely Housing.

154. The Capital Project Manager's manager's emails, she believed, and his computer files had been searched. The Capital Project Manager's emails had been deleted in January 2017.

155. There was discussion of the exemption of the pre-planning advice, and why this had been initially withheld , until Antoinette Carter spoke with the Capital Project Manager and discovered that the application was internal.

156. The Council's retention policy was discussed. Antoinette Carter confirmed there was a 6 year period for most material relating to contracts, but 12 years for material relating to contracts under seal, in accordance with the Limitation Act 1980. That would run from when the project ended, although she went on to say that it would run from when the contract was awarded. It would be up to Capital Project Manager to decide what was to be retained and for how long.

157. For a discussion in Council, not every document would be made available, and there would not necessarily be records of preparatory material or discussions. The decision taken would be the core information, the Council cannot keep material in that level of detail. Such ephemeral material would not be retained for more than a year. It was up to individuals to decide what material to keep. There was no requirement to archive such material. The scheme would be considered by the Housing Audit Committee, and those reports would be held by the Chief Executive's office.

158. It was put, and Antoinette Carter accepted , that the retention policy was that the emails and personal drive of employees who leave are retained for one year after

they leave. In relation to the Capital Project Manager , he had deleted his personal drive, after putting material onto the shared drive. His extended leave had not been planned.

159. She went on to say she did not personally know if he had deleted his personal drive, but he moved material onto the shared drive. His email account was deactivated. Each member of staff has a personal H drive , in their name. The Capital Project Manager moved files onto the S drive,. This did not include emails, only other files. His emails would be shared into Sharepoint.

160. Antoinette Carter agreed that there were very few emails disclosed, but the Capital Project Manager had said he had forwarded everything that he could. Some may already have been deleted before the request was made, or he may have done this later , in early 2017.

161. The Appellant then asked about the period when Souad Akbur took over as Project Manager, and what she could have accessed. Everything had been transferred to the S drive by then. The Capital Project Manager's manager could have access to his H drive if needed, and she named who it would have been at that time .

162The Capital Project Manager's leave was for some 5 to 6 months. He may have been able to work from home, with access to a PC.

163. The Appellant handed over to Antoinette Carter the emails she had attached to her email of 13 December 2019 , during the adjournment (neither the witness nor the instructing solicitor recollected having seen this email, although it was addressed to them) , and was asked why these had not come to light before. Antoinette Carter said that they could be with other departments. She had asked every department three times over about these matters. They all have different ways of working. The terms of the Appellant's request were relayed to the departments.

164. Antoinette Carter was asked further by the Tribunal about the terms of the request as relayed to the departments. The Appellant's request in its full terms at page 36 of the bundle includes the express wording set out in para. 24 above, in which she specifies the scope of her request in relation to the type of correspondence and communications she was seeking.

165. Antoinette Carter confirmed that the request as first relayed to the departments was as shown in the response on page 38 of the bundle, that is without the preceding explanation of what the Appellant meant by it.

166. This was, however, discussed later with the ICO, and such a full search, for these types of documents, was conducted for the internal review.

167. Returning to the Appellant's cross - examination, Antoinette Carter accepted that she accepted the financial viability from June 2014 report had not been found initially, but had been found subsequently. She could only say what efforts had been made.

Responses to the Tribunal's questions.

168. The salient responses of Antoinette Carter to questions from the Tribunal were as follows. Antoinette Carter's methodology of searching was explored. She had done so by using the casefile name, across sharepoint, and across all Council services. All services would have received the same email enquiry from her. There were ten departments at the time, now eight. There had to be a reply in some form, even if it was a "nil" return. She would contact Heads of Department. She had started in the role in May 2016. She made her own searches, as well as relying upon the Departments. She had searched again, and been back to the Heads of Department shortly before making her witness statement. She had gone across Departments, but had focussed on HASS.

169. When asked about page 286 of the bundle – Steve Key's email, and the table in which the increase in cost of the project is noted, Antoinette Carter said that she had contacted Steve Key after the last hearing to find out where he had got that information, but he was unable to tell her.

170. When asked about page 294 of the bundle, Antoinette Carter said that she believed there had been quite a lot of "business as usual" direct contact between the Appellant and Capital Project Manager, and a lot of the information she had received had come from him.

171. The Judge took Antoinette Carter through the Appellant's list at document 11 in the Additional documents bundle, in order to ensure that her evidence, and the Second Respondent's case on each item was clear.

172. She provided the following responses:

Item 1:

Everything that the Council had had been provided. She referred to page 110 of the bundle, an email from Capital Project Manager to the Appellant of 7 January 2016, in which he states that all information relating to internal briefs had been previously forwarded to her.

Item 2:

This had been provided.

Item 3:

This was ephemeral information, and was not retained.

Item 4:

The only brief was the design brief, there was no other document.

Item 5:

Antoinette Carter could not recall seeing any records of telephone calls, or any file notes. They did not exist any more, even if they ever did.

Item 6:

As for Item 5.

Item 7:

She believed this was in 2016, and had been provided to the Appellant.

Item 8:

She had provided the '04' version at the last hearing, recognising that it had been sent out a lot later but the '01' version may just have been prepared by the consultants and never handed to the Council.

Item 9:

There were none.

Item 10:

Any request or discussion would have been in face to face meetings, and not recorded.

Item 11:

As for Item 10.

Item 12:

There was no such document, there would simply have been a re-evaluation of the unit.

Item 13:

The Appellant has been provided with this, being a corporate plan for the whole Council (also on its website); there wasn't a specific one for this project.

Item 14:

This post - dates the request.

Item 15:

There were only four items which meet this description, and they are not full briefs. She had gone back to the Departments to enquire further, but had been told there were no emails or anything else.

Item 16:

The procurement rules would not have been engaged at the time of the request. The Council had not gone to tender at that stage. There was no final scheme. No quotations had been sought, and the costs referred to were merely indicative costs. It had not been necessary to use contracts with consultants producing reports on the scheme as these were covered by Framework Agreements.

Item 17:

She was not sure what the Appellant meant , this seemed to be a reference to the Capital Project Manager's email at page 108

Item 18:

She had looked but could find none , if there were any they had gone by September 2015. She gave no explanation why notes or emails relating to events in June and July 2015 would have been deleted by September 2015, when they would ordinarily have been kept for a year.

Item 19:

There was only what the Capital Project Manager sent to Maxine Holdsworth, nothing more.

Item 20:

Anything there was would be after the date of the request.

Item 21:

There was nothing more.

173. Housing and Social Services were in one Department. She had one point of contact for the request. She had made enquiries of the Finance Department, but that Department would only have records of payments, not budgets, or proposals. The Chief Executive's Office was a Department, and it was asked for any Committee papers.

Re - examination.

174. In re-examination, Antoinette Carter confirmed that she had searched the shared drive. There was a Windsor Street file from the beginning. She had conducted three levels of search. She had sought advice from the IT department as to what might have been added or deleted when she did the review. She could only carry out searches on her device, and had to rely upon the Departments to carry out any other searches. She would ask them for evidence that searches had been made, and would not be fobbed off.

The Submissions.

175. Ms Parekh made her submissions for the Council. She took the Tribunal through the request, the response, the review, and the ICO's investigation, leading up to the Decision Notice. She endorsed the Commissioner's approach to the issue of how the Tribunal should determine whether the Council held, at the time of the request, any further information falling within the scope of the request.

176. There had been delay, but everything that there was had eventually been disclosed. The single question for the Tribunal was whether that was so. Three searches had been carried out, on three separate occasions. The Appellant did not work for the Council, but challenged its assertions. She either did not believe that certain information did not exist, or believed that it had been deliberately concealed by the Council. She does this from the later documents that have been disclosed (since the Council's internal review), from which she argues that further information must have existed.

177. Ms Parekh cited the legal test cited in the response of the Information Commissioner, where caselaw is cited in support of the contention that this issue is to be determined on the balance of probabilities (*Bromley v I C and the Environment Agency EA/2006/0072*). The focus has to be upon the scope and rigour of the searches, and not why there were not documents which it may be felt there should have been.

178. There were twenty one classes of document that the Appellant was still seeking. Antoinette Carter had been through each one, and had provided explanations for each one, as to whether they had existed at the time of the request.

179. Highlighting some of the particular items, Items 3 and 4, briefings for meeting, there were no such documents. If there had been, they would not be kept as a matter of housekeeping. Emails of this nature would be deleted within a year. That would be in accordance with Council policies, implemented by individuals familiar with them.

180. In relation to Items 5 and 6, there were no file notes of telephone calls.

181. In relation to Item 6, which relates specifically to a telephone call referred to on page 141 of the bundle, between Nathaniel Baker of the Council and a consultant at A B Heritage, there was no note of it, it was not practice to make notes of calls.

182. In relation to Items 7 to 11, feasibility and other proposals for alternative use of the unit, other than what had been disclosed, the Council simply did not have these, or did not have at the time of the request, though such things may have to come into existence later.

183. Items 12 and 13 related to finance and the proposals at an early stage. Page 196 of the bundle, part of the Windsor Street – Site Scheme Design Report, was for 12 bedrooms, supported living accommodation. Detailed costing would only come at a later stage.

184. Item 14 relates to a change of the number of bedrooms to 14, but this was later on.

185. In relation to Item 16, the rules of procurement would not be applicable, since the Council was not at that stage in the project, indeed, it still was not.

186. In relation to financial information, the Appellant contended that there were three instances of this. The first was on 13 June 2014, at pages 272 to 277 of the bundle, sent to her neighbour. The next email is at page 285, but that is January 2018, from Steve Key. The next set of figures is from November or December 2017. Both post – date the request. The June 2014 report is the only one in scope. The Council cannot say why there is nothing else, or why the June 2014 report was not found in response to the original request. This may well be due to poor practices, which the Council has acknowledged. As was suggested there may have been some ‘crossing of paths’. The fact that Steve Key mentions these costs in his email does not mean that there was a document with the information in it. It would be in the Council’s interests to disclose whatever it had. Antoinette Carter had asked Steve Key about this, but had not been able to tell her where these figures came from. This is referred to in the email of 16 March 2018, at page 294 of the bundle. It was believed that the figures came from Steve Key.

187. Whatever the position, on the *Bromley* test there was nothing indicate that the information did exist at the time of the request. The Commissioner had accepted that. There was no evidence that the Commissioner got this wrong. The Tribunal had heard more detailed evidence of the searches that were conducted, and how they had been conducted. Antoinette Carter had explained how each department had been contacted, up to Head of Department level.

188. The shared drive had been searched, which each individual could access, and each individual had been asked to check their H drives. Capital Project Manager’s drive was searched, but he had moved the documents to the shared drive.

189. In relation to Capital Project Manager, and the suggestion that he be required to attend the hearing, the Tribunal had the Council’s submissions in its letter of 6 November 2019, as to his willingness if required, and what he could recollect, and why.

190. Going back to Antoinette Carter's evidence, she sits in Information Governance, she is not a planner or a housing officer. It was she who "had to" answer, however, because she had to make the enquiries. She cannot say any more than she has been able to find out.

191. The Council acknowledged the delay, and poor administration, and had "held its hands up". That, however, had to be viewed against the background of what was going on at the time, with 12 other FOIA requests being made for information on the same project.

192. The Council's previous errors, however, do not help to determine whether the searches that have since been carried out were adequate, nor whether the Council did, in fact, on a balance of probabilities, hold the requested information at the material time.

193. The evidence showed there had been a thorough investigation. There was simply nothing more that the Council could do. The obligations under the EIR were never to create that which does not exist. The Decision Notice got it right, and the appeal should be dismissed.

The Appellant's submissions.

194. In opening the Appellant submitted that detailed costing would not be prepared only at the planning stage, they would be sooner than that, as the evidence from Cllr Ward suggests. Planning was approved in 2018, costing would be done before then.

195. Whilst some commissioning of consultants may have been done under a framework agreement, not all consultancies had these, and there should be procurement documentation for these.

196. Whether there were multiple FOIA requests was irrelevant, nor was what the Capital Project Manager could or could not remember. The issue is what was available, what did the Council hold, at the time of the request.

197. She did not agree that Antoinette Carter had provided the outstanding information. She had made understandable errors, and had not got a full understanding of the detail that would have been involved in this project.

198. Addressing specific aspects of the outstanding elements, she submitted as follows:

Item 1:

There had been inconsistent responses from the Council. Contentions were made at the last hearing, which had not been borne out. She referred to page 107 of the bundle, and

the Capital Project Manager's comments about all options having been discussed at length previously, but nothing having been provided .

Item 2:

Although this had been provided, it was initially refused. The Capital Project Manager had said it existed, but would not be provided .

Item 9:

The reports disclosed did refer to "briefs" and to amendments, so what were these ?

Item 15:

Her request had only been circulated in the bullet points that it contained, so the full request was not fully repeated to all the Departments at the time.

Item 16:

There would have been tenders from consultants.

Item 20:

The Islington Learning Disability Partnership had confirmed that it was aware of the proposal, and its members were all part of the Council.

199. The Appellant accepted that some of the information may have been ephemeral, but that does not explain why it was not disclosed previously, at the time of the request. Her request was clearly not properly considered, because all that was provided initially was reports and other non - ephemeral material.

200. The evidence that came from Cllr Ward, Antoinette Carter had said did not exist, and Steve Key could not explain where the figures came from.

201. Antoinette Carter , it was true, was not in Housing or Social Services. Her request had been dealt with by the Capital Project Manager, but she (the Appellant) was told that her point of contact was Sean McLaughlin.

202. She remained unconvinced that the Council had provided all the requested information. She had prepared a 14 page document in May 2019 (Item 7 of the Additional Documents bundle) which set out her grounds extensively. It had been suggested that the Appellant was unwilling to accept that the Council did not hold this information, but she had provided the reasons why she could do so. Such a comment by Antoinette Carter was not warranted, she later said.

203. Antoinette Carter's witness statement did not refute her case. She had (page 181 of the bundle) admitted that there probably was more correspondence , but said it was not within the scope of the request.

203. It may be that Antoinette Carter was unable to access all that was needed. She could not understand why the Council did not call the Capital Project Manager. Overall there had been an inconsistency in approach, and she invited the Tribunal to find that the Council holds, or did hold at the time of the request, the requested information.

Discussion and Findings.

204. This is a slightly unusual appeal, in that the central point of it relates to one paragraph in the Decision Notice, namely para.11, in which the Commissioner says this:

"11. As the complainant has now received all of the recorded information held by the Council, the scope of the Commissioner's investigation is limited to the timeliness of its responses to her initial and internal review requests."

205. One issue that has not been before the Tribunal has been the Reg.12(4)(e) exception. It is unclear what became of the Council's case upon that. It was clearly being relied upon by Antoinette Carter in January 2017, and Antoinette Carter expressly declined to abandon reliance upon it when invited to consider doing so in October 2017. The Appellant in any event was provided with the pre-planning documentation passing between HASS and Planning in October 2014. Planning permission, however, was granted in March 2018 , and the Council has since abandoned this exemption.

206. That leaves one, and one only, issue for this appeal, and that is whether, on a balance of probabilities the Council, at the date of request, held the information requested. The Council's position is that it held no more than it has disclosed, the Appellant's is that it did.

207. The Commissioner's response, and further submissions, are effectively neutral. She accepted that the Council had provided the information requested, and did not investigate any further. She leaves it to this Tribunal to do so, and acknowledges the possibility that it may find that the Council did hold some information at the time of the request. Further the submission is made on behalf of the Council that the issue for the Commissioner , and then the Tribunal , is not what information should have been recorded, but what actually was.

208. The Tribunal appreciates that a lot of the evidence before it has been rehearsed in this Decision. That is, however, an inevitable consequence of the task that the Tribunal has had to carry out, which has been , in effect, to determine whether the Council has proved, on a balance of probabilities, a negative, namely that it did not, at the time of the request, hold any more of the information requested than it has

disclosed. That inevitably involves a consideration of what indications there are , or may , be which suggest the existence of further information, and of what evidence there is that suggests that there was not.

209. In a helpful document which has been added as document 11 to the Additional Documents bundle, the Appellant has set out some 21 documents, or types of document , that she submits the Council held at the time of her request , which were not, and mostly still have not been , disclosed in accordance with her request.

They are (using largely the Appellant's terminology, but not repeating them verbatim):

1. Feasibility studies and internal service needs (email from the Capital Project Manager, p.107 of the bundle)
2. Copies of the planning application and documentation attached to the planner's response
3. Request from the planners that the Capital Project Manager and the architects should attend a members briefing on 21 July 2015
4. Materials notes and/or minutes relating to the members briefing on 21 July 2015
5. Notes, such as but not limited to, file notes of telephone calls relating to a pre-application enquiry between Simon Owen at HTA design and principal planning officer Nathaniel Baker
6. Notes , such as but not limited to file notes of telephone calls relating to a pre-application enquiry between Kerry Kerr - Patterson at AB Heritage and principal planning officer Nathaniel Baker
7. The 'indicative brief' and 'need for demand' of the project from Islington Adult Social Services
8. Architect reports to 2264 report 01 and 2264 report 04
9. Further to the design brief dated 23 April 2013, any briefs or amendments to the briefs to the architects
10. A brief instructing the architects to design for flexibility or conversion from accommodation for adults with learning disabilities to general needs rents (social housing)
11. A request from the head of strategy and development of the scheme to be capable of being converted into general needs housing

12. Any financial appraisal document resulting from a change of scheme from four bedrooms and no staff sleep - in to 14 bedrooms with staff sleep - in

13. The procurement plan which identified the need for a 14 bed very high need scheme 2014/15

14. A proposal highlighting the value for money benefits of the 14 bed very high need scheme

15. Any briefs or correspondence containing instructions or information to the report authors of the reports already disclosed

16. Notes reports business cases tenders quotations decision notices etc relating to the production of reports and services for the Windsor Street development

17. Information relating to internal briefs previously forwarded with responses to FOIA requests

18. Notes and/or briefing notes relating to consultation event held on 22 June 2015

19. Correspondence and notes relating to the members briefing on 21 July 2015

20. Information shared with Islington Learning Disability Partnership

21. Any further information on written visual aural electronic other material form as defined by the EIR

210. The central issue, is, of course, whether the Commissioner was entitled to, and we should, find that the assertion by the Council that it did not hold the requested information was, on the balance of probabilities, correct. We note that on the basis of the caselaw (*Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190* and *Oates v Information Commissioner and Architects Registration Board EA/2011/0138*) the Commissioner was acting consistently by deciding to rely upon, at face value, the response of the public authority, but this is so in the absence of any reason or motive on the part of the Council to withhold this information. As with the *Bromley* decision, of course, such FTT decisions are not binding upon us, but they are indicative of the approach to be taken.

211. That there is, or may be, such a motive is, in our view, an issue raised by the unchallenged evidence of the Appellant, going back to the very genesis of the request, that at the public meeting in September 2015 the Capital Project Manager stated that the proposal would go through come what may, and refused requests for more information about how viability of the scheme had been determined. That suggests a mindset that the decision had been taken, and would be maintained, whatever the views received through the consultation process. That approach may well have informed, and continued to inform, the willingness of the Council to provide further

information, or to make real efforts to look for it when requested. That said, we do not need to be satisfied that there was any deliberate withholding of information, or any reluctance to disclose it, we merely have to decide whether, on the balance of probabilities, there was more.

212. The Council declined to call the Capital Project Manager, which is its prerogative. That means, however, that other than the second hand evidence of Antoinette Carter, and assertions made in correspondence as to what he would have said, the Tribunal has no direct evidence of the non - existence of at least some of information requested by the Appellant. It certainly has no evidence to contradict her account of what was said in the meeting of 15 September 2015.

213. We appreciate that Antoinette Carter had, and has, a difficult job. She only became involved some 8 months after the Appellant's original request, when the "trail" may already have been going cold. Whilst not for one moment suggesting that she was doing anything other than attempting to give honest evidence to the Tribunal, some aspects of Antoinette Carter's evidence troubled us. For example, when she was asked about Steve Key's email to the Appellant of 19 January 2018 (pages 285 to 288 of the bundle) she said that she had not seen that until the bundle for the Tribunal case was prepared. That, however, is not correct, as the ICO sent her a copy of the document, after the Appellant, had provided it to the ICO, by letter of 22 January 2018 (page 291 of the bundle). That was the same letter that enclosed the Financial Evaluation, to which Antoinette Carter responded by email that same day, pointing out that there was no reference to a particular month, to which the ICO responded, again the same day, highlighting the section in the document in which September 2015 is mentioned. Antoinette Carter did not further respond until March 2018, during which time she had made her enquiries of Souad Akbur, but not, it seems, of Steve Key, whom, the Tribunal would have thought, was the obvious person to ask what he was referring to in this email. Antoinette Carter similarly claimed not to have seen the Appellant's email to the Tribunal of 13 December 2019, another important document. Further, we found parts of her evidence inconsistent and unclear, particularly as to which computer drives she personally could and did access, and which she was reliant upon others to search for her.

214. It seems to us that there may well have been some ephemerality in the information that the Appellant was seeking in September 2015, which may account for the inability of the Council subsequently to locate some of it. That the full terms of the request, including the Appellant's helpful and detailed description of what she meant by the term "correspondence/communications" (see page 36 of the bundle), were not relayed to the departments at the time of the request, and this was not done until the review carried out by Antoinette Carter some 8 months later, may account for this. It also seems to be the case that the importance of locating all the relevant information (and, where there is an outstanding request under the FOIA or EIR, retaining it), and not just the most up to date version of it, was perhaps lost upon personnel unfamiliar with the FOIA/EIR regime, such as Souad Akbur, who seemed to be of the view that as long as the Appellant had the latest version, this would suffice.

215. For those reasons, and perhaps unusually in such case, the Tribunal is not prepared to take at face value the assertions of the Council that it does not hold any more of the requested information. Whilst the Tribunal is prepared to accept that in respect of some of the items of requested information, it is not so prepared in respect of others, for the reasons set out in each instance. In general terms, we have in some instances been persuaded by the extraneous evidence, and the evidence of what information has been provided, either in the course of the ICO investigation, or to the Appellant from other sources, that there is indeed likely to be, or to have been at the time of the request, rather more recorded information in connection with this substantial and significant project than the Council has been able, thus far, to produce. The Appellant, however, will appreciate that it is the Council, and only the Council, upon whom the obligation to search rests, and to search internally. It is not its function, nor this Tribunal's to require it, to seek missing information which it could possibly obtain from external sources, such as the consultants, if, in fact, it does not hold that information itself.

216. We note that there was some dispute as to what the Appellant had or had not received at various stages, even as late as the hearing. It is not our function to adjudicate upon such matters, the only relevance of such is, clearly, that if the Council claims to have provided such information to the Appellant, its existence, at least at some point in time, is not being disputed. For completeness, and to address whether the information was held at the time of the request, we will determine those matters.

217. Our findings are:

Item 1.

Feasibility studies and internal service needs.

Decision: In so far as the same includes any financial feasibility, viability or other budget or costing information, on a balance of probabilities the Council holds, or did hold, more information of this nature, in particular a financial report, or cost estimate, or similar prepared in or around September 2015.

Reasons:

The Tribunal considers that the evidence is strongly suggestive of there having been some other documentation from which the figures referred to in Steve Key's email were derived. There is clearly an increase in the total costs of the scheme from the figures in the June 2104 report, and that increase is likely to have been documented in some form, rather than simply appearing in Steve Key's document. The Second Respondent's contentions that the Appellant has had this document are not correct, she says she has not (including in her email of 13 December 2019), and nothing else produced to the Tribunal contains these September 2015 figures, nor any data from which they could have been derived.

Item 2

Copies of the application and planner's response

The Tribunal understands this now to have been provided, the Council no longer seeking to rely upon an exemption for any internal pre - planning advice.

Item 3.

Request from the planners that Mr Gore and the architects should attend a members briefing on 21 July 2015

Decision: On a balance of probabilities the Council holds, or did hold, more information of this nature.

Reasons:

The Tribunal considers it unlikely that the meeting of 21 July 2015 would have taken place without a paper , or email , trail , of which this material would form part. Capital Project Manager's email of 21 October 2015 alludes to this process, but no other documents relating to it have been disclosed. Both the witness and Counsel had stated that emails are routinely deleted after a year, but the request was received within three months of the event - so any deletion by that point would be a deviation from stated routine practice.

Item 4.

Materials notes and/or minutes relating to the members briefing on 21 July 2015

Decision: On a balance of probabilities the Council holds, or did hold, more information of this nature.

Reasons:

The Tribunal considers it unlikely that the meeting of 21 July 2015 would have taken place without a paper , or email , trail , of which this material would form part. Further, the Tribunal considers that there would be likely to be some documentation created as a result of, and following it. Capital Project Manager says in his email that changes were made after this meeting, but no documents relating to these changes have been disclosed.

Item 5:

Notes, such as, but not limited to, file notes of telephone calls relating to a pre-application enquiry between Simon Owen at HTA design and principal planning officer Nathaniel Baker

Decision:

On a balance of probabilities the Council does not hold, and did not hold, more information of this nature.

Reasons:

Whilst there may be suspicion that such documents exist, or existed , and they may have done, there is nothing more to suggest , on a balance of probabilities, that they did. No file notes of any telephone conversations have been produced, supporting the Council's position that such notes were not made as a matter of practice.

Item 6:

Notes , such as but not limited to file notes of telephone calls relating to a pre-application enquiry between Kerry Kerr - Patterson at AB Heritage and principal planning officer Nathaniel Baker

On a balance of probabilities the Council does not hold, and did not hold, more information of this nature.

Reasons:

Whilst there may be suspicion that such documents exist, or existed, and they may have done, there is nothing more to suggest , on a balance of probabilities, that they did. No file notes of any telephone conversations have been produced, supporting the Council's position that such notes were not made as a matter of practice.

Item 7:

The 'indicative brief' and 'need for demand' of the project from Islington Adult Social Services

On a balance of probabilities the Council does not hold, and did not hold, more information of this nature.

Reasons:

Whilst there may be suspicion that such documents exist, and they may have done, there is nothing more to suggest , on a balance of probabilities, that they did.

Item 8.

Architect report_ 2264_report 04

Decision: On a balance of probabilities the Council holds, or did hold, more information of this nature, as it has claimed to have provided these to the Appellant.

Reasons:

Despite Antoinette Carter's assertions that the Appellant has had these versions (stating that the report 04 had been brought to the September hearing), she maintains that she has not received them, and at a different point in the hearing it was suggested that report 01 may have only been internal to the architects and never have been received by the Council.

Item 9.

Further to the design brief dated 23 April 2013, any briefs or amendments to the briefs to the architects

Decision: On a balance of probabilities the Council holds, or did hold, more information of this nature.

Reasons:

The Tribunal considers it likely that there would have been subsequent briefs, or amendments following the design brief of April 2013. It is considered unlikely that these would have been purely oral, and some email or other documentation in connection with such amendments would have been generated.

Item 10.

A brief instructing the architects to design flexibility for conversion from accommodation for adults with learning disabilities to general needs rents (social housing).

Decision: On a balance of probabilities the Council holds, or did hold, more information of this nature.

Reasons:

The Tribunal considers it likely that there would have been such a brief for such a potential change of specification for the proposed building. Whilst it may not have been the Council's intention to change its use for the "foreseeable future", that is irrelevant to the request. That such a "brief" existed is suggested by the reference to "the brief to RPA" referred to in the email from Geraldine Medrano of 7 October 2014 at page 117 to 118 of the bundle.

Item 11.

A request from the head of strategy and development of the scheme to be capable of being converted into general needs housing

Decision: On a balance of probabilities the Council holds, or did hold, more information of this nature.

Reasons:

The Capital Project Manager's statement to the Appellant at page 109 of the bundle to this effect establishes this, and we consider it unlikely that such a request from a senior official affecting a proposed Council development would not have been recorded in one form or another.

Item 12.

Any financial appraisal document resulting from a change of scheme from 12 bedrooms and no staff sleep - in to 14 bedrooms with staff sleep - in

On a balance of probabilities the Council does not hold, and did not hold, more information of this nature.

Reasons:

Whilst there may be suspicion that such documents exist, or existed, and they may have done, there is nothing more to suggest, on a balance of probabilities, that they did, or, in particular, did at the time of the request.

Item 13:

The procurement plan which identified the need for a 14 bed very high need scheme 2014/15

Decision: On a balance of probabilities the Council holds, or did hold, more information of this nature.

Reasons:

The Appellant refers to the Islington Disability Learning Partnership document, which does suggest that such a document existed. Whilst this IDLP document is dated January 2016 at the earliest, it is an Islington document, and refers (in para. 3.2) to a Learning Disabilities ("LD") Accommodation Procurement Plan (2013 - 2019). It seems unlikely that such a Plan would be produced later than 30 September 2015, or that it would be ephemeral. It seems likely to emanate from, or sit in, Adult Social Care.

[Antoinette Carter said that the Appellant had been provided with this]

Item 14:

A proposal highlighting the value for money benefits of the 14 bed very high need scheme

On a balance of probabilities the Council does not hold, and did not hold, more information of this nature.

Reasons:

Whilst there may be suspicion that such documents exist, or existed , and they may have done, there is nothing more to suggest , on a balance of probabilities, that they did. The Appellant refers to the Islington Disability Learning Partnership document, which does suggest that such a document may have existed. This document is dated January 2016 at the earliest, and the Appellant refers to para. 4.2 . What is unclear is when any such proposal document was created. It may have been before 30 September 2015, but it may have been after . There is nothing more to suggest that such a proposal document was in existence at the date of the Appellant's request.

Item 15:

Any briefs or correspondence containing instructions or information to the report authors of the reports already disclosed

On a balance of probabilities the Council does not hold, and did not hold, more information of this nature.

Reasons:

Whilst there may be suspicion that such documents exist, or existed , and they may have done, there is nothing more to suggest , on a balance of probabilities, that they did.

Item 16:

Notes reports business cases tenders quotations decision notices etc relating to the production of reports and services for the Windsor Street development which fulfil the Council's rules on procurement of products and services , or which were covered by any framework agreement.

On a balance of probabilities the Council does not hold, and did not hold, more information of this nature.

Reasons:

Whilst there may be suspicion that such documents exist, or existed , and they may have done, there is nothing more to suggest , on a balance of probabilities, that they

did. The Tribunal considers this to be outside the scope of the original request, relates only to information which would relate solely to the engagement of various consultants. Whether or not they were or were not covered by existing framework agreements, or would be subject to procurement rules, which might or might not, give rise to the possibility of there being further information which might or might not fall within the scope of the Appellant's request falls short of establishing on a balance of probabilities the existence at the material time of this information, or whether they would in any event fall within the scope of the request.

Item 17.

Information relating to internal briefs previously forwarded with responses to FOIA requests

Decision: On a balance of probabilities the Council holds, or did hold, more information of this nature.

Reasons:

The Tribunal considers it unlikely that these internal briefings would have taken place without a paper, or email, trail, of which this material would form part. Capital Project Manager's email of 7 January 2016 alludes to this process, and suggests that all information relating to these briefings had been forwarded to the Appellant, but no such documents, or not the complete set of documents, relating to them have been disclosed.

Item 18.

Notes and/or briefing notes relating to consultation event held on 22 June 2015

Decision: On a balance of probabilities the Council holds, or did hold, more information of this nature.

Reasons:

The Tribunal considers it unlikely that the meeting of 22 June 2015 would have taken place without a paper, or email, trail, of which this material would form part, and that this information would not have been deleted by the date of the request. Further, the Tribunal considers that there would be likely to be some documentation created as a result of, and following it.

Item 19.

Correspondence and notes relating to the members briefing on 21 July 2015

Decision: On a balance of probabilities the Council holds, or did hold, more information of this nature.

Reasons:

The Tribunal considers it unlikely that the meeting of 21 July 2015 would have taken place without a paper, or email, trail, of which this material would form part, and that this information would not have been deleted by the date of the request. Further, the Tribunal considers that there would be likely to be some documentation created as a result of, and following it.

Item 20:

Information shared with Islington Learning Disability Partnership

On a balance of probabilities the Council does not hold, and did not hold, more information of this nature.

Reasons:

The document relating to the Islington Disability Learning Partnership was said by the Appellant to have been created in January 2016, and modified in March 2016. She relies upon para. 4.2 to support an argument that a value for money proposal was in existence at the time of her request (see Item 14 above, to which this is also relevant) and that there is, prior to this document, prior communication about the project with ILDP. Nothing in the document produced by the Appellant suggests that this was not the first time that the Windsor Street project had been discussed in this manner with the ILDP. The highest it can be put, we consider, is that there might have been, but that is short of establishing on a balance of probabilities that there was, or, most crucially, that the was at the date of the request.

218. Thus, in summary, the Tribunal finds, and allows the appeal in respect of Items 1, 3, 4, 8, 9, 10, 11, 13, 17, 18 and 19 of Document 11 in the Additional Documents bundle.

219. Given the current circumstances, the public authority is afforded 6 weeks, 42 calendar days, in which to take the steps required in the Substituted Decision Notice.

Judge of the First-tier Tribunal
Dated: 15 June 2020
Date Promulgated: 18 June 2020

SCHEDULE

List of information that Tribunal determines the public authority held at the time of the Appellant's request, and which fell within its scope :

Item

1. Feasibility studies and internal service needs, in particular any financial feasibility or viability report in or around September 2015, pre - dating the Appellant's request.
3. Request from the planners that the Capital Project Manager and the architects should attend a members briefing on 21 July 2015
4. Materials notes and/or minutes relating to the members briefing on 21 July 2015
8. Architect report 2264 report 04
9. Further to the design brief dated 23 April 2013, any briefs or amendments to the briefs to the architects
10. Any brief instructing the architects to design in flexibility for conversion from accommodation for adults with learning disabilities to general needs rents (social housing)
11. Any request from the head of strategy and development of the scheme to be capable of being converted into general needs housing
13. The procurement plan which identified the need for a 14 bed very high need scheme 2014/15 referred to in para. 3.2 of the ILDP document submitted by the Appellant at Document 7 of the Additional Documents bundle.
17. Information relating to internal briefs previously forwarded with responses to FOIA requests
18. Notes and/or briefing notes relating to consultation event held on 22 June 2015
19. Correspondence and notes relating to the Members' briefing on 21 July 2015
