

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

**Decision Notice**

**Date: 17 March 2011**

**Public Authority:** Amber Valley Borough Council  
**Address:** Town Hall  
Market Place  
Ripley  
Derbyshire  
DE5 3XE

**Summary**

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The complainants asked the Information Commissioner ("the Commissioner") to consider the refusal of Amber Valley Borough Council ("the Council") to provide some information from a file relating to problems concerning drainage from a particular area of land. The Council refused to provide this information initially using the exception under regulation 12(4)(b) of the Environmental Information Regulations 2004 ("the EIR"). When the Commissioner advised that he did not consider that 12(4)(b) was engaged, the Council issued a new refusal citing the exceptions under regulations 13(1), 12(4)(e), and 12(5)(b) of the EIR. The Council also accepted that some of the information was the personal data of the complainant and should have been handled as a subject access request under the Data Protection Act 1998 ("the DPA"). The Commissioner investigated and found that regulation 13(1) was engaged in relation to some of the withheld information but that it had been incorrectly applied to other information. He also found that regulation 12(5)(b) was engaged and that the public interest did not favour disclosure. The Commissioner did not find it necessary to consider the application of regulation 12(4)(e). He found breaches of regulation 5(1), 5(2), 14(2) and 14(3) of the EIR and requires the Council to disclose the information that was incorrectly withheld using regulation 13(1) within 35 days.

## The Commissioner's Role

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1. The EIR were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Commissioner. In effect, the enforcement provisions of Part 4 of the Freedom of Information Act 2000 ("the FOIA") are imported into the EIR.

## Background

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2. This request relates to information in a file concerning problems arising from drainage in the field between two lanes. The complainants live in this area and in May 2005, they complained about water drainage issues on the land. The Council began a course of correspondence with the owner of the field regarding what land drainage system existed and what action could be taken. There subsequently followed works carried out by both the owner of the land and the Council in an attempt to rectify the problem. The complainants did not find these satisfactory and continued to complain. The Council wrote to the complainants and to a number of other residents who had been in touch about the issue in 2006. The Council stated that their involvement in the matter would not continue because having expended a significant amount of resources on the issue, it could not justify continuing to be involved in a problem with was for the private landowners to resolve amongst themselves. The Commissioner understands that the complainants subsequently complained to the Local Government Ombudsman who decided to take no further action in July 2007.

## The Request

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3. On 23 February 2009, following on from the complaint detailed in the "background" section of this notice, one of the complainants in this case requested information from Amber Valley Borough Council ("the Council") in the following terms:

*"In [name]'s letter of 9<sup>th</sup> March 2007 to [name] Investigator, under Conclusion paragraph two it refers to a 'File' reviewed by the Leader of the Council. My questions for your consideration are as follows:*

- (1) *Is the 'File' public information?*
- (2) *If the 'File' is public information, what is the procedure for viewing the 'File' should any member of the public be interested?"*

4. The Council responded to the complainant the next day referring to a complaint to the Ombudsman. It advised that as it considered that the pursuit of the issues had become "unreasonably persistent" it was not going to deal with the correspondence.
5. On 9 March 2009, the complainant wrote expressing dissatisfaction. He stated that having taken advice from the Commissioner, he understood that the Council needed to issue a valid refusal notice.
6. The Council replied to the complainant on the same day stating that its position on the issue had not changed.
7. Following initial intervention from the Commissioner's Office prompted by a complaint from the complainants (the requester and his wife), the Council wrote to the complainants on 1 October 2009. The Council stated that it had decided to refuse the request under regulation 12(4)(b) on the basis that it was manifestly unreasonable. It explained that it believed this exception applied because it had already provided the complainants with the information it held on the file. It became clear from this response that the Council had interpreted the request as being for a copy of the file in question. For clarity, this interpretation was subsequently accepted by the complainants and the Commissioner. For clarity, the Council did refer to the complainant's right to ask it for an internal review, but it stated that it did not consider that this would be necessary as its position would not change.

## **The Investigation**

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### **Scope of the case**

8. Prior to the above complaint, the Complainants had complained to the Commissioner about the Council's use of the exception under regulation 12(4)(b). The Council's rationale for applying this exception largely focused on its belief that the complainants had been provided with all the information on the requested file following previous requests. During the Commissioner's investigation, the Commissioner stated that he did not accept that this exception had been correctly applied as it transpired that the complainants had not in fact been provided with all the information on the file. The Council subsequently issued the refusal notice that is the subject of this notice. In view of this, the Commissioner treated the Council's application of the exception under regulation 12(4)(b) as having been withdrawn and his notice therefore does not address this issue, although for clarity this

part of the Commissioner's investigation is referred to briefly in the Chronology section below.

9. Various complaint letters were sent in to the Commissioner throughout this case at different stages as the investigation progressed. The one that is relevant to this Decision Notice is the letter of complaint dated 7 April 2010. In this letter, the complainants asked the Commissioner to consider the Council's refusal to provide information from the requested file in a refusal notice dated 2 February 2010. They also complained about the way in which the Council had conducted its internal review because there was no review panel and they did not consider that it could have been impartial because of the particular staff member who undertook the review. The Commissioner has considered the complaint about the internal review in the "Other Matters" section of this notice.
10. During the Commissioner's investigation of the information that was withheld, it came to light that some of the information being withheld actually represented the personal data of the complainant who had made the original request. As this information must be considered under the rights of subject access provided by section 7 of the DPA and this notice is limited to issues falling under the FOIA or the EIR, this information does not form part of this notice. This issue will be considered separately by the Commissioner.
11. The Council also disclosed some of the information that it was withholding informally during the course of the Commissioner's investigation. The Commissioner considers that the complaint relating to this information was informally resolved by the disclosure and the Analysis and Decision sections of the notice do not therefore deal with this matter.

## **Chronology**

12. From 30 November 2009 until 20 January 2010, the Commissioner was in correspondence with the Council regarding its application of the exception under regulation 12(4)(b). On 20 January 2010, the Commissioner wrote to the Council explaining that he did not accept that the exception had been correctly applied because it was not the case that all of the information on the file had been provided. He asked the Council to reconsider the matter in view of this and issue a new response.
13. The Council forwarded to the Commissioner a copy of its new response to the request dated 2 February 2010. This letter had been sent directly to the complainants. In this letter, the Council conceded that it

- was not the case, as previously suggested, that the complainants had seen all of the information held on the file. It stated that it had enclosed 12 documents from the file that had not previously been made available. It also enclosed a number of letters between the Council and third parties. It explained that it had redacted all the personal details from this information as it believed that disclosure of this information would breach the DPA. It cited the exception under regulation 12(3)<sup>1</sup> of the EIR and the exemption under section 40(2) of the FOIA. It added that it had also withheld copies of letters from the landowner because he had not consented to the disclosure for the same reasons. The Council explained that it had also withheld eleven emails, one letter and nine file notes. It cited the exception under regulation 12(4)(e) and section 36(2)(b)(i) and (ii) of the FOIA and stated that it considered that the public interest did not favour disclosure.
14. On 22 February 2010, the complainants requested an internal review of the refusal.
  15. The Council completed its internal review on 22 March 2010. This stated that the Council had decided that its previous decision had been correct.
  16. Following a letter of complaint from the complainants dated 7 April 2010, the Commissioner wrote to the complainants on 10 August 2010. He set out his understanding of the request and the complaint and asked the complainants to let him know if any of the details were inaccurate.
  17. The Commissioner wrote to the Council on 10 August 2010. As there had previously been correspondence between himself and the Council, he set out the history of the matter and explained that he would write again once the complainants had confirmed the precise details of the complaint.
  18. The complainants replied to the Commissioner on 12 August 2010 and confirmed that the Commissioner's correspondence had accurately described the details of their request and complaint. In a separate letter dated 14 August 2010, the complainants also confirmed that they would be content with hardcopies of the information and would not need to inspect it.
  19. On 23 August 2010, the Commissioner wrote to the Council. He confirmed the details of the complaint. He also asked to be provided with copies of all of the withheld information. Finally, the Commissioner

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<sup>1</sup> This regulation refers to the exception under regulation 13(1) regarding third party personal data.

- noted that it was not clear which legislation the Council considered applied to the request. He noted that in its refusal notice dated 2 February 2010, it had referred to both the EIR and the FOIA. The Commissioner also pointed out that earlier correspondence on the case indicated that the Council had previously considered that access to at least some of the information in the file would be a subject access request under section 7 of the Data Protection Act 1998 ("the DPA"). The Commissioner asked for the Council's clarification.
20. The Council replied on 24 August 2010. It supplied copies of the withheld information. It also stated that it would not be able to respond to the Commissioner's request for the Council to clarify which legislation applied by the deadline set. It pointed towards annual leave, other work commitments, and the possible need for it to seek legal advice on the matter.
  21. Unfortunately, a delay ensued at this stage, with the Council providing some background information in the meantime. On 2 September 2010, having considered the withheld information and the background details provided, the Commissioner wrote to the Council to set out his own view on which legislation was appropriate. The Commissioner stated that in his view, the information should be handled under the EIR, with the exception of those parts of the information that referred specifically to the requester. The Commissioner pointed out that this information represented his personal data and should be considered under the rights of subject access provided by section 7 of the DPA.
  22. Having reached the above conclusions, the Commissioner went on to express a view on the application of the exceptions under regulation 13(1) and 12(4)(e). The Commissioner stated that his provisional view was that the Council had correctly applied regulation 13(1) to withhold third party personal data. However, he was not persuaded that the Council had provided sufficient arguments to justify withholding the information using regulation 12(4)(e). He asked the Council to consider disclosure of this information, and the information that had been identified as the complainant's own personal data.
  23. The Council supplied a response to some questions that had been posed by the Commissioner on 2 September 2010 and the Commissioner provided some clarification that was requested by the Council regarding comments in his letter on 8 September 2010. Unfortunately, there was another delay at this point because the Council decided that it would be necessary to seek external legal advice regarding the issue of whether to disclose any of the information. From this point onwards, all contact was with the Council's appointed solicitors acting on behalf of the Council. As the solicitors

- were acting on the Council's behalf, the notice continues to refer to the Council only.
24. The Commissioner received a telephone call from the Council on 15 October 2010. During this telephone call, the Council indicated that it wished to rely on a new exception, namely regulation 12(5)(b). The Council stated that it would be responding very shortly with arguments relating to this.
  25. On 19 October 2010, the complainants telephoned the Commissioner for an update. The Commissioner explained that the Council was now seeking to rely on the exception under regulation 12(5)(b).
  26. On 20 October 2009, the Council responded to the Commissioner. It provided a bundle of information with numbered pages. In this response, the Council stated that it accepted the Commissioner's view about which legislation was relevant to the withheld information. It did not withdraw its reliance on regulation 12(4)(e), however it noted the Commissioner's view that it had not adequately justified withholding the information. In relation to the point raised by the Commissioner regarding some of the information representing the complainant's personal data, the Council stated that it wished to claim exemptions under the DPA relating to third party information and Legal Professional Privilege. Regarding information which was not the complainant's personal data, the Council stated that it wished to rely on the exception under regulation 12(5)(b) in relation to all of this information, with the exception of emails on page 2 and 11 of the bundle provided to the Commissioner and a letter dated 4 January 2006. The Council stated that it was willing to disclose this information although it wished to redact third party personal data. It did not cite a particular exception.
  27. On 3 November 2010, the Commissioner wrote to the Council. The Commissioner asked the Council to identify clearly precisely what information it considered represented the requester's personal data. He also asked the Council to reconsider whether it was able to disclose this information. In relation to the exception under regulation 12(5)(b), the Commissioner asked for further supporting arguments. He also pointed out that although the Council had said it was willing to disclose some information with redactions, it had not supplied any rationale for redacting the information. The Commissioner also noted that some emails clearly referred to attached information and it was not apparent to the Commissioner whether all or any of this information had been provided to him.
  28. Following a significant delay, in a letter dated 16 December 2010, the Council replied to the Commissioner. It supplied a further bundle of the

- withheld information with the information that was considered to be the requester's own personal data highlighted. The Council continued to maintain that all of this information was exempt under the DPA. Regarding the Commissioner's concerns over attachments to some of the emails, the Council supplied copies of the attachments within the new bundle, some of which had never been previously provided to the Commissioner. The Council did not address the issue of whether it was able to disclose the attachments. The Council continued to assert that the majority of the remaining withheld information was covered by regulation 12(5)(b) and provided further rationale. In relation to the information which the Council had already agreed to disclose with redactions (i.e. emails on page 2 and 11 of the bundle provided to the Commissioner on 20 October 2010 and a letter dated 4 January 2006), the Council clarified that having reconsidered this matter, it had decided to make fewer redactions but still felt that some information should still be withheld using regulation 13(1).
29. During January 2011, the Commissioner contacted the Council on a few occasions to ask it to disclose information and to clarify whether the attachments that did not represent the personal data of the requester could be disclosed. The Council agreed to disclose a copy of a letter sent to the landowner with redactions under regulation 13(1) and a copy of a template notice relating to the Land Drainage Act. There was also some correspondence in February 2011 as the Council made some additional redactions using regulation 13(1) to the emails on page 2 and 11 of the bundle provided to the Commissioner on 20 October 2010 and to a letter dated 4 January 2006.
30. Following receipt of information disclosed by the Council, the complainants wrote to the Commissioner on 18 February 2011. They asked for a copy of a plan that was referred to as being attached to a disclosed letter dated 4 January 2006. They also noted that the same letter refers to an earlier letter of 16 November 2006 (it is assumed that the date was incorrectly stated and that it should have stated 16 November 2005). The complainants said that they had never seen this letter and wished to be provided with a copy of it.
31. The Commissioner contacted the Council on 28 February 2011 to ask it to consider providing the information discussed in the paragraph above. The Council replied on the same day and confirmed that it was happy to provide the attached plan to the complainants. It sent a further reply on 9 March 2011 confirming that it had located the relevant letter of 16 November 2005. It stated that it would be willing to disclose this letter as well with redactions under regulation 13(1).



## Analysis

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### Substantive Procedural Matters

#### Is the information environmental?

32. The Commissioner's view is that the information is environmental in nature because it falls within the scope of regulation 2(1)(c) of the EIR. This regulation provides that any information on measures including plans and activities affecting or likely to affect the elements and factors listed in regulation 2(1)(a) and (b) is environmental information. The information relates to a drainage problem on a particular area of land and action taken in respect of it. Land and water are elements mentioned in regulation 2(1)(a). The Council did not dispute the Commissioner's position.

#### Exceptions

##### Regulation 13(1) – Third party personal data

33. The Council applied this exception to the following information:
1. Letters from the land owner regarding the drainage issue (withheld in full)
  2. Letters between the Council and third parties, including one to the landowner regarding the drainage issue (disclosed with some redactions)
  3. Redactions from emails on page 2 and 11 of the bundle that was provided to the Commissioner on 20 October 2010 as well as a letter dated 4 January 2006
  4. Redactions to a letter from the Council to the landowner dated 3 November 2005 (attachment identified on 16 December 2010 as described in paragraph 28 of this notice).
  5. Redactions to a letter dated 16 November 2005 that was identified on 9 March 2011 as described in paragraph 31 of this notice.

#### Is the information personal data?

34. Personal data is defined by the DPA as any information relating to a living and identifiable individual. The Commissioner was satisfied that the letters from the land owner in point 1 of paragraph 33 above related to a living and identifiable individual. He was therefore satisfied that this information represented the personal data of the land owner.

35. The redactions to the information in the information in point 2 of paragraph 33 consisted of the names and contact details of members of the public with whom the Council had corresponded regarding the drainage issue or whose contact details and names were mentioned in correspondence. The Commissioner was satisfied that this information relates to living and identifiable individuals and he therefore also accepts that this information is personal data.
36. The redactions to the information in the emails and letter in point 3 of paragraph 33 of this notice consist of names, postal and email addresses and telephone numbers. The Commissioner was satisfied that this information relates to living and identifiable individuals and he therefore accepts that this information is personal data.
37. The redactions to the information in point 4 of paragraph 33 consist of names and contact details. The Commissioner accepts that this is personal data as it relates to living and identifiable individuals.
38. The withheld information described in point 5 of paragraph 33 consists of names and contact details. The Commissioner accepts that this is personal data as it relates to living and identifiable individuals.

### **Would disclosure contravene the first principle of the DPA?**

39. The first principle of the DPA is most relevant in this case and provides that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering this, the Commissioner finds that it is useful to balance the consequences of any disclosure and the reasonable expectations of the data subject, with principles of accountability and transparency.

### **Reasonable expectations**

40. Regarding the letters from the land owner in point 1 of paragraph 33 of this notice, the Council explained that it had already refused to provide this information to the complainants in 2006. This is because the land owner had not given his consent. There was no evidence available to the Commissioner to suggest that this position is likely to have changed. The lack of consent suggests that disclosure of the correspondence to the general public was not something which the land owner would have expected. Further, the Commissioner considers that this would have been a reasonable expectation for him to have had. Correspondence sent to a public authority from a member of the public or vice versa regarding a particular complaint is generally regarded as confidential.

41. Regarding the redactions from the information in point 2 of paragraph 33, the Commissioner considered the fact that no consent existed at the time of the request. The Commissioner's view is that disclosure to the public would not have been within the reasonable expectations of those concerned for the same reasons outlined in the paragraph above.
42. In relation to the information in point 3 of paragraph 33, the Council advised that it wanted to redact the names and contact details of third party members of the public. It also wished to redact the names of its employees and a consultant as well as their contact details. The Council also redacted the name and contact details of an employee of the Environment Agency. The Council argued that the staff members and the consultant were in relatively junior roles and some are no longer employed by the Council. In relation to the Environment Agency employee, the Council stated that it had redacted the name because the individual was not one of its own employees.
43. As set out in above paragraphs, the Commissioner accepts that third party members of the public generally expect correspondence with the Council to be confidential. The Commissioner accepts that there was no evidence indicating that disclosure to the public would have been within the reasonable expectations of these individuals. Regarding the council employees, the consultant and the Environment Agency employee, despite having been referred to the Commissioner's published guidance, the Council made little attempt to address the issue of whether the disclosure would have been fair in the circumstances. A disclosure would not necessarily be unfair simply because a person may have been in a junior or consultancy role, had left the authority's employment or worked for another organisation if the context is not sensitive. Further, the Commissioner notes that two of the staff members are referred to as "senior" in their job titles. Having considered the nature of the information and the rationale presented by the Council, the Commissioner was not persuaded that disclosure in these circumstances would have been outside any of the individuals' reasonable expectations given their professional, public roles.
44. In relation to the withheld information described in point 4 of paragraph 33 of this notice, for the reasons already given above, the Commissioner accepts that the name and address of the landowner should be withheld. However, the Commissioner noted that the Council made little attempt to explain why disclosure of the name of a consultant and a council employee, together with their contact details would be unfair other than to explain that one of the individuals was a consultant and the other was a council employee who was not employed in a senior role. Again, having considered the nature of the

information and the rationale presented by the Council, the Commissioner was not persuaded that disclosure in these circumstances would have been outside any of the individuals' reasonable expectations given their professional, public roles.

45. In relation to point 5 of paragraph 33, the Council withheld the name and address of a third party member of the public. As already indicated in the paragraphs above, the Commissioner accepts that third party members of the public generally expect correspondence with the Council to be confidential. The Commissioner accepts that there was no evidence indicating that disclosure to the public would have been within the reasonable expectations of this individual. The Council also withheld the name and contact details of a member of its staff (the same details were also withheld from the information in point 3 of paragraph 33. For the reasons already given, the Commissioner was not persuaded that disclosure of these details would have been outside his reasonable expectations.

### **Consequences of disclosure**

46. In relation to the information in points 1 and 2 of paragraph 33, as the Commissioner considers that there is no evidence indicating that the disclosure would have been within the reasonable expectations of the land owner or the members of the public involved, he considers that disclosure could be regarded by them as an unwarranted invasion of their privacy. This has the potential to cause distress. It may also result in individuals being reluctant to correspond with the Council in future or prompt unwanted contact.
47. In relation to the information referred to in point 3 of paragraph 33, the Commissioner was satisfied that there is no evidence indicating that the disclosure would have been within the reasonable expectations of the third party members of the public whose names and contact details have been redacted. He therefore considers that the disclosure could have the same consequences as described in the paragraph above. However, in relation to the names and contact details of the Council's employees, the consultant and the employee of the Environment Agency, the Commissioner was not satisfied that disclosure would have been beyond their reasonable expectations. He therefore considers that the disclosure is unlikely to be distressing.
48. In relation to the information referred to in point 4 of paragraph 33, the Commissioner considers that there is no evidence indicating that the disclosure would have been within the reasonable expectations of the landowner whose name and contact details have been redacted. He therefore considers that the disclosure could have the same

consequences as described in paragraph 46 above. However in relation to the names and contact details of the consultant and the council employee, the Commissioner was not satisfied that disclosure would have been beyond their reasonable expectations. He therefore considers that the disclosure would be unlikely to be distressing.

49. In relation to the redactions from the information in point 5 of paragraph 33, the Commissioner accepts that there is no evidence indicating that disclosure would have been within the reasonable expectations of the particular third party and he therefore considers that the disclosure could have the same consequences as described in paragraph 46 above. However, in relation to the name and contact details of the staff member, the Commissioner found that the disclosure is unlikely to be distressing as he does not consider that the disclosure would have been beyond the consultant's reasonable expectations.

### **Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure**

50. There is always some legitimate interest in the disclosure of information held by public authorities in order to promote transparency and accountability. However, in relation to the information in points 1 and 2 of paragraph 33 of this notice, the Commissioner was not of the view that this was sufficiently strong to equal or outweigh the legitimate expectation of privacy attached to the correspondence in question. Further, the Commissioner notes that the Council has taken steps to be as transparent as possible by disclosing some redacted versions of the letters. In view of this, the Commissioner is satisfied that the disclosure of this information would be unfair.
51. In relation to the information in point 3 of paragraph 33, the Commissioner's view is that disclosure would have been unfair in relation to the third party members of the public and their contact details. The Commissioner was not of the view that the public interest in disclosure was sufficiently strong to equal or outweigh the legitimate expectation of privacy attached to the information in question. However, in relation to the names and contact details of council employees, the consultant and the Environment Agency employee, the Commissioner was not persuaded that disclosure would be unfair because it would have been within their reasonable expectations. There is a legitimate public interest in public sector workers being transparent. When a disclosure would be fair, the Commissioner must also consider whether it would be necessary in accordance with Condition 6 in Schedule 2 of the DPA. The full wording of Condition 6 is as follows:

*"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject".*

52. In the Commissioner's view, the disclosure is necessary to bring about public sector transparency.
53. In relation to the information in point 4 of paragraph 33, the Commissioner's view is that disclosure would have been unfair in relation to the landowner's name and address because the public interest is not sufficiently strong to outweigh the legitimate expectation of privacy attached to this information. However, the Commissioner considered that disclosure of the withheld name of a consultant and a council employee together with their contact details would have been fair and necessary for the reasons given in the two paragraphs directly above.
54. In relation to the redactions from the information in point 5 of paragraph 33, the Commissioner's view is that disclosure of the third party's name and address would have been unfair because the public interest is not sufficiently strong to outweigh the legitimate expectation of privacy attached to this information. However, the Commissioner considered that the disclosure of the name and contact details of the staff member would have been fair and necessary for the reasons already presented.

### **Regulation 12(5)(b) – Adverse effect to the course of justice**

55. Under this exception, a public authority can refuse to disclose information to the extent that disclosure would adversely affect "the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature".
56. The Commissioner accepts that this exception will encompass information that would be covered by Legal Professional Privilege because this common law concept is considered to be a fundamental part of the justice system.
57. The principle of Legal Professional Privilege is based on the need to protect a client's confidence that any communication with his or her legal advisor will be treated in confidence. There are two categories of privilege: advice privilege (where no litigation is contemplated or pending) and litigation privilege (where litigation is underway or

anticipated). In this case, the Council advised the Commissioner that it wished to rely on legal advice privilege and litigation privilege in relation to emails sent to or by the Council's legal executive and file notes created by the same legal executive.

### **Does the information attract Legal Professional Privilege?**

58. The Commissioner was prepared to accept that the information was covered by Legal Advice Privilege and he did not therefore find it necessary to consider whether Litigation Privilege also applied. Having inspected the information, the Commissioner's view was that the emails formed part of a chain of communications between a qualified legal executive and their client for the main purpose of giving or receiving legal advice in relation to the land drainage problem. He was similarly satisfied that the legal file notes that had been kept by the same legal executive, had been kept on the file or sent to the client for the dominant purpose of giving or receiving legal advice.
59. Legal Advice Privilege may cease to apply if the privilege has been waived i.e. it has been shared in circumstances where it loses its confidentiality. In the absence of any evidence that the information does not still retain its confidentiality, the Commissioner accepts the privilege has not been waived.

### **Would disclosure have caused an adverse effect?**

60. In the decision of *Archer v Information Commissioner and Salisbury District Council* (EA/2006/0037) the Information Tribunal highlighted the requirement needed for this exception to be engaged. It has explained that there must be an "adverse effect" resulting from disclosure of the information as indicated by the wording of the exception.
61. In accordance with another Tribunal decision *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/030), the interpretation of the word "would" is "more probable than not".
62. The Commissioner considers that disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind Legal Professional Privilege.
63. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* (EA/2005/0023), the Information Tribunal

described Legal Professional Privilege as, "a fundamental condition on which the administration of justice as a whole rests".

64. The Commissioner accepts that disclosure of privileged information would more probably than not undermine the important common law principle of advice privilege and therefore undermine the course of justice in general. It is important that public authorities should be able to consult with their lawyers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice.
65. As the Commissioner was satisfied that disclosure of the privileged information would have adversely affected the course of justice at the time of the request, he has gone on to consider the public interest test associated with regulation 12(5)(b) in relation to that information.

#### **Public interest arguments in favour of disclosing the requested information**

66. The EIR specifically state that a presumption in favour of disclosure should be applied. Some weight must therefore be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
67. In addition to the above general considerations, the Commissioner also appreciates that decisions concerning environmental matters can significantly affect people in the area and there is generally a greater expectation of transparency surrounding environmental matters partly because of this. The Commissioner is aware that the water drainage situation in this case has been distressing for the complainants and their neighbours over a lengthy period of time. He notes that disclosure of the information may help them to understand more about the actions taken by the Council in respect of this matter.
68. The Commissioner also appreciates that the Council advised that it would not be taking further action in 2006 and some of the information in question dates back to 2005. The public interest in withholding information generally diminishes over time.

#### **Public interest arguments in favour of maintaining the exception**

69. The Commissioner's published guidance on Legal Professional Privilege states the following:



*"Legal Professional Privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal advice, including potential weaknesses and counter-arguments. This in turn ensures the administration of justice".*

70. In light of the above, there will always be a strong argument in favour of maintaining Legal Professional Privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the Bellamy case when it stated that:

*"...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."*

71. The above does not mean that the counter arguments favouring public disclosure need to be exceptional, but they must be at least as strong as the interest that privilege is designed to protect as described above.

### **Balance of the public interest arguments**

72. The Commissioner appreciates that in general there is a strong public interest in public authorities being as accountable as possible in relation to environmental issues, particularly those that have the potential to affect people in the area. The Commissioner accepts that disclosure of the information in question may help the public to consider more fully the actions taken by the Council in respect of this matter.
73. However, having regard to the circumstances of this case, it is not the Commissioner's view that the public interest in disclosure equals or outweighs the strong public interest in maintaining the Council's right to consult with its lawyers in confidence.
74. In the Commissioner's view, the content of the information itself would not add to the public understanding of the Council's decision in this matter to the extent that it would justify its disclosure. The Council has already informed the residents of the reasons for its decision and in a letter addressed to the requester dated 10 October 2006, it explained the following:

*"The Council has expended a significant amount of resources on this matter, both in Officer time and actually completing works on site to improve the drainage system. I have reviewed the case and decided that no further action should be taken by the Council. I am also satisfied that we have acted properly and, in fact, over and above the discretionary powers in an attempt to assist, but we cannot justify any further involvement in a problem which, essentially, is for the private landowners to resolve amongst themselves".*

75. Having considered the nature of the information, the Commissioner can see no obvious signs of wrong-doing or evidence that the Council misrepresented any legal advice it received.
76. Although the Commissioner appreciates that the Council made the decision not to take any further action some time ago, the evidence shows that the complainants have continued to pursue a grievance against the Council and the possibility that the Council may have needed to defend its position still existed at the time of the request in 2009. For the reasons above, the public interest in disclosure is not sufficient enough in the particular circumstances to justify the undermining of the general principle behind Legal Professional Privilege as discussed earlier in this notice.
77. The Commissioner would also add that he is aware that the complainants have a personal interest in this information, as do their neighbours. However, the Commissioner must consider the wider public interest and he finds that this is not strong enough in the circumstances. While the Commissioner fully appreciates that the drainage situation is distressing for the residents, the Commissioner would observe that other avenues are open to individuals wishing to pursue complaints against local authorities.
78. For the reasons above, the Commissioner's view was that the public interest in maintaining the exception in relation to privileged information outweighed the public interest in disclosing it.

### **Regulation 12(4)(e) – Internal communications**

79. For clarity, the Commissioner did not find it necessary to consider regulation 12(4)(e) in relation to the information that he found had been correctly withheld under regulation 12(5)(b). However, regulation 12(5)(b) was not applied to all of the withheld information. As outlined in this notice, the Council applied regulation 13(1) to make various redactions to information and the Commissioner was not persuaded that this exception had been correctly applied to all of the redactions. The Commissioner has not considered the application of regulation

12(4)(e) to any of these redactions because as the information was personal data, the appropriate exception to consider the disclosure under is regulation 13(1).

## **Procedural Requirements**

80. As the Commissioner found that some information was incorrectly withheld using regulation 13(1), he considers that the Council breached regulation 5(1) and 5(2) of the EIR for the failure to provide this information.
81. The Commissioner notes that the Council sought to rely on regulation 12(4)(e), 12(5)(b) and 13(1) at a late stage in the Commissioner's investigation. This was a breach of regulation 14(2) and 14(3) of the EIR.

## **The Decision**

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82. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the EIR:
  - It correctly determined that regulation 13(1) was engaged in relation to the information discussed in points 1 and 2 of paragraph 33 of this notice.
  - It correctly determined that regulation 13(1) was engaged in relation to part of the withheld information discussed in point 3 of paragraph 33 of this notice, namely the names and contact details of third party members of the public.
  - It correctly determined that regulation 13(1) was engaged in relation to part of the withheld information discussed in point 4 of paragraph 33 of this notice, namely the name and address of the landowner.
  - It correctly determined that regulation 13(1) was engaged in relation to part of the withheld information discussed in point 5 of paragraph 33 of this notice, namely the name and address of the third party to whom the correspondence was addressed.
  - It correctly determined that regulation 12(5)(b) was engaged and it correctly determined that the public interest did not favour disclosure.

83. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the EIR:

- It incorrectly determined that regulation 13(1) was engaged in respect of part of the information discussed in point 3 of paragraph 33 of this notice, namely the names and contact details of council employees, a consultant and an employee of the Environment Agency. The Council therefore breached regulation 5(1) and 5(2) for failing to provide this information.
- It incorrectly determined that regulation 13(1) was engaged in respect of part of the withheld information in point 4 of paragraph 33 of this notice, namely the names of a consultant and a council employee, as well as their contact details. The Council therefore breached regulation 5(1) and 5(2) for failing to provide this information.
- It incorrectly determined that regulation 13(1) was engaged in respect of part of the withheld information in point 5 of paragraph 33, namely the name and contact details of a staff member.
- The Council relied on the exceptions under regulation 12(4)(e), 12(5)(b) and 13(1) at a late stage in the Commissioner's investigation. It therefore breached regulation 14(2) and 14(3) of the EIR.

### **Steps Required**

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84. The Commissioner requires the Council to disclose to the complainant the information it incorrectly withheld using regulation 13(1) as set out in paragraph 83 of this notice.

85. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

### **Failure to comply**

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

## Other matters

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87. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

### Records Management

88. The Commissioner's investigation was delayed considerably by the Council's failure to identify that it held information that had never previously been made available to the complainants. The Commissioner is concerned that this failure might indicate records management problems within the Council and directs it to the recommendations of the code of practice issued under section 46 of the FOIA which is published online at this address:  
<http://www.justice.gov.uk/guidance/docs/foi-section-46-code-of-practice.pdf>

### Appropriate legislation

89. Paragraph 1 of the code of practice issued under regulation 16 of the EIR (the "EIR code") states:

*"All communications to a public authority, including those not in writing and those transmitted by electronic means, potentially amount to a request for information within the meaning of the EIR, and if they do they must be dealt with in accordance with the provisions of the EIR. It is therefore essential that everyone working in a public authority who deals with correspondence, or who otherwise may be required to provide information, is familiar with the requirements of the EIR and this Code in addition to the FOIA and the other Codes of Practice issued under its provisions, and takes account of any relevant guidance on good practice issued by the Commissioner. Authorities should also ensure that proper training is provided".*

90. The Commissioner was concerned to note that the Council's response dated 2 February 2010 failed to state categorically whether the EIR or the FOIA applied. It referred to exceptions under both the EIR and the FOIA. Additionally, when the Commissioner asked for clarification the Council failed to supply a prompt response and suggested that it may wish to seek legal advice which resulted in the Commissioner making the decision on behalf of the authority to avoid excessive delay. These circumstances, coupled with the Council's poor response to the request initially, may suggest that appropriate staff at the authority have not received adequate training. The Commissioner, therefore, reminds the

Council that it should ensure that staff members handling requests are provided with proper training, as recommended in the EIR code.

### **Late application of exceptions**

91. Once it had been confirmed that the EIR applied, the authority applied regulation 12(5)(b) in addition to the exceptions it had already relied upon. Regulation 13(1) was also applied to additional information. The late application of these exceptions may suggest that the request was not given sufficient consideration in the refusal notice or the internal review or both.

### **Internal reviews**

92. In relation to internal reviews, paragraph 61 of the EIR code recommends that "The complaints procedure should be a fair and impartial means of dealing with handling problems and reviewing decisions taken pursuant to the EIR..." The complainants complained specifically to the Commissioner about the Council's internal review on 22 March 2010. The complainants were unhappy with the individual who had conducted the review because they felt that, due to a background grievance which involved the member of staff, they could not have conducted a fair review. They also felt that a review panel should have heard the review as this would have been in line with the authority's review procedure. In this case, the Commissioner was not persuaded that the complainants were disadvantaged due the above circumstances although he would like to draw the Council's attention to the guidance in the EIR code.

## Right of Appeal

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93. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 17<sup>th</sup> day of March 2011**

**Signed .....**

**Andrew White  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## **Legal Annex**

### **Environmental Information Regulations 2004**

#### **Regulation 2 - Interpretation**

##### **Regulation 2(1)** In these Regulations – ...

'environmental information' has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...

#### **Regulation 5 - Duty to make available environmental information on request**

##### **Regulation 5(1)**

Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

#### **Regulation 12 - Exceptions to the duty to disclose environmental information**

**Regulation 12(1)** Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

- (a) an exception to disclosure applies under paragraphs (4) or (5);  
and



- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

**Regulation 12(2)** A public authority shall apply a presumption in favour of disclosure.

**Regulation 12(3)** To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

**Regulation 12(4)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

- (b) the request for information is manifestly unreasonable;
- (e) the request involves the disclosure of internal communications.

**Regulation 12(5)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

### **Regulation 13 - Personal data**

**Regulation 13(1)** To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

### **Regulation 14 - Refusal to disclose information**

**Regulation 14(1)** If a request for environmental information is refused by a public authority under regulations 12(1) or 13(1), the refusal shall be made in writing and comply with the following provisions of this regulation.

**Regulation 14(2)** The refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

**Regulation 14(3)** The refusal shall specify the reasons not to disclose the information requested, including –

- (a) any exception relied on under regulations 12(4), 12(5) or 13;
- and

- (b) the matters the public authority considered in reaching its decision with respect to the public interest under regulation 12(1)(b) or, where these apply, regulations 13(2)(a)(ii) or 13(3).