

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

**Date:** 27 January 2017

**Public Authority:** Eastleigh Borough Council  
**Address:** Eastleigh House  
Upper Market Street  
Eastleigh  
Hampshire  
SO50 9YN

**Decision (including any steps ordered)**

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1. The complainant has requested copies of correspondence to and from the Council Leader regarding spatial zones in the Issues and Options document published by Eastleigh Borough Council and the Eastleigh Strategic Transport Study Interim Report - Issues and Options December 2015.
2. The Commissioner's decision is that Eastleigh Borough Council has incorrectly applied the exception at regulation 12(4)(d) to the 'Eastleigh Strategic Transport Study - Project Scope; June 2015' but correctly applied that exception to the 'Eastleigh Strategic Transport Study Interim Report - Issues and Options December 2015'. However, she has decided that in all the circumstances of the case, the public interest in maintaining the exception at regulation 12(4)(d) does not outweigh the public interest in disclosing the information.
3. The Commissioner has also decided that Eastleigh Borough Council has correctly applied the exception at regulation 12(4)(e) to withheld internal emails and the presentation to Members and that in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
4. With regard to the application of regulation 12(5)(f), the Commissioner has decided that the exception is not engaged in relation to two communications with external third parties.

5. The Commissioner has also decided that Eastleigh Borough Council did not respond to the request within the statutory time limit in breach of regulation 5(2), that it complied with the requirements of regulation 11(5)(a) and 11(5)(b) but was in breach of regulation 11(5)(c).
6. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the 'Eastleigh Strategic Transport Study – Project Scope; June 2015', the 'Eastleigh Strategic Transport Study Interim Report - Issues and Options December 2015', and the two communications with external third parties.
  - State the time period within which additional training will be offered to officers and members in respect of Eastleigh Borough Council's duty to respond to requests within the statutory timeframes.
7. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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8. On 3 April 2016, the complainant wrote to Eastleigh Borough Council ('the council') and requested information in the following terms:

"My request is to see copies of all correspondence (including emails) from and to the Council Leader, Councillor Keith House relating to:

  1. The draft options described as "Option B" and "Option C" spatial zones in the Issues and Options document published by EBC on 23rd December. This should include copies of all email and postal correspondence from and to Councillor House relating to this document's preparation, including comments on all drafts. It should include correspondence to and from all bodies involved.
  2. The Hampshire County Council "Eastleigh Strategic Transport Study Interim Report - Issues and Options December 2015" study document and all appendices. This should include copies of all email and postal correspondence from and to Councillor House relating to this document's preparation, including comments on all drafts. It should include correspondence to and from all bodies involved."

9. On 15 April 2016 the council sought clarification as to the date parameters of the request. The complainant responded on the same day clarifying that he required the requested information from 1 January 2015 to the date of the request.
10. On 2 June 2016, the council confirmed to the complainant that it holds the requested information and apologised for not yet being in a position to provide a formal response. It said that it is in the process of consulting with third parties as well as considering whether the information is disclosable.
11. The council provided its response on 10 June 2016. It confirmed holding the information requested, provided one email chain, but refused to provide the remainder of the information citing the exceptions at regulations 12(4)(e) and 12(5)(f) as its basis for doing so.
12. On 13 June 2016, the complainant requested an internal review of the decision and complained about the time taken to respond.
13. The council provided an internal review response on 4 July 2016. It confirmed that the requested information falls within the scope of the EIR and maintained its original position in relation to the exceptions. It also provided an explanation as to the delay in providing a response.

### **Scope of the case**

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14. The complainant contacted the Commissioner on 7 July 2016 to complain about the way his request for information had been handled. He specifically commented that he asked for the information under the FOIA rather than the EIR and that the correct level of public interest hasn't been factored into whether the information should be disclosed. He also expressed his concern that the council default to 40 working days for an initial response instead of 20 working days and that it did not comply with regulation 11(5) of the EIR.
15. During the course of the investigation, the council also applied the exception for material still in the course of completion at regulation 12(4)(d) of the EIR.
16. The Commissioner has first considered whether the information requested is environmental and therefore whether the council was correct to deal with the request under the EIR rather than the FOIA.
17. She has then considered the council's application of the exceptions at regulations 12(4)(d), 12(4)(e) and 12(5)(f) of the EIR.

18. The Commissioner has also considered whether the council was in breach of breach of the time limits for compliance at regulations 5(2) and 7(1) of the EIR and the requirements regarding internal reviews at regulation 11(5).

## **Reasons for decision**

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### **The appropriate legislation – FOIA or EIR?**

19. The first matter for the Commissioner to decide is whether the information is covered by the FOIA or the EIR. Section 39 of the FOIA states that information is exempt information if the public authority holding it is obliged, by regulations under section 74 of the FOIA, to make the information available to the public in accordance with those regulations or would be so obliged but for any exemption under those regulations. The regulations under section 74 of the FOIA are the EIR. Information falls to be considered under the EIR if that information is environmental information.
20. Regulation 2(1) of the EIR defines 'environmental information' as having the same meaning as in Article 2(1) of Council Directive 2003/4/EC:
- "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;
  - (d) reports on the implementation of environmental legislation;
  - (e) cost-benefit and other economic analyses and assumptions used

within the framework of the measures and activities referred to in (c);and

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

21. In the Commissioner's view, the use of the word 'on' indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information.
22. The Commissioner considers that the requested information is environmental within the meaning of the EIR by virtue of regulation 2(1)(c), as it is information on a local plan affecting or likely to affect the land and landscape which are elements of the environment referred to under regulation 2(1)(a).

**Regulation 12(4)(d) –the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data**

23. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that it relates to material still in the course of completion, to unfinished documents or to incomplete data.
24. The exception is often engaged relatively easily since if the withheld information falls into one of the categories described above, then the exception is engaged. It is not necessary to show that the disclosure would have any adverse effect in order to engage the exception, however any adverse effects of disclosures may be relevant to the public interest test.
25. The council has applied this exception to a draft of the 'Eastleigh Strategic Transport Study Interim Report - Issues and Options December 2015'. The Commissioner understands that a final version of the requested report dated December 2015<sup>1</sup> was published on the council's website prior to the request in this case being made.

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<sup>1</sup> <https://www.eastleigh.gov.uk/planning-building/planning-policy-and-implementation/local-plan/emerging-local-plan-2011-2036/transport-study.aspx>

26. In line with the decision of the Tribunal in *Secretary of State for Transport v the Information Commissioner*<sup>2</sup>, and the Commissioner's published guidance on regulation 12(4)(d)<sup>3</sup>, it is the view of the Commissioner that drafts are unfinished documents for the purposes of regulation 12(4)(d), and remain unfinished even upon completion of a final version. The Commissioner is therefore satisfied that the exception is engaged in respect of the draft of the 'Eastleigh Strategic Transport Study Interim Report - Issues and Options December 2015'.
27. The council also applied the exception at regulation 12(4)(d) to a document entitled 'Eastleigh Strategic Transport Study – Project Scope; June 2015'.
28. The council said that the exception applies as the project scope document relates to material still in the course of completion.
29. Given that the purpose of the document was to define the scope of a study for which a report was published before the request was made in this case (as per paragraph 25), the Commissioner considers that it relates to a process, in this case defining the scope of the Eastleigh Strategic Transport Study, that in itself has been concluded and therefore it cannot be said to relate to material still in the course of completion and the exception is not engaged.
30. The Commissioner considers that this is akin to the First Tier Tribunal's decision concerning regulations 12(4)(d) and (e)<sup>4</sup>, referred to by the council in as stated in paragraph 65, regarding whether a draft plan, which had been published for consultation, was material in the course of completion. The Tribunal decided that the draft plan was material that was complete for the purposes of the EIR as it was published on the website for the purposes of consultation.
31. As the Commissioner considers that the exception is engaged in relation to the draft of the 'Eastleigh Strategic Transport Study Interim Report - Issues and Options December 2015', she has gone on to consider the relevant public interest arguments in this case.

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<sup>2</sup> Appeal number EA/2008/0052

<sup>3</sup> [https://ico.org.uk/media/1637/eir\\_material\\_in\\_the\\_course\\_of\\_completion.pdf](https://ico.org.uk/media/1637/eir_material_in_the_course_of_completion.pdf)

<sup>4</sup> Appeal no: EA/2013/0069

### **The public interest test**

32. Where the exception in Regulation 12(4)(d) is engaged it is subject to a public interest test required by Regulation 12(1).
33. The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
34. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information which is required by Regulation 12(2).

### **The public interest arguments in favour of disclosure**

35. The council said that it is important to provide local residents with a clear understanding of the local plan process, and the work involved in developing the local plan, and that it should maintain transparency as much as possible to increase public faith in council decision making.
36. The complainant said that he considers the assessment methodology to be suspect as it does not show that an independent assessment has been conducted and appears to rely heavily on the views/actions of those concerned. He said that this is critical as the request relates to concerns that the leader of Eastleigh BC has gone beyond reasonable dialogue with developers prior to the completion of the public consultation phase. He is concerned that this level of influence has resulted in a prejudgment of the public consultation exercise, causing a local plan to potentially fail at the Secretary of State assessment stage and that this level of public interest has not been factored into the council's assessment.
37. The Commissioner considers that there is always a general public interest in disclosing environmental information, derived from the purpose of the EIR. She considers that some weight must always be attached to the general principles of achieving accountability and transparency which in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities. There may also be an argument for informing public debate on the particular environmental issue.

### **The public interest arguments in favour of maintaining the exception**

38. The council said that draft documents may misinform the public and mislead debate; that comments may be taken out of context; and that there is a clear statutory process whereby local residents are able to

view and comment on numerous documents and be involved in the local plan process.

### **The balance of the public interest test**

39. The council considers that the public interest favours withholding the information as the public benefit in releasing documents in respect of an incomplete process is minimal.
40. As stated above, the Commissioner accepts that there is always a general public interest in disclosure of environmental information and that there is a presumption in favour of disclosure.
41. The Commissioner considers that the timing of the request may well be a factor that affects the relative weight of the arguments in the public interest test. If a final version of a draft document exists when the public authority receives the request, the public interest in withholding the incomplete or draft version is likely to be reduced.
42. In relation to the argument that the information may misinform the public, mislead debate, and that comments may be taken out of context the Commissioner does not consider that this argument in itself carries any significant weight, because it should generally be possible for a public authority to put the disclosure into context. It should usually be possible to provide an explanation if, for example, a draft differs significantly from a final version.
43. As stated in the Commissioner's aforementioned guidance on regulation 12(4)(d), the misleading argument would only carry some weight if the information would create a misleading or inaccurate impression and there were particular circumstances that would mean it would be difficult or require a disproportionate effort to correct this impression or provide an explanation. Examples of this could include where the explanation could only be provided by an employee who has left the public authority, or the authority does not hold the final or corrected information. The Commissioner notes that the council did not provide any reasons as to why the council could not in this case put the disclosure into context by providing an explanation as to the differences between the requested draft and the final published version.
44. The Commissioner considers that the council has not provided specific detailed reasons, why the draft report should not be exposed to public scrutiny after the final publication of the document. Having viewed the draft of the 'Eastleigh Strategic Transport Study Interim Report - Issues and Options December 2015' it is not clear to the Commissioner why that draft should not be disclosed.



45. The council provided the Commissioner with a web link which sets out the anticipated timescales for the entire local plan process<sup>5</sup>. The Commissioner therefore understands that the overall issue remains live, as at the time the request was responded to, the 'Consideration of consultation responses, evidence gathering and testing options. Identification of a preferred approach' stage wasn't, and at the time of writing still isn't, completed, and the following stages have not yet commenced: 'Pre-Submission Publication stage (Regulation 19)', 'Submission to Secretary of State', 'Examination (including public hearing sessions)', 'Receipt of Inspector's Report', and 'Adoption' have not yet commenced. Therefore, release of information which could add to the public debate on the issue is in line with the purpose of the EIR.
46. For the reasons stated above and taking into account the timing of the request, the nature of the information and the EIR's emphasis on disclosure, the Commissioner has found that the public interest weighs in favour of the release of the requested information.

**Regulation 12(4)(e) – the request involves the disclosure of internal communications**

47. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
48. The council has applied this exception to emails and attachments to those emails in the form of a presentation to Members and a document entitled 'Eastleigh Strategic Transport Study – Project Scope; June 2015'.
49. The Commissioner has published guidance<sup>6</sup> on regulation 12(4)(e), which includes a description of the types of information that may be classified as 'internal communications.'
50. The first factor that must be considered is whether the information in question can reasonably be described as a 'communication'. In her aforementioned guidance on the exception, the Commissioner acknowledges that the concept of a 'communication' is broad and will encompass any information someone intends to communicate to others, or places on file so that others may read it.

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<sup>5</sup> <https://www.eastleigh.gov.uk/LDS>

<sup>6</sup> [https://ico.org.uk/media/1634/eir\\_internal\\_communications.pdf](https://ico.org.uk/media/1634/eir_internal_communications.pdf)

51. The Commissioner is satisfied that the information withheld under this exception properly constitutes 'communications' for the purpose of the exception. He has therefore next considered whether the withheld information constitutes 'internal' communications.
52. There is no definition contained in the EIR of what is meant by 'internal'. Consequently, in the absence of one, a judgment on what is an internal communication must be made by considering the relationship between the sender and recipient, the particular circumstances of the case and the nature of the information in question. Typically, however, an internal communication is one that stays within one public authority.
53. The council has confirmed that the emails were sent internally only and the Commissioner notes that the presentation is a briefing for Councillors. The Commissioner therefore considers that such information constitutes internal communications and the exception is engaged.
54. However, as it appeared to the Commissioner that the document entitled 'Eastleigh Strategic Transport Study – Project Scope; June 2015' originated from Hampshire County Council, she made further enquiries with the council. The council clarified that the document was received from Hampshire County Council. As stated previously, communications between two local authorities will not constitute internal communications. The Commissioner therefore does not consider that such information constitutes an internal communication and the exception is not engaged.
55. As the Commissioner considers that the exception is engaged in relation to the emails and the presentation to Members, she has gone on to consider the relevant public interest arguments in this case.

### **The public interest test**

56. Where the exception in Regulation 12(4)(e) is engaged it is subject to a public interest test required by Regulation 12(1).
57. The test is whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
58. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information which is required by Regulation 12(2).

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

59. The council said that its decisions should be open to public scrutiny, that transparency promotes confidence in local authorities, and that full

disclosure of information relating to decision making processes removes any suspicion as to how such decisions have been made.

60. The complainant submitted the same public interest arguments in favour of disclosing the requested information as detailed in paragraph 36.
61. The Commissioner considers that there is always a general public interest in disclosing environmental information, derived from the purpose of the EIR. She considers that some weight must always be attached to the general principles of achieving accountability and transparency which in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities. There may also be an argument for informing public debate on the particular environmental issue.

### **The public interest arguments in favour of maintaining the exception**

62. In essence, the public interest considerations relating to Regulation 12(4)(e) relate to the protection of thinking space and the ability to have full and frank discussions without fear that the information will be disclosed.
63. As stated in her aforementioned guidance on the subject, there is no automatic or inherent public interest in withholding an internal communication. Arguments should relate to the particular circumstances of the case and the content and sensitivity of the specific information in question.
64. The council submitted the following arguments:
  - "It is important that Officers are able to debate issues and reach decisions without external input or comment.
  - The Council must protect its internal decision making process in order to maintain the trust of its Officers and Members. Officers and members need a safe thinking space, as to disclose all internal communications in respect of the local plan would inhibit the frankness of debate.
  - Formal documents relating to the draft local plan are available (or will be available in due course) on the Council's website, and explain matters more fully than internal communications.
  - Internal communications may not provide a full picture and disclosure therefore may be misleading.

65. It also said that these arguments were previously made in a markedly similar matter at the First Tier Tribunal<sup>7</sup> where it was decided that the public interest in maintaining the exception outweighed the public interest in disclosure.

### **The balance of the public interest test**

66. The Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.
67. However, he considers that, in general, once a decision has been taken the private thinking space which is required is diminished and the sensitivity of the information is reduced. The timing of the request will therefore be an important factor.
68. The Commissioner does not consider that safe space arguments automatically carry much weight in principle. The weight accorded to such arguments depends on the circumstances of the specific case, including the timing of the request, whether the issue is still live, and the content and sensitivity of the information in question.
69. The Commissioner considers that although some particular processes which make up the preparation of the local plan, those being 'Commencement', 'Evidence Gathering' and 'Issues & Options consultation (Regulation 18)', were complete at the time of the request, it is clear that the overall production of the local plan is still in progress and not scheduled to be adopted until June 2018. Therefore the overall issue in hand was still live at the time of this request, and is still live.
70. In the specific circumstances of this case, and having considered the particular information in question, the Commissioner considers that disclosure of the withheld information could reduce the council's thinking space and the ability to have full and frank discussions without fear that the information will be disclosed. This could detrimentally affect the decision making process. She has therefore given the safe space argument significant weight.
71. In relation to the complainant's submission that the assessment methodology is suspect as it does not show that an independent assessment has been conducted, the Commissioner considers that full disclosure of information relating to decision making processes removes

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<sup>7</sup> Appeal no: EA/2013/0069

any suspicion as to how decisions have been made. Therefore, this argument does carry some weight.

72. The Commissioner has considered the argument that internal communications may not provide a full picture and disclosure therefore may be misleading. Generally, the Commissioner does not accept arguments that information should not be disclosed because it would be misleading. A public authority should be able to publish some context or explanation with any information it releases. However, as stated in the Commissioner's guidance on the public interest test<sup>8</sup>, the argument in relation to the information being misunderstood may only be used if it is not possible to provide this explanation, or if the explanation would not limit any damage caused. The council has not provided any details as to why this would be the case. Therefore the Commissioner has not given this argument any weight.
73. The Commissioner acknowledges the presumption in favour of disclosure inherent in regulation 12(2) of the EIR. She also accepts that there is an inherent public interest in the openness and transparency of public authorities and their decision making processes. However, due to the specific circumstances of this case, particularly that the overall production of the local plan is still in progress, the Commissioner has placed significant weight on the inherent value of protecting a safe space. She finds that the public interest in maintaining the exception is not outweighed by the public interest in favour of disclosure.

**Regulation 12(5)(f) – disclosure would adversely affect the interests of the person who provided the information**

74. Regulation 12(5)(f) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information where that person -
- i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
  - ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
  - iii) has not consented to its disclosure.

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<sup>8</sup> [https://ico.org.uk/media/for-organisations/documents/1183/the\\_public\\_interest\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf)

75. The council said that the information withheld under this exemption is two confidential communications between Councillor House and external third parties who are seeking to bring forward sites and infrastructure for development within the local plan.
76. The council explained that the communications meet the three criteria set down by regulation 12(5)(f) in that in both cases the external third party was not under an obligation to supply the information, the information was provided in confidence and therefore the council was not under any duty (other than the EIR) to disclose it, and those third parties have not consented to the disclosure.
77. Therefore, the Commissioner has determined that sub-paragraphs i) to iii) of regulation 12(5)(f) are satisfied. The next step is for the Commissioner to consider whether disclosure would adversely affect the interests of the providers of the information.
78. It is the Commissioner's view that the purpose of this exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available. It operates on the principle that if those who provide information on a voluntary basis suffer as a consequence of providing that information, they will not be so willing to volunteer information in the future. Therefore, to engage the exception it is necessary to demonstrate that disclosure would result in some adverse effect on the provider of the information.
79. The Commissioner is conscious that the threshold to engage an exception under regulation 12(5) of the EIR is a high one compared to the threshold needed to engage a prejudice based exemption under the FOIA:
  - Under regulation 12(5) for information to be exempt it is not enough that disclosure of information will have an effect, that effect must be 'adverse'.
  - Refusal to disclose information is only permitted to the extent of that adverse effect. Therefore if an adverse effect would not result from disclosure of part of a particular document or piece of information, then that information should be disclosed.
  - It is necessary for the public authority to show that disclosure 'would' have an adverse effect, not that it may or simply could

have an effect. With regard to the interpretation of the phrase 'would' the Commissioner has been influenced by the Tribunal's comments in the case Hogan v Oxford City Council & Information Commissioner<sup>9</sup> in which the Tribunal suggested that although it was not necessary for the public authority to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.

80. In its response to the Commissioner's enquiries, the council said that disclosure would adversely affect the parties' commercial interests in negotiating land deals and could lead to sites not being included within the local plan.
81. The Commissioner does not consider that this provides sufficient detail of the adverse affect that disclosure would have on the parties supplying the information, and having viewed the withheld information, she does not consider that the adverse affect is obvious.
82. The Commissioner considers that the council has been provided with sufficient opportunity to provide its rationale for withholding the requested information. The rationale should have been in place since the request was refused and therefore opportunities for providing this existed at the original refusal, at the internal review and when requested by the Commissioner. The council was informed by the Commissioner that it must justify its position and was provided with the Commissioner's guidance on how he deals with complaints<sup>10</sup> which clearly states that it is the public authorities responsibility to satisfy the Commissioner that information should not be disclosed and that it has complied with the law. In this particular case, the council was asked to explain how disclosure of the withheld information would adversely affect the interests of the person who supplied that information and to ensure that the particular interests of the person are clearly identified and that the explanation demonstrates a clear link between disclosure of the information that has actually been withheld and any adverse affect.
83. As the council did not provide sufficient details of what the adverse affect on the interests of the person who supplied the information would

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<sup>9</sup> Appeal number EA/2005/0026 & 0030

<sup>10</sup> [http://www.ico.org.uk/for\\_organisations/freedom\\_of\\_information/guide.aspx](http://www.ico.org.uk/for_organisations/freedom_of_information/guide.aspx)

be in this case, the Commissioner has no choice but to conclude that the exception at regulation 12(5)(f) is not engaged.

**Regulation 5(2) – Time for compliance and Regulation 7(1) – Extension of time**

84. Regulation 5(1) states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) states that this information shall be made available as soon as possible and no later than 20 working days after the date of receipt of request.
85. Regulation 7(1) states that a public authority can extend the period of 20 working days to 40 working days in any case where it reasonably believes that the complexity and volume of the requested information means it is not practicable to make a decision about whether to refuse the request within the 20 working day period.
86. The council received the initial request on 3 April 2016. On 2 June 2016 it informed the complainant that it holds the requested information and said the following:

“This is an update to firstly apologise for not yet being in a position to provide you with a formal response. I can confirm we are dealing with your request as a matter of urgency. Although it is the Council’s decision whether to release information it is considered good practise to consult third parties to whom information relates, We are in the process of doing this, as well as considering whether information is disclosable. I shall provide you a full response as soon as possible (I expect to be in a position to provide a response early next week).”
87. The Commissioner notes that the above statement regarding the delay does not refer to the complexity and volume of the requested information and therefore it does not appear that the council was intending to extend the time to 40 working days under the provision at regulation 7(1).
88. On 10 June 2016 the council provided its response in which it disclosed an email chain and cited exceptions.
89. As the response in this case was provided 48 days after the date of receipt of the request, the council did not respond to the request within the statutory time limit in breach of regulation 5(2).

**Regulation 11(5) - Representations and reconsideration**

90. Regulation 11(5) states the following:



“Where the public authority decides that it has failed to comply with these Regulations in relation to the request, the notification under paragraph (4) shall include a statement of—

- (a) the failure to comply;
- (b) the action the authority has decided to take to comply with the requirement; and
- (c) the period within which that action is to be taken.”

91. The complainant does not consider that the council’s internal review response provides sufficient detail to constitute a full response as required under this regulation. He specifically stated that “Training will be offered” is both a vague and dismissive response and requested that the Commissioner recommend/impose more detailed action regarding this matter.
92. The Commissioner considers that by council stating in its internal review response that it has failed to comply with the EIR in respect of the time taken to provide a response, the council has complied with regulation 11(5)(a).
93. She also considers that by council stating in its internal review response that ‘...additional training is being offered to officers and members in respect of the Council’s duties to respond to requests within the statutory timeframes’, the council has complied with regulation 11(5)(b).
94. However, by not specifically stating the period within which the additional training is to take place, the council has breached regulation 11(5)(c).

### **Other matters**

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95. The complainant has expressed his concern that the council default to 40 working days for an initial response instead of 20 working days.
96. It is noted that under regulation 11(4), the statutory timescale for responding to a request for an internal review is 40 working days.
97. The Commissioner also notes that in its internal review response dated 4 July 2016, the council said the following:

“Please accept my apologies for the delay in acknowledging your complaint. This has been dealt with as a request for internal review in accordance with the Environmental Information Regulations 2004 (‘EIR

2004'). Whilst I appreciate that you have asked for this to be separated by complaint type, there is a formal procedure for dealing with complaints set out in Regulation 11 of the EIR 2004, and therefore I have dealt with your complaint in accordance with the procedure set out in Regulation 11. I have, however, considered the two aspects of your complaint separately, as set out below.

### Item 1

I have reviewed the timeline of events in respect of your request, and I consider that in this instance the Council has failed to comply with the EIR 2004 in respect of the time taken to provide a response to your request. Please accept my apologies for the delay which occurred. I understand that your request was received during peak election time, meaning Councillors (including the Leader; Councillor House) were incredibly busy. It therefore took some time for the Council Leader to be able to locate and provide relevant information. This consisted of a number of lengthy complex emails which had to be carefully reviewed (and upon review it was felt that a number of the emails were not relevant to the information you requested), and as you were previously informed consultation with third parties to whom information relates had to be carried out. Therefore, on this occasion we were unfortunately not able to provide you with a full response with the 40 working day timescale. In accordance with Regulation 11 I can confirm that the action being taken in respect of this is that additional training is being offered to officers and members in respect of the Council's duties to respond to requests within the statutory timeframes. Whilst the Council endeavours to always meet the statutory timeframes required there are unfortunately times when this timeframe is not met."

98. The Commissioner considers that it is not clear whether the 40 working day timescale referred to above relates to the initial request or the request for an internal review. It appears that the paragraphs above have caused the complainant's concern regarding the timeframe for responding to a request.
99. The Commissioner has not seen evidence that the council default to 40 working days for an initial response. She notes that the council's website<sup>11</sup> refers to the 20 working day time limit for responding to an

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<sup>11</sup> [https://www.eastleigh.gov.uk/the-council/data-protectfreedom-of-information/publication-scheme-\(foi\)/foi-complaints-procedure.aspx](https://www.eastleigh.gov.uk/the-council/data-protectfreedom-of-information/publication-scheme-(foi)/foi-complaints-procedure.aspx)

initial request and that it states that a response to an internal review request will be responded to within 20 working days.

## Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

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

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

101. 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.

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

**Signed .....**

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