

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 19 November 2018

**Public Authority:** Cornwall County Council  
**Address:** County Hall,  
Treyew Road  
Truro  
Cornwall  
TR1 3AY

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to a complaint made against a neighbour regarding planning contraventions. He considered that the council had not investigated the complaint properly previously, and following a complaint to the Local Government Ombudsman (the LGO) he was awarded compensation and the council was required to complete its investigations. The complainant's requests were essentially for information regarding the actions taken by the council subsequent to this.
2. The council applied the exemptions in Regulation 12(4)(b) (manifestly unreasonable), Regulation 12(5)(d) (confidentiality of proceedings), Regulation 13 (personal data of a third party), Regulation 5(3) (personal data of the applicant for the information) and Regulation 12(5)(b) (course of justice). During the course of the Commissioner's investigation however the council agreed to provide further information to the complainant and withdrew its reliance upon Regulation 12(5)(d).
3. The Commissioner's decision is that council was correct to apply Regulation 12(4)(b) to parts 1 to 3 of the request, that it was correct to apply Regulation 13 and 5(3) to personal data within the withheld

information, and that it was also correct to apply Regulation 12(5)(b) to the information.

4. She had decided however that as the council responded to one request outside of the 20 working days required by the Act that the council did not comply with the requirements of Regulation 5(2) for this information.
5. The Commissioner does not require the council to take any steps.

### **Request and response**

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6. The complainant wrote to council and requested information in the following terms:

Request 1, dated 8 June 2017

*"For each of the Planning Enforcement files [redacted];*

*1. Please provide copies of all officer notes on this file.*

*2. Please provide a copy of the document or documents that record;*

*(i) the Council's decision on this enquiry and the reason for the decision,*

*(ii) the reason for closing the file, and;*

*(iii) the reason for taking no further enforcement action.*

*3. Please provide copies of all correspondence, whether by letter or email, on this file.*

*4. Please provide copies of any formal notices, including requests for information on land ownership and Planning Contravention Notices, served by the Council under this Enforcement Enquiry and copies of all responses received by the Council to such notices.*

*5. Please explain exactly why the 'Close Reason' on the planning register is 'No Breach Found'.*

*6. Please explain the decision to take no further enforcement action.*

*Local Government Ombudsman (LGO) Complaint reference: [redacted]*

*Please provide copies of all the documents, including documents*

*recording the Council's comments and submissions, provided by the Council to the LGO in respect of this LGO Complaint, as referred to in the LGO Decision (paragraph 5) dated 15 November 2015.*

*Local Government Ombudsman (LGO) Complaint reference: [redacted]*

*Please provide copies of all the documents provided by the Council to the LGO in respect of this LGO Complaint as referred to in the LGO Decision (paragraphs 17 and 19) dated 6 April 2017, and also copies of documents recording the Council's comments and submissions to the LGO in respect of this LGO Complaint."*

7. The council responded on 6 July 2017. It applied Regulation 12(4)(b) (manifestly unreasonable).

Request 2, dated 17 July 2017

*"For each of the Planning Enforcement [redacted];*

- 1. Please provide copies of any formal notices, including requests for information on land ownership and Planning Contravention Notices, served by the Council under this Enforcement Enquiry and copies of all responses received by the Council to such notices.*

- 2. Please provide copies of all correspondence, whether by letter or email, on this file.*

*Local Government Ombudsman (LGO) Complaint reference: [redacted]*

*Please provide copies of all the documents, including documents recording the Council's comments and submissions, provided by the Council to the LGO in respect of this LGO Complaint, as referred to in the LGO Decision (paragraph 5) dated 15 November 2015.*

*Local Government Ombudsman (LGO) Complaint reference: [redacted]*

*Please provide copies of all the documents provided by the Council to the LGO in respect of this LGO Complaint as referred to in the LGO Decision [redacted], and also copies of documents recording the Council's comments and submissions to the LGO in respect of this LGO Complaint."*

8. The council responded on 9 August 2017. It applied Regulation 12(4)(b) to the request.

Request 3, dated 15 August 2017

*"Just in relation to LGO complaints;*

*1. LGO Complaint - ref: [redacted]*

*Please provide copies of all the documents provided by the Council to the LGO in respect of this LGO Complaint, including those referred to in the LGO Decision (paragraph 5) dated 15 November 2015 and the Council's comments and submissions to the LGO.*

*2. LGO Complaint ref: [redacted]*

*Please provide copies of all the documents provided by the Council to the LGO in respect of this LGO Complaint as referred to in the LGO Decision (paragraphs 17 and 19) dated 6 April 2017, and also copies of documents recording the Council's comments and submissions to the LGO in respect of this LGO Complaint."*

9. The council responded on 17 August 2017. It withheld the information under FOI section 40(2) (personal data of a third party), however it also indicated that the information was about the complainant and was not appropriate to be put into the public domain.
10. The council provided an internal review of the above requests on 12 October 2017. It upheld its decision as regards each individual request, but did change its decision on the request of 15 August 2017 to take into account its error in considering the request under the FOI Act initially. It therefore withheld the information under Regulation 13 (personal data of a third party).

Request 4, dated 13 October 2017

*"In respect of Planning Enforcement file [redacted];*

*1. Please provide copies of any formal notices, including requests for information on land ownership and Planning Contravention Notices, served by the Council under this Enforcement Enquiry and copies of all responses received by the Council to such notices.*

*2. Please provide copies of all correspondence, whether by letter or email, on this file."*

11. The council initially responded by saying it was delaying its response (although it referred to an incorrect request when doing so). It subsequently responded on 13 December 2017. It provided some

information however it withheld information under Regulation 12(3) (personal data of a third party), Regulation 12(5)(b) (course of justice), and Regulation 12(5)(d) (confidentiality of proceedings).

12. The council responded to the internal review request on 11 March 2018 regarding all of the above requests. It upheld its earlier decisions.

### **Scope of the case**

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13. The complainant contacted the Commissioner 5 January 2018 to complain about the way his request for information had been handled.
14. The complainant has made a complaint to the Commissioner about the council's application of the exceptions in Regulation 12(4)(b), Regulation 13(1), Regulation 12(5)(b) (course of justice) and Regulation 12(5)(d)(confidentiality of proceedings).
15. The council also received a subject access request from the complainant under section 7 of the DPA, which the Commissioner has received a separate complaint about. This has been dealt with separately to the issues decided in this decision notice.
16. During the course of the Commissioner's investigation the council withdrew its reliance upon Regulation 12(5)(d) and provided redacted documents to the complainant under his rights under the Data Protection Act 1998 (although it wrongly attributed these rights to the 2018 Act).
17. The complainant's arguments suggest that part of the reason for the council's failure to provide information is to cover up a conflict of interest between a council officer and a landowner. This is not a matter which the Commissioner has the powers to investigate. He also suggested that its reasons for failing to provide information had less to do with concern over the disclosure of personal data of various parties but with preventing any transparency or scrutiny of the Council's investigation and decision making.
18. The Commissioner therefore considers that the complaint is that the council was not correct to apply the exceptions it has to the information.

## Reasons for decision

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### Regulation 12(4)(b)

19. Requests 1 and 2 were deemed manifestly unreasonable by the council on the basis that it would require an unreasonable diversion of resources to respond to the request and create a disproportionate burden on the council. The complainant disputes this finding and has provided a number of discrepancies with the council's response which he has asked the Commissioner to consider.
20. The council said that for each of these requests it provided advice and assistance to the requestor, and provided copies of this advice to the Commissioner for her consideration. It subsequently admitted to the complainant that the advice could have been more detailed and offered apologies to the complainant for this.
21. Regulation 12(4)(b) of EIR states that: "*For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that – the request for information is manifestly unreasonable.*"
22. In line with her published guidance which follows previous Tribunal decisions, the Commissioner considers a request can be manifestly unreasonable if the cost of complying with it is too great.
23. The EIR differ from the FOIA in that there is no specific limit set for the amount of work required by an authority to respond to a request, as that provided by section 12 of the FOIA. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations) which apply in relation to section 12 of the FOIA are not directly relevant to the EIR - the cost limit and hourly rate set by the fees regulations do not apply in relation to environmental information. However, the Commissioner accepts that the fees regulations provide a useful starting point where the reason for citing regulation 12(4)(b) is the time and cost of a request, but she considers that they are not a determining factor in assessing whether the exception applies.
24. The Commissioner is satisfied that Regulation 12(4)(b) sets a fairly robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is 'manifestly' unreasonable, rather than simply being 'unreasonable' per se. The Commissioner considers that the term 'manifestly' means that there must be an obvious or clear quality to the identified unreasonableness.

It should be noted therefore that public authorities may be required to accept a greater burden in providing environmental information than other information. This was confirmed by the Information Tribunal in the

DBERR case (*Department for Business Enterprise and Regulatory reform v The Information Commissioner and Platform. Appeal no. EA/2008/0097*) where the tribunal considered the relevance of Regulation 7(1) and commented as follows (paragraph 39):

*"We surmise from this that Parliament intended to treat environmental information differently and to require its disclosure in circumstances where information may not have to be disclosed under FOIA. This is evident also in the fact that the EIR contains an express presumption in favour of disclosure, which FOIA does not. It may be that the public policy imperative underpinning the EIR is regarded as justifying a greater deployment of resources. We note that recital 9 of the Directive calls for disclosure of environmental information to be "to the widest extent possible". Whatever the reasons may be, the effect is that public authorities may be required to accept a greater burden in providing environmental information than other information."*

25. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will take the following factors into account:

- Proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services.
- The nature of the request and any wider value in the requested information being made publicly available.
- The importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue.
- The context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.
- The presumption in favour of disclosure under Regulation 12(2);
- The requirement to interpret the exceptions restrictively.

26. The Council has provided the Commissioner with its rationale for applying the exception to disclosure provided by Regulation 12(4)(b). It said that upon receiving the first and second requests it had completed charging templates setting out the work which would be required to locate, retrieve and extract the relevant information for the request. It

confirmed to the Commissioner that these charging templates set out the quickest way of gathering the required information.

27. It said that as both of these requests asked for 'all information' on three separate, but related, enforcement cases this triggered a need for email audits (which it called mailmeters). Email audits search the council's email systems for relevant emails sent or received by specific email addresses over a specific time period using key words or phrases. It said that it is obtaining results from these mailmeters which make up the substantial amount of time estimate. It provided its charging templates to the Commissioner demonstrating that this was the case.
28. It said that it originally considered that each email would take 5 minutes to review its relevance for release, however during the internal review it was found that even reducing this to 3 minutes per email left a time estimate which it considered to be manifestly unreasonable.
29. It said that since responding to the requests it had carried out a sampling exercise for the FOI team to determine an average time for reviewing emails from mailmeter searches, and that it had used these requests as its basis for the exercise. Three officers in the team had each reviewed 10 randomly selected emails from the mailmeter results for this case and timed how long it took them to review them for relevance to the request. As a result of this exercise it had determined that an average time for each email was 3.8 minutes.
30. It said that, as a result of this exercise it had recalculated the time it would take to respond using the figure the rounded up figures of 4 minutes per email. Its estimate is that the 1<sup>st</sup> request would take 28.25 hours to complete, and the second request would take 31.7 hours. It said that using these figures, it considered the requests to be manifestly unreasonable.
31. It said that in addition to this, it has taken into account a view that the complainant is seeking to reopen matters that have already been extensively investigated by both the council and the Local Government Ombudsman (the LGO). It provided a copy of the outcome of the LGO investigations to the Commissioner for her consideration.

### Conclusions

32. Having considered the above the Commissioner is satisfied with the thoroughness with which the council set about completing estimates for the time to respond to these requests, and its subsequent sampling exercise has demonstrated the effectiveness of its calculations in this respect.



33. The council is a county council, and its 2017 report on its workforce states that it has 3943 employees with full time contracts and 1766 employees on part time contracts<sup>1</sup>. It published its revenue budget for 2017/18 as being £519 million.<sup>2</sup> It is therefore a large council which covers a population stated as being 532,300 in the 2011 census. This is relevant in assessing how responding to the request might impact upon its ability to carry out its functions. The Commissioner would expect that larger public authorities would have greater scope to respond to requests without the significant burden which would be created on a smaller authority.
34. Despite being a large council, the Commissioner recognises that the budgets for local government organisations are currently tight with many, including Cornwall Council, consistently trying to make cost cuts taking efficiency measures to reduce their expenditure. Responding to the first request would have taken the council an estimated time of 28.25 hours, the second would have taken an estimated 31.7 hours. This is a substantial amount of time to deal with one request for information, and is significantly larger than the appropriate limits set out for responding to requests under the FOI Act. The Commissioner therefore considers that responding to these individual requests would create a significant burden on the council.
35. The request seeks to determine the actions which were taken by the council in respect of a complaint about planning contraventions. A disclosure of the information therefore relates to the council's enforcement activities, but in the context of a small number of complaints relating to one particular set of circumstances which have already been considered by the LGO.
36. The information is therefore of limited use in determining the overall effectiveness of the council's investigation and enforcement of planning matters. They are essentially a snapshot of the council's enforcement process, relating to one set of circumstances which affect a very small number of people.

<sup>1</sup> <https://www.cornwall.gov.uk/media/24199990/cc-workforce-information-psed-2017.pdf>

<sup>2</sup> <https://www.cornwall.gov.uk/media/31879196/budget-book-2017-2018.pdf>

37. Having considered the above factors the Commissioner is satisfied that the council was correct to apply Regulation 12(4)(b) to the requests.
38. The complainant highlighted to the Commissioner that the council's responses differed in the amount of emails which had been located between requests. He argued that the file was closed and therefore no further information should have been added to it in the time between requests.
39. The Commissioner considers however that this is not a matter which affects the outcome of the application of the exemption in this instance. The Commissioner is satisfied that whether the response is the lower or higher figures it does not create a significant difference to the application of the exception in this instance.

#### The public interest

40. Under Regulation 12(1)(b) the Commissioner must carry out a public interest test to determine whether the information should be disclosed even though the exception has been engaged. 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.
41. When carrying out this test Regulation 12(2) provides a presumption towards the disclosure of the requested information.

#### The public interest in the disclosure of the information

42. The Commissioner has considered the public interest in the information being disclosed. The central public interest is in allowing the public to scrutinise the actions taken by the council in respect of its actions following a decision by the LGO that it had failed to act properly in respect of a planning complaint. A disclosure of the information would increase the transparency surrounding the council's actions following the LGO's decision and potentially highlight its effectiveness in dealing with enforcement complaints.
43. However the Commissioner notes that the requests relate to one individual's complaint against a neighbour and would only act as a snapshot of events during the course of the council's investigation into one particular issue, which affects only a small number of people. Nevertheless a disclosure of the information would create greater transparency on the council's actions following the LGO's decision.

The public interest in the maintenance of the exception

44. Weighed against these factors is the burden imposed on the Council by this particular request, particularly in terms of officer time and cost to the Council balanced against the limited public interest in the information being disclosed.
45. The Commissioner believes that there is merit to the public interest arguments which favour compliance with this request but she must also give weight to the effect that this would have on the Council in terms of causing a disproportionate and unjustified level of disruption. The burden imposed on the council by this request constitutes a significant diversion of resources away from its functions and as such would have a proportionally detrimental impact on its provision of services to the public.
46. It appears to the Commissioner that the complainant is using the provisions of the EIR in an attempt to uncover any information which may or may not be informative, over and above the information normally made available in respect of planning enforcement issues. This appears to be primarily on the basis that the council has not taken steps which he considers responds adequately to resolve the issues which were raised by the complainant.
47. There is no question that the council did investigate the issue, and with the subsequent LGO requirements the council did take action to rectify the issues which LGO had identified albeit that the complainant may believe that further action should have been taken. These concerns relate primarily to the private interests of the complainant rather than the public interest however.
48. Additionally, complying fully with the complainant's request will infringe upon the private interests of other parties. Whilst these issues may have highlighted potential contraventions in planning requirements it is for the council to take such matters forward and make decisions based upon its set procedures and planning laws. The solution for the complainant in such matters lies with the LGO and/or potentially through a judicial review of the council's decisions. Whilst requests under the FOI Act or the EIR have a part to play in creating greater transparency on the actions of public authorities in cases such as this, that transparency must be balanced against the overall impact of the requests on the council's ability to carry out its functions. It will also take into account other legal resolutions which the complainant might have available to him.

49. Responding to the requests would create a significant burden on the council. This impact, when considered alongside the fact that the LGO has already completed an investigation, and other means of resolution to complain about the council's decision provides greater weight to the public interest which favours maintaining the council's application of Regulation 12(4)(b).
50. The Commissioner has therefore decided that the public interest rests in the exception being maintained in this instance. The council was therefore correct to apply Regulation 12(4)(b) to these requests.

#### Regulation 12(5)(d)

51. The council also applied Regulation 12(5)(d) to correspondence between itself and the LGO. Regulation 12(5)(d) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
52. The council argued that the correspondence between itself and the LGO took place as part of an investigation by the LGO following a complaint it had received about its actions, or inactions as regards a planning regulations complaint.
53. During the course of the Commissioner's investigation, having reconsidered its position, the council agreed to disclose the majority of the information it withheld under this exception to the complainant under his rights under The Data Protection Act 1998, however it redacted certain sections of the correspondence such as the identities of individuals and council officers contact details under Regulation 13(1).
54. With the disclosure of the information previously withheld under Regulation 12(5)(d) the Commissioner has not found it necessary to consider the application of this exception further within this decision notice.

#### Regulation 5(3)

55. The council disclosed some information to the complainant under his rights under the Data Protection Act 1998.
56. Regulation 5(3) provides that where the requested information is personal data relating to the applicant for the information then it is exempt from disclosure under the EIR.

### Regulation 13

57. The council applied Regulation 13 to information falling within the scope of the fourth request highlighted above. Initially it applied section 40(2) of FOIA but during the review it recognised its error in considering the information under the FOI Act and applied Regulation 13 of the EIR.

58. Regulation 13(1) provides that:

*"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."*

59. Regulation 13(2) provides that

*"The first condition is –*

*(a) in a case where the information falls within any paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene –*

*(i) any of the data protection principles; or..."*

60. The information withheld under Regulation 13 included redactions from correspondence with an MP, correspondence relating to the LGO's findings following its investigation and the entirety of a Planning Contravention Notice (a PCN).

61. During the course of the Commissioner's investigation the council reviewed its decision and decided it could disclose further information relating to the MP's correspondence, redacting personal data such as the identities of some of the correspondents who are identified within the documents. It fully redacted copies of the MP's correspondence which it had received. As stated above, it also decided to disclose information to which it had initially applied Regulation 12(5)(d), however it continued to redact personal data from these documents.

62. The council also disclosed copies of correspondence following the outcome of the LGO's investigation.

63. Both disclosures were made to the complainant under the complainant's access rights under The Data Protection Act rather than under the EIR, and so only the sections which have been redacted under Regulation 13 have been considered further under the EIR in this decision notice.

64. The first question which the Commissioner must consider is whether the withheld information is personal data. If that is the case, then the next question required in Regulation 13 is whether a disclosure of that personal data would fail to comply with any of the data protection principles of The Data Protection Act 1998. Whilst this Act has now been superseded by The Data Protection Act 2018, at the time that the request was received and being considered by the council the older legislation which was still in force.

Is the withheld information personal data?

65. In the case of names and identities within the withheld information this is clearly personal data.
66. As regards the PCN, the council argues that the document relates to a specific property owned by an identifiable individual, and that the information is therefore personal data relating to them. The Commissioner considers that following the First-tier Tribunal's decision in the case of *England & L B of Bexley v the Commissioner (EA/2006/0060 & 0066)* the disclosure of addresses alone (i.e. without the associated details of the owner of a property) can amount to personal data.
67. In applying this to the current case, a disclosure of the withheld information would disclose information about the owner and other associated individuals to the whole world. In effect, the owner of the property is already known to the complainant, as is the fact that a PCN was issued. However a disclosure of the information to the whole world under the Regulations would also allow members of the public to identify that the owner of the property received a PCN and this would be personal data relating to him. In addition, details of an associated land owner would become public, and this information would also be personal data relating to them.
68. Following on from this, the Commissioner is satisfied that the withheld information is personal data relating to third parties.

Would a disclosure of the information breach any of the data protection principles of The Data Protection Act 1998?

69. The relevant data protection principle in this case is the first data protection principle. This states that:

*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

70. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.
71. Whilst the complainant is already aware of some facts relating to third parties, he is not fully aware of all of the details of the case. Additionally, under the FOI Act and the Regulations disclosures are considered to be to the whole world. Therefore, release of the withheld information would provide details above what is already in the public domain to all. It would also provide the complainant with personal information relating to third parties which he has not previously had access to.
72. The council argues that the individual would not expect their information to be disclosed under the circumstances. Planning enforcement is not a public process, partly because of the possibility of unlawful behaviour, and because it is not the case that the enforcement process will always find against an individual. It said that disclosure of the information might lead others to infer wrongdoing where none is found, and that this would be unfair to the individual.
73. Even if the council was to redact the identity and address of the individual concerned the complainant would be aware of who the information related to.
74. The council confirmed that it has not sought the consent of the individual concerned to disclose his personal information as, under the circumstances of the case, it was clear that consent would not be given.
75. The council also felt that it would be unfair on the individual as he effectively had no option but to provide personal information about him and his property in response to its inquiries via the PCN. It said that it is a criminal offence not to provide information in response such a notice. If it complied with the complainant's request by disclosing the PCN it would then be disclosing that information publicly.
76. The complainant has countered this point by stating that PCN notices are clear that a prosecution may follow, and as criminal prosecutions are held in public courts the recipient of such notices cannot have any expectation that the information they provide would be retained in

confidence and not disclosed. If a prosecution followed then that information would form part of the court case, and therefore become accessible to the public. The Commissioner however considers that the nature of the expectation would be that that information would be retained in confidence unless and until a prosecution is brought forward, and then subsequent disclosure of any personal information provided by the recipient would be managed by the courts. She does not therefore consider that the complainant's arguments are correct in this respect.

77. The complainant also argues that much of that data is already in the public domain due to the LGO's investigation. Whilst the complainant may have had access to some of information, the question for the Commissioner is whether the public as a whole would have access to that information, and whether the entirety of that information is publicly available as a result.
78. The complainant's representative stated in his complaint to the ICO that *"Given that [name of complainant redacted] is the informant of the planning enforcement investigations, and the complainant to the LGO, and it is he who has made the allegations of planning breaches against [names redacted], there is no reason why the requested information should not be disclosed to him"*.
79. The Commissioner considers that that is not the case. The complainant has wrongly assumed that a disclosure of information to a party to the LGO's investigation equates to a disclosure to the whole world under the EIR. Additionally he has failed to recognise that a response under the EIR is not the same as disclosures provided to parties to the LGO's investigation, or through a subject access request under section 7 of the DPA 1998. All of the information relating to an LGO's investigation does not become publicly available as a result of their investigation and an individual whose personal data is caught within that investigation would have no expectation that personal information relating to them may become public in this manner when they provide their information to the council. The Commissioner also notes that there are statutory prohibitions in place to prevent information provided to the LGO as part of an investigation being disclosed other than under specific circumstances. Again, where information does become public in this way this would be managed by the LGO in his or her published report and is anonymised.
80. The Commissioner therefore considers that the individual and another associated land owner would not expect that details about their dealings with the council over the issue would be disclosed to the whole world under the circumstances of this case. Neither would it have been obvious to them that that was the case when they provided their



information, or the council obtained that information from or about them for the purposes of its investigation.

81. The Commissioner has also considered the detriment to the individuals if the information were to be disclosed. The individuals would lose privacy on matters which are generally not disclosed into the public domain. The loss of privacy over the issue is likely to be distressing to the individuals concerned given the nature of the information which is in question.
82. The Commissioner has balanced the legitimate interest of the public in obtaining this information with that of the party whose personal data would be disclosed. The issue relates to a single property and the effects upon the wider public are limited. Given the distress a disclosure of the details would have on the individual the Commissioner has decided that the interests of the individuals outweighs the legitimate interests of the public in receiving the information in this case.
83. The Commissioner has therefore decided that a disclosure of the information would breach the requirements of the first data protection principle of The Data Protection Act 1998. The council was therefore correct to apply Regulation 13(1) as regards the document it redacted in its entirety.

The application of Regulation 13 regarding council officers' personal data

Does the disclosure of the information contravene any of the data protection principles?

84. The council argues that a disclosure of the personal data would be unfair and that it would fail to comply with the first data protection principle.
85. In deciding whether disclosure of this information would be unfair, the Commissioner has again taken into account the nature of the information, the reasonable expectations of the data subjects, and the consequences of disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

Nature of the information and reasonable expectations

86. The relevant information is the identities and contact details of the council's officers which has been redacted from the correspondence it has disclosed. The council argues that the individuals would have no expectation that their identities and contact details would be disclosed to the public in relation to the investigation.

87. Additionally the complainant made a complaint to the council that one of its officers had a conflict of interests and should not have been involved in decision making on the case. Some redacted information relates to this aspect of the complaint.
88. In the case of public employees, there is a generally an expectation that personal information relating to them carrying out their public roles holds a different level of expectation to personal information about their private lives. However this is, to an extent, dependent upon their seniority and their roles within the public authority. A more senior officer, and officers in public facing roles must have a greater expectation that information about their public roles will be disclosed in order for the authority to be accountable for their actions. Less senior officers will have far less of an expectation.
89. The officers whose information has been redacted are not senior officers and their role is not generally public facing roles.
90. The Commissioner recognises that as work contact details these individuals would have a full expectation that their details may need to be disclosed as part of the course of their role with the council. The Commissioner considers however that to disclose this personal contact information to the public as a whole would not fall within the expectations of these individuals as it would mean that they could be contacted directly by any members of the public not directly related to their current or past work with the council, potentially even outside of working hours. Given the nature of the work which they carry out with the council (planning enforcement activities), this would be a distinct possibility and it would be likely to have a detrimental effect on their ability to carry out their work.
91. The Commissioner accepts that it is probable that if an internet search were to be carried out then some of the identities of individuals might be able to be found in association with their employment, but considers that this would not link them to the investigation, nor any associations with the opinions and advice provided within the correspondence.
92. Additionally, as regards the complaint regarding the conflict of interests of one of its officers, the Commissioner is satisfied that the individual would have no expectation that information relating to their personal circumstances would be disclosed to the whole world in response to an FOI or an EIR request.
93. Having considered the information the Commissioner is satisfied that the individuals would not expect that their identities would be disclosed in the context of the disclosure of this information relating to this request.

### Consequences of disclosure

94. In order to assess the impact of the consequence of disclosure on whether disclosure would be fair, it is necessary to consider whether disclosure of the information would cause unwarranted damage or distress to the data subjects.
95. The Commissioner considers that the disclosure would associate advice and opinions provided during the course of the investigation to the individuals. She considers that the main consequence of a disclosure of the identities of the individuals would therefore be a general loss of privacy for these individuals. She accepts however that their work was being carried out on behalf of the council, and the public does have a legitimate interest in the council being transparent about the individuals who were in correspondence over the matter. Nevertheless in the case of employees who are not senior officers within the council this legitimate interest is weakened significantly.
96. As regards the disclosure of email addresses and the telephone numbers of council officers, as information disclosed under the Act is considered to be to the whole world, the Commissioner must take into account the possibility that the disclosure would lead to an increase in them receiving unwanted calls during and after their working hours.

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

97. The council disclosed the vast majority of the body of the correspondence, including opinions and advice in order to be transparent about the process it went through during the course of the investigation. For this reason the Commissioner considers that it is not necessary for the identities of individuals to be disclosed in order to understand the process and course of the investigation and the correspondence which they entered into.
98. A disclosure of the identities of the individuals would only create an increase in transparency in the surrounding investigation to a marginal degree. The Commissioner therefore considers that the legitimate interest of the public in the disclosure of the identities of the individuals within the information is relatively low.
99. The Commissioner therefore considers that any disclosure would be unwarranted as regards the individuals' rights and freedoms, and particularly in respect of their expectations of privacy. The Commissioner considers that a disclosure of this information would not comply with the first data protection principle.

100. The Commissioner's decision is that the council was correct to apply Regulation 13(1) to this information.

The MP's correspondence

101. The MP was asked whether she consented to the disclosure of her correspondence. The council argued that they had consulted with the office of the MP and it had responded stating that it felt that the information should be withheld. Although some related correspondence responding to this was subsequently disclosed by the council (subject to redactions of personal data), it withheld the entirety of the correspondence it received from the MP on the basis that Regulation 13 applied.

102. The Commissioner considers that although the public expect MPs to be open and transparent about their actions, MPs themselves generally expect their correspondence on behalf of constituents will be treated as confidential, and may well be exempt under or Regulation 13 (or section 40 of FOIA) where they relate to an MP writing on behalf of a constituent.

103. Although the situation in this case effectively concerns the complainant, nevertheless the correspondence which was sent by the MP would have been made under the understanding that it was being sent in confidence as she was corresponding as part of her role representing one of her constituents. Additionally, because of the nature of the issues being raised, the correspondence also relates to another constituent and to council officers. It also relates to relatively sensitive matters.

104. The disclosure of the correspondence to the complainant under the EIR would have had the effect of disclosing personal data relating to these individuals into the public domain against both their expectations, without their consent, and in all likelihood, at least for some of the parties, against their wishes. The Commissioner also believes that a disclosure of this information would be distressing to the third parties which the correspondence pertains to.

105. The Commissioner therefore considers that a disclosure of this information would be unfair to the individuals concerned.

106. Additionally, for the reason outlined above, she does not consider that the legitimate interests of the public in having access to this information outweigh the rights and freedoms of the data subjects concerned.

Regulation 12(5)(b) – course of justice

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

*(b) 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;”*

108. The council claims that some information relating to its investigation is subject to legal professional privilege. The First-tier tribunal has accepted that the question of the disclosure of environmental information which is subject to legal professional privilege may fall within the scope of Regulation 12(5)(b) to be considered. In *Kirkaldie v Information Commissioner & Thanet District Council (EA/2006/0001, 4 July 2006)* the Tribunal stated that:

*“The purpose of this exception is reasonably clear. It exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation”.*

109. Therefore the Commissioner considers that legal professional privilege is a key element in the administration of justice and a key part of the activities that will be encompassed by the phrase ‘course of justice’.

110. In order to reach a view as to whether the exception is engaged the Commissioner must firstly consider whether the information is subject to legal professional privilege and then decide whether a disclosure of that information would have an adverse effect on the course of justice. The Commissioner notes however that, even where withheld information is not directly covered by legal professional privilege, if its disclosure would have an adverse effect upon the course of justice then the exception in Regulation 12(5)(b) may still apply.

111. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the First-tier Tribunal (“the Tribunal”) in the case of *Bellamy v The Information Commissioner and the DTA (EA/2005/0023)* as:

*“...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be*

*imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation."*

112. There are two types of privilege; 'litigation privilege' and 'legal advice privilege'. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege will apply where no litigation is in progress or being contemplated.
113. In both these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
114. The council confirmed that it considered that the information was covered by advice privilege.
115. The information withheld by the council under Regulation 12(5)(b) is communications between qualified legal officers in the council's legal department and their client – officers in the Planning Enforcement Department. The council argues that the information was created with the sole purpose of obtaining legal advice in a professional capacity. It further argues that the information is considered to be confidential, that the information has substance and that it was imparted in circumstances which led to an expectation of confidence. It does not consider that legal professional privilege has been waived or lost through a disclosure of the information held within the communications.
116. Having considered the information the Commissioner is satisfied that it is covered by legal professional privilege. The Commissioner therefore considers that a disclosure of the withheld information would be likely to adversely affect the course of justice in this case.
117. The Commissioner has therefore concluded that the exception in Regulation 12(5)(b) is engaged.

#### The public interest

118. Regulation 12(5)(b) is subject to a public interest test, required by Regulation 12(1)(b). 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.
119. When carrying out this test Regulation 12(2) provides a presumption towards the disclosure of the information concerned.

The public interest in the information being disclosed

120. There is an inherent public interest in general openness and transparency with regard to decisions made by public authorities. The central public interest in the information being disclosed in this case is in creating greater transparency and accountability on the council's actions in its approach to an enforcement complaint following the findings of the LGO investigation.
121. There is a public interest in providing information which demonstrates how complaints and enforcement of planning laws are approached by the council. A disclosure of the information would help to clarify how the law in this area is approached by the council. The Ombudsman's decision that compensation was due, and that the council had failed to investigate the issue and reach a decision appropriately provides support to the information being disclosed in this case. A disclosure would provide greater transparency on how the council resolved the issue following the Ombudsman's decision.
122. Nevertheless the Commissioner notes that the issues centrally at stake in this case relate primarily to the private interests of the complainant rather than any wider public interests. They relate primarily to why the council did failed to address the issues raised by complainant's complaint regarding his neighbour in the way he wanted them to.

The public interest in the information being withheld

123. The council argues that officers in the Enforcement department should be able to seek legal advice on the basis of full and frank discussions and disclosure with its legal advisors that do not result in prejudice to its position or its ability to defend itself fairly in the future in this case and other similar cases. Whilst the enforcement investigations were complete at the time of the request this does not prevent the advice still being relevant and live for the purposes of the council and for any subsequent complaints which the complainant or his representatives may make.
124. It said that it is concerned that by placing the legal advice in the public domain it could weaken the Council's position in bringing enforcement action and as a regulatory authority with statutory responsibility for taking such enforcement action, to undermine its ability to do so would not be in the public interest.

Balance of the public interest arguments

125. The Commissioner notes the strong inherent public interest in the protection of privileged information which has been identified by the courts and Tribunals. The Commissioner acknowledges the general public interest in maintaining legal advice will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between a client and lawyer to ensure full and frank legal advice, which in turn is fundamental to the administration of justice.
126. This is consistent with the former Information Tribunal's ruling in the case of *Bellamy v the IC (EA/2005/0023)* that there is a strong element of public interest inbuilt into the privilege itself. Indeed, it is worth noting that the Tribunal considers that there should be at least equally strong countervailing considerations to override that inbuilt interest.
127. This was further reinforced in the case of *DCLG v Information Commissioner & WR [2012] UKUT (103 AAC)4 (28 March 2012)* which concluded that the risk of the disclosure of legally privileged information leading to a weakening of confidence in the general principle of legal professional privilege is a public interest factor of very considerable weight in favour of maintaining the exception and there would have to be special or unusual factors in a particular case to justify not giving it this weight.
128. The Commissioner notes that factors which might suggest equally strong countervailing arguments include whether there is a large amount of money involved or a large number of people affected, lack of transparency in the public authority's actions, misrepresentation of advice given, or the selective disclosure of only part of that advice. The Commissioner notes that there is no evidence of any of these factors involved in this particular case.
129. The Commissioner is also mindful that at the time of the request, the advice was recent, the wider issue remains relevant and disclosure of this information would mean that the council would not have a level playing field in the event of any wider legal proceedings covering the same or similar issues in the future relating to these properties.
130. The Commissioner also notes that the complainant may have had rights to question the council's actions further action via a further complaint to the Ombudsman, or via a judicial review if the time limits for such actions had not expired at the time that he made his request for information.



131. The Commissioner has therefore concluded that the balance of public interest is weighted in favour of maintaining the exception and consequently, that the council was justified in its reliance on regulation 12(5)(b) of the EIR.

Regulation 5(2)

132. The complainant made his requests for information on the dates outlined above. During the course of the Commissioner's investigation the council reconsidered its position and agreed to disclose further information to the complainant in October 2018, however this information was disclosed under the complainant's rights under the DPA rather than under EIR. The delay in the disclosure of this information does not therefore fall to be considered under provisions of the EIR.

133. In response to the request of 13 October 2018 the council initially responded on 15 November 2018 stating that it was delaying its response by 40 working days but it referred to a planning application which did not form part of the complainant's request when doing so. It subsequently responded on 13 December 2017 providing some information however withholding other information as outlined above.

134. Given that the notice of delay in response referred to an incorrect request, the notice itself does not meet the requirements of Regulation 7 which requires that a requestor is informed where a public authorities disclosure of information falls outside of the period of 20 working days to response required by Regulation 5(2).

135. The Commissioner has therefore decided that the council failed to comply with Regulation 5(2) in respect of this request for information.

## Right of appeal

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136. 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)

137. 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.

138. 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**