

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

### **Decision notice**

**Date:** 20 July 2020

**Public Authority:** East Lindsey District Council

**Address:** Tedder Hall  
Manby Park  
Louth  
Lincolnshire  
LN11 8UP

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

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1. The complainant has requested information relating to council enforcement activities relating to his own property. The council provided much of the information, however, it redacted some information under Regulation 13 of the EIR. It also initially withheld information on the basis that Regulation 12(5)(b) applied, and refused to provide some information on the basis that it was information which the complainant had provided to the council in the first instance (Regulation 6). The complainants believe that the council was not correct to redact some of the information they have, that the council has not been transparent about some of the redactions it has made, and that further information should be held. They also argue that redactions have been made inconsistently and complained that the council's records contain inaccuracies. During the course of the Commissioner's investigation the council withdrew its reliance on Regulation 12(5)(b) and agreed to disclose the relevant information.

2. The Commissioner's decision is that the council was correct to apply Regulation 13 to redact the information it has. She has also decided that the council has, on a balance of probabilities, provided the complainants with the information which it holds. She has also decided that the council was correct to apply Regulation 6. She has however decided that the council did not comply with the requirements of Regulation 5(2) in that it did not initially disclose information which it considered was subject to Regulation 12(5)(b) within 20 working days.
3. The other issues which the complainants have raised are not matters which the Commissioner is able to consider under her duties under section 50 of the FOI Act.
4. The Commissioner does not require the council to take any steps.

### Request and response

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5. On 6 May 2019, following a previous request for information with the reference FOI-1920-04-009 which the council had responded to by providing information, the complainants wrote to the council and requested information in the following terms:

*"EC//0054/18*

- *Acknowledgment letter to complainant for complaint 28/8/18 and 8/2/19*
- *Letter confirming complaint has now been investigated for complaint 8/2/19*
- *The Stage 2 Scoring file relating to the complaint received 28/8/18 as completed by the officer after his initial visit (13/9/18)*
- *The letter 4/2/19 to Enforcement Team Leader*
- *The Letter 5/2/19 Stage 1 Corporate Complaint Reference CC-1819-02-08*
- *The official confirmation letter/email that CC-1819-02-08 didn't happen, had been closed or is still outstanding?*
- *23/2/19 our letter with attachments to [name redacted by ICO]*
- *Email 3/3/19 from [name redacted by ICO]*

*EC/094/01100/16*

- *Why is it necessary to make the second redaction in file note 13.10.16 'site visit owner (redacted) present (redacted) photos + measurements taken file to (redacted)?'*
- *Why is the section between note 20.10.16 and 28.10.16 totally redacted?*

- *Why is the page after the ariel view of our property, showing the location of the converted garage and its position on the plot redacted?*

*Thank you for your email(s) all the redacted information and pages (140) you have supplied as a result of nine simple questions looks like a case of obfuscation to us.*

- *Please however; confirm these four emails and the ten files, excluding the FOI explanation, contained within, answer all our nine questions as supplied in our two emails 2 & 7 April 2019?*
- *Could you please then advise which content of your four emails and ten files relates to which question we asked - for clarity please.*
- *There seems to be **a spurious garage plan with scale** that does not relate to our case (**AF Architecture**) could you please supply the correct document.*
- *In addition there were **photographs and measurements** taken in 2016 of the **inside** of the converted garage are these subject to:*

*(1) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.*

*If not please send the photographs as requested.*

- *In 2018 the case officer was not the site visitor; **please confirm that there were no photographs taken for this visit**, as none have been supplied."*
6. The council responded on 22 May 2019. It provided some information whilst it withheld other information on the basis that the exemptions in section 40(2) (personal data) and 42 (legal professional privilege) applied. It also said that it does not hold some information falling within the scope of the request
7. On 23 May 2019 the complainants requested that the council carry out a review:

*"1/2 Document 1, pages 5 and 6 have never been in a file, see file holes in the other four pages – 30/8/18 & 13.2.19 were never in or associated with the 'full' file as supplied.*

3. Document 2. Missing the **expediency test report** for stage two scoring as completed by the case officer/supervisor for complaint 28/8/18. We requested:

*'Whilst all the files requested should have been supplied by now we will accept at this juncture, by return please, just the Stage 2 Scoring file and Expediency Test Report relating to the complaint 28/08/18 as completed by the officer after his initial visit (13/9/18) this should have been in the file along with the one completed by [name redacted by ICO] Principle Enforcement Officer 26/2/2019 for the complaint dated 8/2/19 the only redaction on these documents being - the Location and the only one we expect to see on the missing documents when they are supplied.'*

*As who did what from our above request seems to be a bit confused based on the information as now supplied and for clarity we request the Stage Two Scoring, Expediency Test Report and case file reference number for the complaint dated 8/2/19 as noted in the case file, '2nd Complaint received from **someone else** about the holiday cottage' and of which we were never advised.*

4. Document 2, Page 2 **is not** the letter 4/2/19 to Enforcement Team Leader **as you were advised** and none of the documents in this file have been redacted.

5. Document 3, whatever the reference number, document 3 **is not as you have been advised** – if you were redacting the information in the file you would have known this, as Information Management sent the letter out.

6. Document 4, No official closure to the case and at the bottom of page 2 there is an email (4.2.19) however, who it is was sent to has been removed/is missing and the attachment is not evidenced, Mimecast Attachment Protection confirms there was one.

7. The email 23/2/19 in document 5, page 2, clearly confirms there was an attachment as per 'Mimecast Attachment Protection' note on the email so, Under Decision: Comment 7. '...however, we do not hold such document' is clearly incorrect for what is a very relevant/important document.

Document 2, Contains the same email and a distraction on page 4 a large handwritten note (not initialled) for an email dated 3.3.19 which never had an attachment.

*8. The file note 3/3/19 to EC//00564/18 **clearly states** '(redacted) emailed Mr [redacted] back'- **copy in file***

*9. The second redaction to the typed notes 13.10.16 to case EC/094/01100/16 **is not personal information** –please check for yourselves.*

*10/11. Please be aware if there is information on any pages that shouldn't have been redacted under current legislation not just under professional privilege we **will** eventually obtain access to it if it becomes necessary."*

8. The council provided the outcome of its review on 21 June 2019. It maintained its decision that the exemptions it had cited applied.

## **Scope of the case**

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### Background to the case

9. The complainants received correspondence from the council relating to a potential breach of planning licencing requirements regarding their property. The council argue they had changed the use of one part of their property to a holiday let in breach of planning regulations without the necessary licence to do so. The complainants dispute that the changes breach any planning requirements and have subsequently requested information regarding the council's actions.
10. Much of the information was disclosed to the complainants in response to their initial request, ref: FOI-1920-04-009, however some information was redacted under Regulation 13, some was withheld under Regulation 12(5)(b) (course of justice), and the complainants believe that further information is held falling within the scope of their request, which they outlined in the above requests for information. The council also said that it would not disclose information to the complainants which the complainants had sent to the council themselves (Regulation 6).
11. The complainants contacted the Commissioner on 14 July 2019 to complain about the way their request for information had been handled.
12. Their central complaint was that the council was wrong to withhold the information from them. They also argued that the council holds more information than it claims to hold.
13. The complainants also raised other issues with the council's response which are not matters which the Commissioner is able to consider. These are outlined below.

*The complainant's own personal data*

14. Regulation 5(3) provides that "To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data".
15. Therefore, any personal data which falls within the scope of the request is exempt from disclosure under the EIR.
16. During the course of the Commissioner's investigation the Commissioner asked the council look at the request under the Data Protection Act 2018. It did so and provided further information to the complainants. This information falls outside of the matters considered within this decision notice.

*Is the information Environmental information*

17. Having initially refused the request under FOIA, during the course of the Commissioner's investigation the Commissioner asked the council to consider whether the information was environmental information for the purposes of the EIR.
18. The council reconsidered its position and agreed that the information falls within the scope of the EIR. It therefore changed its position and withheld the information under Regulation 13 (personal data) and Regulation 12(5)(b) (course of justice).

Regulation 12(5)(b)

19. As regards the application of Regulation 12(5)(b), during the Commissioner's investigation, the council said that after reconsidering the information, and due to the passage of time, it was now able to disclose the information withheld under Regulation 12(5)(b).
20. The Commissioner has not therefore considered the application of Regulation 12(5)(b) further in this decision notice, other than to note that this information was provided to the complainant's beyond the period of 20 working days from the date that the request was received as required by Regulation 5(2)(below).

*Are the requests valid requests for information?*

21. The Commissioner notes that many of the complainant's 'requests for information' are not valid requests under the EIR as they do not seek recorded information. They are requests for an explanation about the information and the redactions in the information which was provided previously, and requests to explain differences they have noted with

information which has been disclosed to them as compared to other information they have received (or sent to the council) previously.

22. If information is held which can answer such requests then the council should have considered this for disclosure, however given the nature of the questions and explanations requested, the Commissioner accepts that this is not information which will be held due to the specific nature of the requests (i.e., why is there a hyphen missing in a quoted reference on this page, why are their page holes evident in some documents, but not others).
23. There is no requirement for public authorities to provide an explanation as to the differences which might exist if no recorded information is already held at the time of the request which could respond to that point.
24. With this in mind, the Commissioner considers that the following questions were not valid requests for information under the Regulations:

*"EC/094/01100/16*

- *Why is it necessary to make the second redaction in file note 13.10.16 'site visit owner (redacted) present (redacted) photos + measurements taken file to (redacted)?'*
- *Why is the section between note 20.10.16 and 28.10.16 totally redacted?*
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*Thank you for your email(s) all the redacted information and pages (140) you have supplied as a result of nine simple questions looks like a case of obfuscation to us.*

- *Please however; confirm these four emails and the ten files, excluding the FOI explanation, contained within, answer all our nine questions as supplied in our two emails 2 & 7 April 2019?*
  - *Could you please then advise which content of your four emails and ten files relates to which question we asked - for clarity please.*
25. The Commissioner has not therefore considered these parts of the complainants request further within this decision notice.

*The accuracy of the information which was disclosed/alterations to the information*

26. The complainants argue that documents must have been altered (for instance, hyphens were differently quoted within case reference numbers in emails. The complainants argue that this is evidence that emails which are on record could not have been sent out.
27. Regulation 5(4) requires that: "*For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes*".
28. However, the records were accurate and up to date insofar as the fact they held the records as they were retained by the authority at the time. There is no evidence to suggest that that information was altered or amended prior to being disclosed in response to the request.

*The council misquoting the complainant's points in records*

29. The complainants also made a number of points on how the council had recorded information which the complainants had provided to it, arguing that their statements had been misquoted in some documents in order to make the council's position stronger.
30. There is no evidence that the alterations highlighted by the complainant's were made with the purposes of withholding information from the complainants. Rather, the complainants argue that records have been incorrectly transcribed or recorded incorrectly/differently to that which it was originally put to the council.
31. The Commissioner has no powers to consider such issues under the FOI Act or the EIR and advised the complainant's that if they consider that this has led to unfairness in the way the council has acted upon their case they should seek advice from the Local Government Ombudsman as to whether this is a matter they are able to consider.

*Inconsistencies with the way information has been redacted or recorded by the council.*

32. The complainant's have raised several issues with the Commissioner about information which they consider has either not been recorded accurately by the council, or which has not been redacted consistently from the information provided to them. Their argument is essentially that some emails do not include completed headers (i.e. details completed in the 'to', and 'from' fields, whereas other do hold this information. They argue that this points to either the records being held in an inconsistent way, or that the disclosures have had redactions made



which are not apparent in the information which has been disclosed. They also argued some emails which had been disclosed were not capable of being sent or received in the format which they had been disclosed by the council. Therefore, they argue that the redactions must have been made which are not transparent/highlighted within the disclosed documents. The council argues that this is due to the fact that some documents were retained in different formats, whilst the original, initial email was deleted.

33. Although there is scope for the Commissioner to consider whether the records which are retained by the council have been recorded in accordance with the Code of Practice issued by the Secretary of State under section 46 of the Act<sup>1</sup>, this is not a matter which is directly relevant to a complaint made under section 50 regarding access to information requested by a complainant. A failure to conform to the section 46 code is not in itself a breach of FOIA or the EIR; however the Commissioner promotes the observance of the code and can address matters separate to a decision made under section 50 if she notes issues with a public authorities records management. The Commissioner has published guidance on the Code of Practice at <https://ico.org.uk/media/for-organisations/documents/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf>.
34. As regards inconsistencies with the way that the council has redacted information, the Commissioner will consider this as part of her determination as to whether any information has been withheld from disclosure in response to a request which is not compliant with the complainant's rights under the EIR. It is not, however, a failure to comply with the Regulations to redact information from some documents and provide similar information in other documents. Context is important in the redactions which are made.
35. The Commissioner also notes that redacted documents may contain mistakes or errors in redaction on occasion. Such mistakes may lead to complaints being made by the relevant individuals should their data protection rights have been affected.
36. However, the fact that personal data may have been disclosed by error on one occasion does not mean that a public authority cannot retain redactions of the same information from disclosed documents as a whole – the disclosure is an error, not a judgement on whether that information should be disclosed or not.

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/research-and-reports/1432475/foi-section-46-code-of-practice-1.pdf>

37. If the remaining redactions have had an exemption properly applied by a public authority that information will remain exempt even where other similar information may have accidentally been disclosed. Exceptions to this point may, however, occur on a case by case basis.

### *Conclusions*

38. The Commissioner therefore considers that the complaint is whether the council was correct to apply Regulation 13 to withhold personal data from disclosure or not. She will also consider whether any further information is held by the council falling within the scope of the request. She has also considered whether the council was correct to refuse to provide information to the complainants which the complainants had initially sent to the council under Regulation 6.

## **Reasons for decision**

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### **Regulation 6**

#### *Information provided to the council by the complainants*

39. The Commissioner provided advice to the complainants as regards parts of their request where they had requested, and subsequently complained about, documents which had not been disclosed to them by the council, but which had in fact been sent to the council by themselves in the first instance.
40. The council clearly stipulated to the complainants that where it holds information which the complainants had initially provided to the council it would not disclose this back to them. It argues that they already have a copy of it. In effect this applies Regulation 6 of the EIR. Regulation 6 provides that:

*"Where an applicant requests that the information be made available in a particular form or format, a public authority shall make it so available, unless –*

*(a) it is reasonable for it to make the information available in another form or format; or*

*(b) the information is already publicly available and easily accessible to the applicant in another form or format."*

41. The complainant's have not disputed that they have asked for copies of information which they first sent to the council and have not disputed that they already hold copies of the relevant information. The

Commissioner therefore recognises that the complainants already hold the requested information in an easily accessible format.

42. Additionally, the complainants have argued that a redaction of an email address from an email which they had initially sent to the council was not correct. They accepted however that that email is already held by them, and that it was initially sent to the council by them.
43. The Commissioner's decision is that the council was correct to refuse to disclose information initially provided to it by the complainants on the basis that it is exempt from disclosure under Regulation 6 of the EIR.

### **Regulation 5(3)**

44. Regulation 5(3) provides that:

*"To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data."*

45. The council initially provided information to the complainant's entirely under the EIR, withholding some information as it was personal data relating to the complainants, but not specifying why that was the case.
46. As noted above, the Commissioner addressed the issue of the complainant's rights to access information under the Data Protection Act 2018 with the council separately to this decision notice, and further information was subsequently disclosed as a result of this.
47. However, for the avoidance of doubt, the council is correct to withhold information which is the personal data of the complainants under the EIR as Regulation 5(3) applies to exempt this information from further consideration under the EIR.

### **Regulation 13 personal data**

48. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in Regulation 13(2A), 13(2B) or 13(3A) of the Data Protection Act 2018 is satisfied.
49. In this case the relevant condition is contained in Regulation 13(2A)(a)<sup>2</sup> of the Data Protection Act 2018. This applies where the disclosure of the information to any member of the public would contravene any of the

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<sup>2</sup> As amended by Schedule 19 Paragraph 307(3) DPA 2018.

principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulations ('GDPR').

50. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then Regulation 13 of the EIR cannot apply.
51. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

***Is the information personal data?***

52. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual".*

53. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
54. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
55. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
56. The council said that it has withheld information relating to the complainants themselves (however it has subsequently provided this to them under their rights under the DPA 2018), and it has also withheld personal data relating to junior staff.
57. The withheld information demonstrates that the information which has been withheld is contact details and identities of individual council officers. These individuals are identifiable from the redacted information.
58. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to these council officers. She is satisfied that this information both relates to and identifies the officers concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

59. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
60. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

61. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

62. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
63. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

**Lawful processing: Article 6(1)(f) of the GDPR**

64. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.
65. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>3</sup>.*

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<sup>3</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information,*

66. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-
- i. **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii. **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii. **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
67. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

*Legitimate interests*

68. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
69. The Commissioner considers that the central legitimate interest in disclosure relates to the complainant's private interests. It relates to creating a higher degree of transparency over who has been dealing with the complaints about their property.
70. There is however a wider legitimate interest which relates to creating greater transparency over how the council sets about acting upon complaints and enforcement issues relating to breaches of planning law.

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*Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

That being said, creating greater transparency over such issues will not, in general, require the disclosure of personal data relating to junior council officers.

71. The Commissioner therefore considers that whilst there is a legitimate interest in the information being disclosed, this is very weak in this instance.

*Is disclosure necessary?*

72. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
73. The Commissioner notes that the content and substance of the correspondence has been disclosed to the complainants, except that some individual's identities and contact details have been redacted. The chain of events running through the correspondence is however still fully understandable without the individual identities being disclosed. She also notes that due to the nature of the correspondence between the parties, the complainant's will already know the identities of some of the names which have been redacted from the correspondence as they will have interacted with them during the course of the council's enforcement activities.
74. Even where the complainants are aware of the identities of the individuals, redactions may still be necessary as disclosures under the EIR are considered to be to the whole world. The much wider disclosure this would entail must be taken into account by the council when considering its response to the request for information.
75. The Commissioner has considered whether it is necessary to know the identities and contact details of the correspondents in order to fully meet the wider public's legitimate interest in transparency over the issues involved.
76. Following a discussion with the complainants, they clarified to the Commissioner that they only sought details of senior council officers to be disclosed. The council however argues that the names of individuals which it has redacted are all junior officers within its structure.
77. The Commissioner recognises that whilst the council and its senior management are accountable to the public, less senior officers are accountable to the council rather than to the public directly.

78. The legitimate interests in understanding decisions made and holding the authority to account can be met without the disclosure of the personal data of the junior officers involved who do not have sufficient decision-making authority to warrant them being held publicly accountable. As the main body of the documents have been disclosed, it is not necessary to disclose the identities of junior officers in order to meet the public's legitimate interest in transparency and accountability.
79. The legitimate interests in understanding decisions made, and holding the authority to account, can be met without the disclosure of the personal data of junior officers.
80. Whilst the previous disclosure of the identities of individuals is a relevant factor, and the Commissioner notes this point, the question for her is whether it is *necessary* for the information to be disclosed in order to meet the legitimate interests outlined above as regards this case.

*The Commissioner's conclusion as to whether disclosure is necessary*

81. The Commissioner accepts the council's argument that it is not necessary for the council to disclose information on junior officers. The Commissioner notes that whilst the complainant's may already know the names of some of the individuals, this will be through their general correspondence with the council in relation to the potential enforcement activities. The situation with a disclosure under the EIR is that that information is considered to be to the whole world, which is a far wider degree of disclosure than through general day to day business.
82. She considers that there is only a very weak legitimate interest in the disclosure of the identities of junior employees. At this level they are accountable to the council, as its employees rather than to the public as a whole for their actions. At a more senior level this balance may tip in favour of disclosure in order that the public may be aware of senior officers' decisions and actions, albeit that it is still for the council, not the public, to hold the actions of its employees to account. Any wider failure of the council as a whole in this area can be addressed by the electorate through the election process.
83. The Commissioner has consistently maintained in previous decision notices that, whilst it might be appropriate for senior staff to be held publicly accountable for decision-making, there is little public interest in identifying junior or mid-level staff who are ultimately responsible to the council for such matters rather than directly to the public. Moreover, in addition to having a reasonable expectation that their names would not be placed in the public domain, the legitimate public interest in disclosure has been met by the disclosure of the content of the correspondence.



84. On consideration of all of the above, the Commissioner finds that, in this case, it is not necessary for the council to disclose this information to the complainants in order for it to meet the legitimate interests of the public in the council being transparent and accountable for its actions.
85. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing, and it is unlawful. It therefore does not meet the requirements of principle (a).
86. The Commissioner has therefore decided that the council was entitled to withhold the information under Regulation 13(1), by way of Regulation 13(2)(a).
87. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

#### **The Commissioner's view**

88. The Commissioner has therefore decided that the council was entitled to withhold the information under Regulation 13(1), by way of Regulation 13(2A)(a).

#### **Regulation 12(4)(a) information not held**

89. The complainants argued that they have not received all of the information which the council holds falling within the scope of their request. The council argues that it has provided all of the information which it holds other than the personal data it has redacted.
90. The council said that the only information which the complainants had requested which they had not received was a copy of a letter '*Email 3/3/19 from [name redacted by ICO]*'. It said that it had not found a copy of this information within its records.
91. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
92. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

93. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority (and/or the complainant) which is relevant to her determination.
94. During the course of her investigation, the Commissioner asked the council to describe the searches it carried out for information falling within the scope of the request, and the search terms used. She also asked other questions, as is her usual practice, relating to how the it established whether it held further information within the scope of the request.
95. The council said that the relevant officer was asked if he sent an email on 3rd March and states he did not, and there is no record of such in his email records. This was confirmed by the council's IT department which confirmed that it could not trace the 'missing' email.
96. It confirmed that the information, were it held, would be in an electronic format. The council also clarified that it was still not clear exactly what it is that the complainant was arguing is missing.
97. It said that no information had been deleted, and that, having carried out its searches, it considered that, in fact, no email had in fact been sent. It suggested that it may be just the standard message relating to the release of email attachments that comes through its network to protect from viruses etc.
98. It confirmed that there is no statutory requirement on it to retain such information, and that it would have no business purpose for doing so.
99. More widely, the Commissioner also asked the complainants to highlight where they considered that information may be held which they had not received in response to their request (that they do not already hold copies of). The complainants said that they had not received a document which they called the 'Stage One Harm Sheet' in response to an earlier request for information (which does not form part of this complaint), however, they confirmed that they had in fact subsequently received it in response to a later request for information to the council (which also does not form part of this complaint).

100. As the complainants have confirmed that they now hold a copy of this document the Commissioner has not considered this point further. Whilst she acknowledges that this document was not provided in accordance with an earlier request for information, it falls outside of the scope of the complaint made by the complainants to the Commissioner, and she notes, in any event, that they now hold a copy of this.

The Commissioner's conclusion

101. The Commissioner has carefully reviewed the submissions of both parties and the arguments put forward.

102. Under the circumstances described the Commissioner believes that the council has provided a description of having carried out adequate searches in appropriate places to determine whether any further information is held falling within the scope of the complainant's request.

103. The question for the Commissioner to consider is not whether information 'should' be held, but whether relevant information 'is' held.

104. The Commissioner has considered the complainants suggestions as to further information which might have been provided to them in response to their request. Given the explanation provided by the council, together with its description of the searches which were carried out however, in the absence of evidence to the contrary, she considers that there is no evidence demonstrating that further information is held falling within the scope of the complainant's request for information.

105. This being the case, the Commissioner's decision is that, on a balance of probabilities, no further information is held by the council falling within the scope of the complainant's request for information.

**Regulation 5(2) – time for compliance**

106. Regulation 5(2) provides that "*Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request*".

107. The council initially withheld information under Regulation 12(5)(b) as it considered that the information is subject to legal professional privilege, and its disclosure would have an adverse affect upon the course of justice. However, during the course of the Commissioner's investigation, it said that, given the time which had passed, it was now able to disclose the information to the complainants.

108. Given this late disclosure of information, the Commissioner has decided that the council did not comply with the requirements of Regulation 5(2), which requires that where information is held, it should be disclosed to the requestor within 20 working days of the date following the receipt of the request for information.

## Right of appeal

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109. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

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

110. 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.

111. 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**  
**Head of FoI Casework and Appeals**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**