

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

Decision notice

Date: 28 February 2017

Public Authority: Maldon District Council
Address: Princes Road
Maldon
Essex
CM9 5DL

Decision (including any steps ordered)

1. The complainant has requested emails which mention her in relation to planning matters, emails which mention her which may have been written from or to specific councillors, and emails relating to the clearance of trees under the power cables on land south west of Nipsells Chase.
2. The Commissioner's decision is that Maldon District Council has incorrectly applied the exemptions at sections 36(2)(b)(i) (inhibition to the free and frank provision of advice), 36(2)(b)(ii) (inhibition to the free and frank exchange of views), and 36(2)(c) (prejudice the effective conduct of public affairs) of the FOIA.
3. The Commissioner has decided that the council has correctly applied the exemption for personal data at section 40(2) of the FOIA and regulation 13(1) of the EIR.
4. The Commissioner has also decided that Maldon District Council has incorrectly applied that exemption where disclosure would prejudice commercial interests at section 43(2) of the FOIA and the exception at regulation 12(5)(e) of the EIR where disclosure would have an adverse effect upon the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
5. The Commissioner has decided that the council correctly applied the exception at regulation 12(4)(e), where the request involves the

disclosure of internal communications, but that in all the circumstances of the case the public interest in maintaining the exception is outweighed by the public interest in favour of disclosure.

6. In relation to the information to which Maldon District Council applied the exemption for investigations and proceedings conducted by public authorities at section 30(1) of the FOIA and the exemption for legal professional privilege at section 42 of the FOIA, the Commissioner's decision is that the information is environmental and therefore should have been dealt with under the EIR. She has decided that the exception at regulation 12(5)(b) does not apply to the information to which council applied the exemption for legal professional privilege at section 42 of the FOIA but it does apply to the information to which the council applied the exemption for investigations and proceedings conducted by public authorities at section 30(1) of the FOIA and that in all the circumstances of the case the public interest favours maintaining the exception.
7. The Commissioner has also decided that it is feasible that information is held by individual councillors on their own private email systems which could amount to council business falling within the scope of the request under section 3(2)(b) of the FOIA.
8. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose document numbers 24, 25 and 26.
 - Disclose the attachment to document 29 (i.e. the minutes of 4 February 2015 of the Essex Youth Service Maldon Youth Strategy Group).
 - Disclose the attachments to documents 109 & 114 (i.e. the minutes of the Mayland Parish Council meetings of 11 November 2014 and 14 October 2014).
 - Disclose documents 138 (2 emails only dated and timed at 22 July 2014 15:56 and 15:49) and 166.
 - Disclose the email dated and timed at 27 January 2015 15:35 within document 87.
 - Ask the named councillors to search their private email accounts for information falling within the scope of the request and if any is held, the council should issue a fresh response in relation to that information under the applicable legislation.
9. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the

Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

10. Subsequent to a similar request made on 30 September 2015, the complainant made the following request for information on 2 December 2015:

"1) I want all emails which mention [complainant's name] (whether the title cllr is included or not) in relation to planning matters, any which name me personally, not to do with my ward and specifically in Mayland only. This would need to be for the last 18 months, but prior to 1st June 2015. This would include officers and members.

2) Any emails mentioning me personally, (either cllr or not) which may have been written from/to Cllrs [six named councillors]. this would need to be for the last 18 months, prior to 1st June 2015. This would not include emails sent to me, just mentioning me, and not general emails to members.

Basically anything with my name in it.

If you need any clarification, please let me know.

3 ALL emails, prior to June 2015 relating to the clearance of the trees under the power cables on land south west of Nipsells chase, including (but not limited to):

Written consent for the appointment of the agent for the works undertaken from the landowners.

Who decided on the appointment of the agent, including the appointment process.

The contractors used and the appointment/procurement process of hiring them

The legality of and decision to leave the cut trees under the power lines.

The duty of care relating to cut trees being left under electricity cables.

All ecology, habitat reports etc

Tree reports including the type, lists, numbers and detailed location of all trees removed prior to works, including photographs.

All diligence reports of work undertaken,

The email and document trail for the agreement for MDC to act as agents in the (planning?) matter to remove trees under power cables,

on land owned by a known third part(ies).
What the legal process is and how it was followed by the authority.
The mechanism by which the authority and tree officer became agents for the above works.
The risk assessment for leaving large amounts of fallen tree debris being left under the power cables."

11. The council responded on 16 December 2015. It referred to the exemptions at both section 30 and 31 of the FOIA and refused to confirm or deny that the requested information was held as doing so would be likely to prejudice the matters mentioned in section 31(1).
12. The complainant expressed dissatisfaction with the response on 29 January 2016 and 1 February 2016.
13. On 17 February 2016, the council provided an internal review response in which it maintained its original position.

Scope of the case

14. The complainant contacted the Commissioner on 12 January 2016 to complain about the way her request for information had been handled. After having been notified that the council had carried out an internal review, the Commissioner accepted the case for investigation on 27 June 2016.
15. Having seen the wording of the request, the Commissioner considered that some information within the scope of the requests could constitute the complainant's personal data. Therefore, on 19 January 2016 the Commissioner informed the council of the following:

"We note from the correspondence [complainant's name] has brought to our attention in relation to this complaint that some of the information requested may be considered to be her own personal data. Any such requests should be treated as subject access requests under the Data Protection Act. This means that despite the exemption in Section 40 of the Freedom of Information Act, the applicant has a right to request their information under the Data Protection Act.

If it is the case that any of the information you are considering in relation to [complainant's name]'s request is deemed to be their personal information, please take account of their rights under Section 7 of the Data Protection Act when responding to her. A Data Controller has 40 calendar days in which to comply with a subject access request. This period begins once you have been provided with enough information for an accurate search to be carried out, together with any fee required.

You should confirm to [complainant's name] without further delay what further information you require in order to consider the request under the Data Protection Act.

Where information being requested relates to identifiable individuals other than the requester, but still has some connection to the requester (for example witness statements) then it should still be dealt with as subject access request under the DPA, and not under FOIA. There is further information on how to deal with such instances at section 7(4) of the DPA and on the link below.

http://www.ico.gov.uk/for_organisations/data_protection/~media/documents/library/Data_Protection/Detailed_specialist_guides/SAR_AND_THIRD_PARTY_INFORMATION_100807.ashx

16. On 10 February 2016, the Commissioner reminded the council of the need to deal with the complainants own personal data under the DPA as follows:

“You also confirmed that an internal review into the handling of both requests would now be undertaken. Presumably this will take into consideration whether or not any of the information requested is the personal data of the applicant and therefore falls to be treated under section 7 of the Data Protection Act.”

17. In its response to the Commissioner's enquiries, the council confirmed that it identified documents which contain personal data, or sensitive personal data, relating to the complainant and dealt with those documents as a subject access request under the DPA. Any of the complainant's personal data has therefore not been considered in this decision notice.

18. The council sent the Commissioner a schedule of numbered documents detailing which exemption or exception applies and why along with which documents it would now disclose to the complainant. The complainant either sent or was a party to the following documents:

3, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 30, 32, 34, 35, 40, 41, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85, 86, 95, 96, 99, 101, 102, 103, 104, 106, 107, 110, 111, 112, 113, 116, 120, 121, 125, 126, 127, 129, 130, 132, 133, 134, 135, 136, 137, 140, 141, 142, 144, 145, 146, 147, 152, 153, 154, 155, 156, 158, 165.

The Commissioner has not deemed it necessary to consider the documents that the complainant was originally a party to. She notes

that in part 2 of the request the complainant specifically said that the request does not include emails sent to her but the council has included some such documents in its schedule of information (examples of these include documents 58 and 81). For the avoidance of doubt, the documents numbered above are outside the scope of this decision notice.

19. The council applied the following exemptions and exceptions to the information that the Commissioner considers to be within the scope of the request:

Section 36 – documents 24, 25, 26.

Section 40(2) – documents 1, 2, 4, 5, 7, 21, 22, 27, 29, 45, 97, 105, 157.

Section 43 – the attachment to document 29 (i.e. the minutes of 4 February 2015 of the Essex Youth Service Maldon Youth Strategy Group).

Regulation 12(4)(e) – documents 138 (2 emails only dated and timed at 22 July 2014 15:56 and 15:49) and 166.

Regulation 12(5)(e) – attachments to documents 109 & 114 (i.e. the minutes of the Mayland Parish Council meetings of 11 November 2014 and 14 October 2014).

Regulation 13(1) – documents 31, 33, 36, 37, 38, 39, 42, 65, 84, 90, 98, 100, 109, 114, 115, 162, 163, 164.

Therefore the Commissioner has considered whether the above exemptions and exceptions apply in this case.

20. The council also applied the exception at regulation 12(4)(e) to documents 28, 91, 92, 93, 94, 167 & 168. However, upon reviewing those documents, the Commissioner considered that they fall outside the scope of the request. They have therefore not been considered in this decision notice.

21. The council applied the exemption at section 30(1) of the FOIA to the following documents:

117

118 (1 email dated and timed at 25 July 2014 16:12)

119 (1 email dated and timed at 25 July 2014 15:05)

122 (2 emails dated and timed at 24 July 2014 11:44 and 11:06)

123 (4 emails dated and timed at 24 July 2014 11:52, 11:46, 11:44, 11:06)

124 (1 email dated and timed at 24 July 2014 11:06)

128 (2 emails dated and timed at 24 July 2014 08:36 and 08:33)

131 (1 email dated and timed at 24 July 2014 08:24)

143 (2 emails dated and timed at 18 July 2014 10:41 and 10:06)

148 (2 emails dated and timed at 26 June 2014 21:45 and 14:36)

149 (1 email dated and timed at 26 June 2014 14:36)

150 (8 emails dated and timed at 26 June 2014 13:26, 13:20, 13:18, 13:14, 13:12, 13:10, 13:06, 13:04)

151 (7 emails dated and timed at 26 June 2014 13:20, 13:18, 13:14, 13:12, 13:10, 13:06, 13:04)

159 (3 emails dated and timed at 18 May 2014 16:08 and 16 May 2014 09:41 and 09:10)

160 (3 emails dated and timed at 15 May 2014 17:09, 16:45 and 15:43)

161 (2 emails dated and timed at 15 May 2014 16:45 and 15:43)

It also applied the exemption at section 42 of the FOIA to the following documents:

87 (3 emails only dated and timed at 28 January 2015 16:01, 27 January 2015 17:30 and 27 January 2015 15:35)

88 (2 emails only dated and timed at 28 January 2015 15:54 and 28 January 2015 13:35)

89 (2 emails only dated and timed at 28 January 2015 14:26 and 28 January 2015 13:35).

The rest of the emails within the above documents include the complainant as a recipient or sender so are outside the scope of this decision notice as explained in paragraph 18 above.

On reviewing the above information, the Commissioner considered it to constitute environmental information (as detailed in the section below entitled 'The applicable legislation – FOIA or EIR') and has deemed it appropriate to consider the exception at 12(5)(b) of the EIR to this

information. She also considered that the two emails dated and timed at 28 January 2015 16:01 and 27 January 2015 17:30 within document 87 and documents 88 and 89 fall outside the scope of the request. They have therefore not been considered in this decision notice.

22. The council also applied the exemption at section 36 to documents 108, 117, 118, 119, 122, 123, 124, 128, 131, 139, 143, 148, 149, 150, 151, 159, 160, 161. As the Commissioner has decided that the exception at regulation 12(5)(b) applies to all of these documents except documents 108 and 139, she has not deemed it necessary to consider the application of section 36 to such documents. As documents 108 and 139 constitute the complainant's own personal data, the Commissioner has not considered these in this decision notice as per paragraph 17.
23. In its response to the Commissioner's enquiries, the council said that it is notable that the complainant's concerns lay in identifying emails talking about her between certain members of the council and pointed out that each of its members are separately registered with the ICO in their own capacities and may have use of their own email systems not supported by the council. It said that it is not possible for the council to provide any emails which may exist outside of its own systems. Because the council has brought this to the Commissioner's attention, she deems it necessary to consider whether information is held by another person on behalf of the council under section 3(2)(b) of the FOIA.

Reasons for decision

The appropriate legislation – FOIA or EIR?

24. The first matter for the Commissioner to decide is whether the requested information is covered by the FOIA or the EIR. Section 39 of the FOIA states that information is exempt information if the public authority holding it is obliged, by regulations under section 74 of the FOIA, to make the information available to the public in accordance with those regulations or would be so obliged but for any exemption under those regulations. The regulations under section 74 of the FOIA are the EIR. Information falls to be considered under the EIR if that information is environmental information.
25. Regulation 2(1) of the EIR defines 'environmental information' as having the same meaning as in Article 2(1) of Council Directive 2003/4/EC:

'namely any information in written, visual, aural, electronic or any other material form on –

 - (a) the state of the elements of the environment, such as air and

atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

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

26. In the Commissioner's view, the use of the word 'on' indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information.
27. Having reviewed the information, the Commissioner considers that the documents to which the council applied the exemption for investigations and proceedings conducted by public authorities at section 30(1) of the FOIA and the exemption for legal professional privilege at section 42 of the FOIA constitute environmental information.
28. The information withheld under section 30(1) relates to a prosecution for a breach of a Tree Preservation Order ('TPO') which the Commissioner considers to be information on a measure designed to protect the elements of the environment within the definition of environmental information at regulation 2(1)(c).
29. The information withheld under section 42 relates to the Brownstock festival and specifically compliance with license conditions which the

Commissioner also considers to be information on a measure designed to protect the elements of the environment within the definition of environmental information at regulation 2(1)(c).

Section 36

30. Section 36 states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. Section 36 is engaged, only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).
31. In this case the council has not specified which subsection(s) of section 36 it is relying on. However, it did state that disclosure '...would or would be likely to cause the types of prejudice or inhibition that would inhibit the ability to have frank and free provision of advice or exchange of views and the effective conduct of public affairs would likewise be inhibited' which incorporates the following sub sections:
- Section 36(2)(b) which provides an exemption where disclosure would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation.
 - Section 36(2)(c) which provides an exemption where disclosure would, or would be likely to, otherwise prejudice the effective conduct of public affairs.

Is section 36 engaged?

32. In order to establish whether the exemptions have been applied correctly the Commissioner needs to:
- Ascertain who is the qualified person or persons for the public authority in question;
 - Establish that an opinion was given;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion given was reasonable.
33. With regard to the first two criteria, the council said that 'In the reasonable opinion of the Authority's qualified person...'. It did not state who the qualified person is and therefore the Commissioner cannot be

satisfied that the opinion was given by the qualified person under section 36(5) of the FOIA.

34. In relation to the third criterion, the council did not provide dates as to when the opinion was sought and given. The Commissioner therefore cannot be satisfied that the opinion was provided after the receipt of the request.
35. With regard to the fourth criterion, as stated in the Commissioner's guidance on section 36¹, the exemptions at section 36(2) are expressed in broad terms, and in order for the opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise.
36. The council informed the Commissioner that the information withheld under section 36(2) '...is entirely with regards to a discussion between District Council Members. It is about a highly sensitive issue which requires significant discussion which should be allowed to occur in an environment where there can be free and frank exchange of views to allow the Authority to properly conduct its affairs'.
37. The Commissioner's guidance on section 36 states the following:

"In dealing with a complaint the ICO will expect to see evidence of the qualified person's opinion and how it was reached. The more evidence we have of how the qualified person's opinion was formed, the better we can assess whether it was reasonable. The purpose of obtaining evidence is not to assess the quality of the qualified person's reasoning process, but to help us to decide whether the substantive opinion could be considered reasonable in the terms described above...

... we would expect to see a record of who gave the opinion, their status as qualified person and the dates when the opinion was sought and given; furthermore, in order to consider whether the opinion was reasonable we would ideally expect to see a copy of the submission made to the qualified person detailing the information in question, the factors to be taken into account and the reasons why disclosure would or would be likely to have the specific prejudicial or inhibitory effect. Public authorities should also provide a record of the factors the qualified person took into account, the weight they attached to them, and the opinion they gave.

¹ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

While good record keeping practice would suggest that the public authority should be able to provide the above information and documents, we recognise that in some cases such discussions may be oral rather than in writing. If that is the case then we would accept a full record of the discussion (taken at the time of the discussion) and the decision.

If there is not even a record taken at the time of the discussion, then **as a minimum** we would accept a signed statement from the qualified person recording their opinion. In order to assist public authorities in providing this statement, we have produced a form, which is available as a separate document: Record of the qualified person's opinion. This shows the minimum information that we expect public authorities to provide to us about the qualified person's opinion. While there is no statutory requirement for public authorities to complete the form, to do so should assist them in giving us the information we require. In addition, public authorities may also wish to use it as part of the process of obtaining the qualified person's opinion."

38. The Commissioner does not consider that the council has provided enough information for her to establish that the opinion given in this case was reasonable.
39. It is not for the Commissioner to apply arguments on behalf of the council. The council was informed by the Commissioner that it must justify its position and was provided with the Commissioner's guidance on how she deals with complaints² which clearly states that it is the public authorities' responsibility to satisfy the Commissioner that information should not be disclosed and that it has complied with the law.
40. The Commissioner considers that the council has been provided with sufficient opportunity to provide its rationale for withholding the requested information under the exemptions at section 36(2).
41. As the council has not provided sufficient arguments for the application of the exemptions at section 36(2) to the specific information in this case, the Commissioner has no choice but to conclude that the exemptions are not engaged.

² http://www.ico.org.uk/for_organisations/freedom_of_information/guide.aspx

42. The Commissioner also notes that the council did not specify whether the claimed inhibition and prejudice 'would or would be likely to' occur if the information was disclosed and did not provide any details relating to the public interest test.

Section 40(2) and regulation 13(1)

43. Section 40(2) of the FOIA and regulation 13(1) of the EIR state that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the legislation would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').

44. In order to rely on the exemption provided by section 40(2) and the exception at regulation 13(1), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

"personal data" means data which relate to a living individual who can be identified –

- (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."
45. 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 data protection principles under the DPA.

Is the withheld information personal data?

46. As explained above, the first consideration is whether the withheld information is personal data.
47. The withheld information under consideration in this case is names of council officers and members of the public, email addresses, telephone numbers and contact details for councillors.
48. The Commissioner is satisfied that such information constitutes personal data.

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

49. The council considers that the disclosure of the information would contravene the first data protection principle.

50. The first data protection principle 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.”

51. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, 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

52. The information in this case is names and contact details for council officers and councillors.

53. The Commissioner’s guidance on ‘Requests for personal data about employees’³ states the following:

“In assessing whether employees can have a reasonable expectation that their names will not be disclosed, key factors will include their level of seniority and responsibility and whether they have a public facing role where they represent the authority to the outside world. A junior employee whose name appears on an email simply because they are organising a meeting or distributing a document in an administrative capacity would have a reasonable expectation that their name would not be disclosed.”

54. The council said it would be unfair to disclose the redacted personal data as it would not be foreseeable. It said that the officers are junior and

³ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

their names are not already publicly available elsewhere. It explained that the telephone numbers that have been redacted are not for public use and are personal and that the officers are not of sufficient seniority to anticipate that their emails may find their way into the public domain. It said that the details relating to members of the public are sensitive. In relation to the councillors contact details, it said that in some instances the individuals are ex councillors and no longer hold a public office and that some councillors do not wish their contact details to be in the public domain for security reasons.

55. The Commissioner considers that it would be reasonable for junior officers and members of the public to have an expectation of privacy and that their names and contact details would not be disclosed to the public at large.
56. The Commissioner is aware that councillor contact details are usually in the public domain but considers it reasonable for ex councillors, and those where security is an issue, to have an expectation of privacy.

Consequences of disclosure

57. 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.
58. The council said that disclosure would cause harm to junior members of staff and ex councillors but did not states what the harm would be.
59. The Commissioner considers that disclosure would amount to a loss of privacy.

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

60. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake along with specific interests which in this case is knowing which individuals were involved in the requested emails and accessing individuals contact details.
61. The council has said that the withheld personal data is not central to the understanding of the documents or the request and as such the public interest in disclosure of these redacted details is lesser than the interest in protecting the data of these individuals.

62. The complainant has stated that she needs the information for court proceedings. The Commissioner has considered this but it is not clear how the redacted personal details would assist the complainant.

Conclusion on the analysis of fairness

63. Taking all of the above into account, the Commissioner concludes that it would be unfair to the individuals to release their personal data. She considers that the data subjects would not have a reasonable expectation that their personal data would be disclosed, that disclosure could cause unwarranted distress to those data subjects and that any legitimate interest in disclosure does not outweigh the rights and freedoms of the data subjects. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i), and regulation 13(1).
64. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, she has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Section 43(2)

65. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
66. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43⁴. This comments that:
- "...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."
67. In this instance the council has applied section 43(2) to minutes of a meeting of the Maldon Youth Strategy Group ('the group') stating that

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

the document details the way in which the group intends to spend internal grants. It said that to disclose the confidential document may prejudice the group when making further bids for grant funding. It is not clear to the Commissioner how this information relates to the groups commercial interests as opposed to its financial interests and therefore it is not clear whether the withheld information falls within the remit of section 43(2) FOIA. However, she has continued with the analysis of whether this exemption is applicable.

68. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
69. In its submission to the Commissioner, the council said that disclosure 'is likely to' prejudice the commercial interests of the group therefore the Commissioner considers that it is appropriate in this case to apply the lesser test of "would be likely to" occur.
70. The Commissioner needs to consider how any prejudice to commercial interests would be likely to be caused by the disclosure of the withheld information. This includes consideration of whether the prejudice claimed is "real, actual or of substance" and whether there is a causal link between disclosure and the prejudice occurring.
71. When claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner expects a public authority to obtain arguments from the third parties themselves. The council has not confirmed that it has consulted with the group regarding whether disclosure of the redacted information would prejudice their commercial interests. Neither has the council said that its submission represents its prior knowledge of the groups concerns. The Commissioner's aforementioned guidance on section 43 states the following:

"It is important to note that in claiming the exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect; the prejudice must be based on evidence provided by the third party, whether during the time for compliance with a specific

request or as a result of prior consultation. This approach has been confirmed by the Information Tribunal⁵."

72. The Commissioner's guidance on 'The Prejudice Test'⁶ states that;

"If an authority claims that prejudice would be likely to occur they need to establish that

- there is a plausible causal link between the disclosure of the information in question and the argued prejudice; and
- there is a real possibility that the circumstances giving rise to prejudice would occur, ie the causal link must not be purely hypothetical; and
- the opportunity for prejudice to arise is not so limited that the chance of prejudice is in fact remote."

73. The Commissioner does not consider that the explanation given by the council (at paragraph 67) sufficiently demonstrates a causal link between the disclosure of the withheld information and the prejudice to commercial interests. The explanation is couched in very general terms and no link is made between the information that has actually been withheld and the prejudice to commercial interests. This was despite the council being informed by the Commissioner that it must justify its position and being provided with the Commissioner's guidance on how he deals with complaints⁷ which clearly states that it is the public authorities' responsibility to satisfy the Commissioner that information should not be disclosed and that it has complied with the law.

74. It is not for the Commissioner to speculate as to how the prejudice would be likely to occur. The lack of sufficient arguments from the council, coupled with the lack of confirmation that the group considers disclosure would be prejudicial to its commercial interests, has led the Commissioner to the conclusion that section 43(2) of the FOIA is not

⁵ Derry City Council v Information Commissioner (EA/2006/0014; 11 December 2006)

⁶

http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_prejudice_test.ashx

⁷ http://www.ico.org.uk/for_organisations/freedom_of_information/guide.aspx

correctly engaged in this case. As the exemption is not engaged, the Commissioner has not gone on to consider the public interest.

Regulation 12(5)(e)

75. Regulation 12(5)(e) provides that information will be exempt where its disclosure would have an adverse effect upon "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest."
76. In relation to the minutes of the Mayland Parish Council meetings of 11 November 2014 and 14 October 2014, the council said the documents have been withheld on the basis that to disclose the confidential documents (which do not belong to the council) is likely to prejudice the commercial interests of the parish council. It explained that the minutes in this format were only in draft format, and not public documents at this stage, and could have been subject to change for commercial reasons. Although the council did not specifically cite the exception at regulation 12(5)(e), given the above explanation, and that it said it has considered that the documents fall within the EIR, the Commissioner has deemed consideration of the exception at regulation 12(5)(e) to be appropriate.
77. Regulation 12(5)(e) can be broken down into a four-stage test, which was adopted by the Information Tribunal in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association*⁸. All four elements are required in order for the exception to be engaged:
- The information is commercial or industrial in nature.
 - Confidentiality is provided by law.
 - The confidentiality is protecting a legitimate economic interest.
 - The confidentiality would be adversely affected by disclosure.
78. The council has said that disclosure is likely to prejudice the commercial interests of the parish council.
79. The Commissioner considers that if it is a third party's interests that are at stake, the public authority should consult with the third party unless it has prior knowledge of their views. It will not be sufficient for a public

⁸ Appeal number EA/2010/0012

authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party. This principle was established by the Information Tribunal in *Derry City Council v Information Commissioner*⁹. That case related to the commercial interests exemption under FOIA, but it is equally applicable to third party interests under regulation 12(5)(e).

80. It has not been made clear to the Commissioner whether the argument that prejudice would occur genuinely reflects the concerns of Mayland Parish Council.
81. The council's reasons for withholding the minutes as described in paragraph 76 do not make it clear to the Commissioner whether all the information contained within the withheld is commercial or industrial in nature, and from the Commissioner's review of the information, she does not consider this to be the case. The council has also not explained whether the information is subject to confidentiality provided by law, or how disclosure would adversely affect the legitimate economic interest of Mayland Parish Council.
82. The Commissioner does not consider that the council has linked the claimed consequences to the specific information or sufficiently explained the causal sequence. This lack of clarity suggests that the council either does not properly understand what the effects of disclosure would be or has struggled to meet the evidential and explanatory burden set by the exception.
83. As stated earlier, in order for the exception to be engaged it is necessary to demonstrate that disclosure of information would result in specific harm to a party or parties' economic interests and to explain the causal sequence. She considers that the council's arguments, whilst identifying a possible effect (that being prejudice to the commercial interests of the parish council), fails to make this effect sufficiently concrete and fails to identify the causal link with the withheld information. She considers that it is for public authorities to fully explain the relevant causes and effects.
84. The Commissioner considers that the council has been given sufficient opportunity to provide evidence and arguments in support of its position. In cases where a public authority has failed to provide sufficient arguments to demonstrate that exceptions are engaged, the

⁹ Appeal no. EA/2006/0014, 11 December 2006

Commissioner is not obliged to generate arguments on a public authority's behalf or to provide the causal link.

85. In this instance, the Commissioner has decided that the council has failed to demonstrate that the exception is engaged. As the exception is not engaged, the Commissioner has not gone on to consider the public interest.

Regulation 12(4)(e)

86. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.
87. The Commissioner has published guidance¹⁰ on regulation 12(4)(e), which includes a description of the types of information that may be classified as 'internal communications.'
88. The first factor that must be considered is whether the information in question can reasonably be described as a 'communication'. In her aforementioned guidance on the exception, the Commissioner acknowledges that the concept of a 'communication' is broad and will encompass any information someone intends to communicate to others, or places on file so that others may read it.
89. The Commissioner is satisfied that the emails withheld under this exception properly constitute 'communications' for the purpose of the exception. She has therefore next considered whether the withheld information constitutes 'internal' communications.
90. There is no definition contained in the EIR of what is meant by 'internal'. Consequently, in the absence of one, a judgment on what is an internal communication must be made by considering the relationship between the sender and recipient, the particular circumstances of the case and the nature of the information in question. Typically, however, an internal communication is one that stays within one public authority.
91. The Commissioner is satisfied that the communications are internal as they are sent only to officers and members of the council. She therefore considers that such information constitutes internal communications and the exception is engaged.

¹⁰ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

92. As the Commissioner considers that the exception is engaged she has gone on to consider the relevant public interest arguments in this case.

The public interest test

93. Where the exception in Regulation 12(4)(e) is engaged it is subject to a public interest test required by Regulation 12(1).
94. 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.
95. When carrying out the test the Commissioner must take into account a presumption towards the disclosure of the information which is required by Regulation 12(2).

Public interest in favour of disclosing the requested information

96. The council did not submit any arguments in favour of disclosing the requested information.
97. The Commissioner considers that there is always a general public interest in disclosing environmental information, derived from the purpose of the EIR. She considers that some weight must always be attached to the general principles of achieving accountability and transparency which in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities. There may also be an argument for informing public debate on the particular environmental issue.

The public interest arguments in favour of maintaining the exception

98. In essence, the public interest considerations relating to regulation 12(4)(e) relate to the protection of thinking space and the ability to have full and frank discussions without fear that the information will be disclosed.
99. As stated in her aforementioned guidance on the subject, there is no automatic or inherent public interest in withholding an internal communication. Arguments should relate to the particular circumstances of the case and the content and sensitivity of the specific information in question.
100. In relation to document 138, the council said that the public interest in the information being disclosed is outweighed by the potential harm to the junior officers concerned by this information being disclosed. It said

that the officers in question are not of sufficient seniority for them to assume that their emails may be disclosed.

101. In relation to document 166, the council said that the disclosure of this internal communication would breach the requirement for the council to have a private thinking space. It explained that the matter in question is a highly sensitive local matter, where a great deal of impact is felt within the local community and that the council, as Licencing Authority has worked very hard to maintain a very safe event. It said that disclosure of this information could fundamentally undermine the event and the positive relationship that is being developed between the event holder and the community at large. It said that in handling the many sensitive issues around this event it requires a space to be able to discuss how to deal with the many complex issues at hand. It also said that if this information were made public it would significantly harm the ongoing success in nurturing this event and the safety of the local people and that the huge harm that its disclosure could cause significantly outweighs the public interest in disclosure.

The balance of the public interest test

102. As stated in the Commissioner's guidance on the public interest test¹¹, in considering the public interest in relation to any particular exception, a public authority should take into account only the public interest arguments that are relevant to that exception – public interest arguments that support other exceptions are irrelevant. The Commissioner notes that the council's argument in paragraph 100 does not relate to the exception being considered, it appears to relate to the exception for personal data, therefore she has not taken it into consideration. She notes that the council did not submit any other arguments for maintaining the exception in relation to document 138.

103. In relation to document 166, the Commissioner accepts that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.

104. However, she does not consider that safe space arguments automatically carry much weight in principle. The weight accorded to such arguments depends on the circumstances of the specific case, including the timing of the request, whether the issue is still live, and the content and sensitivity of the information in question.

¹¹ https://ico.org.uk/media/for-organisations/documents/1629/eir_effect_of_exceptions_and_the_public_interest_test.pdf

105. The Commissioner has studied the content of both documents under consideration and notes that they are both administrative only – one in relation to complaints the complainant made to the council and the other in relating to the running order of a Planning and Licensing Committee meeting. She does not consider that these reveal anything particularly controversial or sensitive. She also notes that, due to the age of the information, it is highly unlikely that the matters are still live.
106. In the specific circumstances of this case, and having considered the particular information in question, the Commissioner does not consider that disclosure of the withheld information would reduce the council's thinking space and the ability to have full and frank discussions without fear that the information will be disclosed. She has therefore given the safe space argument very little weight.
107. The Commissioner acknowledges the presumption in favour of disclosure inherent in regulation 12(2) of the EIR. She also accepts that there is an inherent public interest in the openness and transparency of public authorities and their decision making processes. The Commissioner has placed very little weight on the safe space argument due to the fact that that the information itself does not reveal anything particularly controversial or sensitive and that matters are highly likely to be no longer live. She finds that the public interest in maintaining the exception is outweighed by the public interest in favour of disclosure.

Regulation 12(5)(b)

108. Regulation 12(5)(b) applies to information where disclosure would have an adverse effect on 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.
109. The Commissioner has first considered the application of this exemption to the information to which the council applied the exemption at section 30(1) of the FOIA.
110. In the case of *Kirkaldie v ICO & Thanet District Council*¹² 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

¹² Appeal number EA/2006/0001

right of individuals or organisations to a fair trial.”

111. The council has said that the original request was received immediately before an investigation was launched into alleged criminal activities occasioned by the complainant and her partner. It explained that the complainant and her partner attended an interview under caution in October 2015 and that the council has now moved to prosecute. It confirmed that the criminal investigation remains live with court proceedings listed for March 2017 in relation to breach of a Tree Preservation Order ('TPO').
112. The council also said that it has a duty to investigate offences and that the withheld information goes to the heart of the investigation in this case. It explained that disclosure would assist the requester to perpetrate a crime.
113. In deciding whether this exception has been applied correctly, the Commissioner has considered whether the withheld information relates to an inquiry or investigation conducted by the council of a criminal or disciplinary nature. Based on the council's statements that it is under a duty to investigate and that the withheld information goes to the heart of the investigation, the Commissioner is satisfied that the information relates to an investigation conducted by the council of a criminal nature. She has therefore gone on to consider whether the disclosure of the withheld information would have an adverse effect on the course of justice.
114. In *Archer v ICO & Salisbury District Council*¹³ the Tribunal highlighted the requirement needed for the exception to be engaged. It explained that it is not enough that disclosure would simply affect the course of justice, the effect must be “adverse” and refusal to disclose is only permitted to the extent of that adverse effect. It stated that it was also necessary to show that disclosure “would” have an adverse effect and that any statement that it could or might have such an effect was insufficient.
115. In reaching a decision on whether disclosure would have an adverse effect it is also necessary to consider the interpretation of the word “would”. It is the Commissioner's view that the Tribunal's comments in the case of *Hogan v ICO & Oxford City Council*¹⁴ in relation to the

¹³ Appeal number EA/2006/0037

¹⁴ Appeal numbers EA/2005/0026 & EA/2005/0030

wording of "would prejudice" are transferable to the interpretation of the word "would" when considering whether disclosure would have an adverse effect. The Tribunal stated that when considering the term "would prejudice" that it may not be possible to prove that prejudice would occur beyond any doubt whatsoever. However, it confirmed that the prejudice must at least be more probable than not.

116. The Commissioner accepts that disclosure of information which forms part of an investigation, however innocuous the information itself may appear, would risk the integrity of the investigation. The Commissioner is therefore persuaded that as the investigation was on-going at the time of the request disclosure would have an adverse effect on the council's ability to conduct the investigation. Accordingly, she finds that the exception is engaged.
117. The Commissioner has next considered the application of this exemption to the information to which the council applied the exemption at section 42 of the FOIA.
118. The council said that the relevant documents are exempt due to the provision of legal advice.
119. Legal professional privilege protects the confidentiality of communications between a lawyer and a client. It has been described by the Tribunal, in the case of *Bellamy v the Information Commissioner and the DTI*¹⁵ 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." (paragraph 9)
120. There is no specific exception within the EIR referring to information which is subject to legal professional privilege, however both the Commissioner and the Tribunal have previously decided that regulation 12(5)(b) encompasses such information.

¹⁵ Appeal no. EA/2005/0023

121. As stated earlier, in the case of *Kirkaldie v ICO & Thanet District Council*¹⁶ the Tribunal said 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”. (paragraph 21)

122. 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’.

123. 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.

124. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both 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.

125. The council’s response to the Commissioner’s enquiries did not state whether the withheld information is subject to litigation privilege or legal advice privilege. It said that advice given in the email between the council’s Chief Executive and Monitoring Officer on the 28 May 2015 was between lawyer and client and has not been disseminated and therefore remains confidential.

126. The Commissioner notes that the one email within the scope of the request is dated 27 May 2015 (as detailed in paragraph 21, the emails dated 28 May 2015 have been deemed to fall outside the scope of the request). The council did not provide details of how the specific withheld information is subject to legal professional privilege in this case. It is not clear to the Commissioner whether the email was written for the sole or

¹⁶ Appeal no. EA/2006/0001

dominant purpose of obtaining legal advice and she notes that the recipients include two councillors which may affect its confidentiality.

127. The Commissioner acknowledges that that ordering disclosure of information which is subject to legal professional privilege is likely to have an indirect adverse effect upon the course of justice simply through a weakening of the doctrine if information subject to privilege is disclosed on a regular basis under the FOIA or the EIR. However, the Commissioner must also consider the specific information caught by the request when making her decision in this case and the council has not provided specific arguments in this respect.
128. As stated in relation to the application of sections 36 and 43(2) of the FOIA, it is not for the Commissioner to apply arguments on behalf of the council. The council was informed by the Commissioner that it must justify its position and was provided with the Commissioner's guidance on how he deals with complaints¹⁷ which clearly states that it is the public authorities' responsibility to satisfy the Commissioner that information should not be disclosed and that it has complied with the law.
129. The Commissioner considers that the council has been provided with sufficient opportunity to provide its rationale for withholding information because it considers it to be subject to legal professional privilege.
130. As the council has not provided sufficient arguments for the application of the exception to the specific information in this case, the Commissioner has no choice but to conclude that the exception is not engaged in relation to the information to which the council applied the exemption at section 42 of the FOIA.

The public interest test

131. Regulation 12(1)(b) requires that where the exception in regulation 12(5)(b) is engaged then a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. As the Commissioner has decided that the exception is engaged in relation to the information to which the council applied the exemption at section 30(1) of the FOIA, she must consider the public interest test.

¹⁷ http://www.ico.org.uk/for_organisations/freedom_of_information/guide.aspx

Public interest arguments in favour of disclosing the requested information

132. The Commissioner is mindful of the fact that there is a strong presumption in favour of disclosure of information under the EIR as stipulated in regulation 12(2) which states:

“A public authority shall apply a presumption in favour of disclosure.”

133. The council did not submit any arguments in favour of disclosing the requested information.

134. The Commissioner notes that the complainant has stated that the requested information is needed for court proceedings.

135. The Commissioner considers that disclosing the information would promote general accountability and transparency and could also build confidence in the council's investigative and enforcement activities if it demonstrates that the council has conducted a thorough and fair investigation.

Public interest arguments in favour of maintaining the exception

136. In favour of maintaining the exception the council said that the complainant is currently being prosecuted for an offence and that the withheld information goes to the heart of that investigation. It said that the ongoing investigation is entirely in the public interest and as such its continuation outweighs the public interest in disclosure at this time.

137. The council also said that a junior member of staff is referenced in the information as being criticised. It explained that there was a serious concern around bullying from the requestor of this information towards the officer in question and that the officer was highly impacted by this criticism and as such the matter is highly sensitive and requires confidentiality. It said that for this information to be put in the public domain would firstly identify the member of staff, as there is only one person who does that job, and secondly cause personal upset and harm and for that reason the public interest in disclosing the information is lesser than the public interest in maintaining the confidentiality of the document.

138. The Commissioner considers that there is a general public interest in not prejudicing investigations, proceedings and inquiries. There is also general public interest in maintaining the confidentiality in on-going investigations, in particular the public interest in not prejudicing the investigation by the premature release of information.

139. The Commissioner also considers that there is public interest in the public having confidence in the ability of the council to ensure that its conduct of an investigation is fair and thorough. She considers that the disclosure of information used as part of an investigation makes it vulnerable to accusations of a flawed investigation as it could undermine the ability of investigators to obtain a true account of all relevant contributing factors to an offence in order to make a fully informed view. The Commissioner therefore considers that disclosure would be prejudicial to the council's ability to conduct a fair, thorough and effective investigation.
140. In addition, the Commissioner considers that disclosure of the requested information could adversely affect the ability of investigators to plan and complete investigations without fear of potential offenders temporarily altering their behaviour in order to avoid a prosecution.

Balance of the public interest arguments

141. As stated in the Commissioner's aforementioned guidance on the public interest test, in considering the public interest in relation to any particular exception, a public authority should take into account only the public interest arguments that are relevant to that exception – public interest arguments that support other exceptions are irrelevant. The Commissioner notes that the council argument in paragraph 137 does not relate to the exception being considered therefore she has not taken it into consideration.
142. The Commissioner considers that the argument submitted by the complainant, that being that the information is needed for court proceedings, relates to the interests of an individual. She is mindful that the ICO's own guidance on the subject, 'The course of justice and inquiries exception (regulation 12(5)(b))'¹⁸ states that in applying the public interest test to cases involving civil and criminal investigations, proceedings and enquiries, the distress of individuals associated with the case is not a relevant factor under the exception. Although the Commissioner can appreciate the interest of the complainant, it is essentially a private interest and not that of the wider public interest. It should be made clear that the Commissioner's concern is not with the private interest of individuals. Whilst the requested information is clearly of interest to the complainant, this does not necessarily mean that there is a wider public interest that would be served by its release.

¹⁸ https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf

143. Whilst the Commissioner recognises the strong public interest inherent in environmental information and in favour of transparency, accountability and building confidence in the council's investigative and enforcement activities, she is mindful of the fact that the investigation was on-going at the time of the request and this fact means that very considerable weight should be given to the public interest inherent in the exception in avoiding an adverse effect to the course of justice. As previously stated, the disclosure of the information during the course of an investigation could impact on the council's ability to conduct its investigation in a thorough and fair manner. The Commissioner is also mindful of the effect that disclosure could have on the effectiveness of future investigations.
144. The Commissioner has therefore concluded that the balance of public interest favours maintaining the exception and accordingly, regulation 12(5)(b) is engaged and the council is not required to disclose the information.

Section 3

145. Section 3 of the FOIA sets out the two legal principles by which it is established whether information is held for the purposes of FOIA.
146. Section 3(2)(b) provides that in circumstances where information is held by another person on behalf of the public authority, the information is considered to be held by the authority for the purposes of FOIA.
147. The Commissioner's guidance on 'Official information held in private email accounts'¹⁹ states the following:

"Information held in non-work personal email accounts (e.g. Hotmail, Yahoo and Gmail) may be subject to FOIA if it relates to the official business of the public authority. All such information which is held by someone who has a direct, formal connection with the public authority is potentially subject to FOIA regardless of whether it is held in an official or private email account. If the information held in a private account amounts to public authority business it is very likely to be held on behalf of the public authority in accordance with section 3(2)(b).

¹⁹ https://ico.org.uk/media/for-organisations/documents/1147/official_information_held_in_private_email_accounts.pdf

This can apply to any public authority. For example, a Councillor may hold information relating to local authority business in his/her private email account on behalf of the local authority... In the local government context, there is a need to have a clear demarcation between Council business and work for individuals as their local representative.

Information in private email accounts that does not relate to the business of the public authority will not be subject to FOIA.

Situations where information legitimately requested under FOIA includes relevant information held on private email accounts will be rare. However, when a request for information is received, public authorities should consider all locations where relevant information may be held. This may include private email accounts...

...Where a public authority has decided that a relevant individual's personal email account may include information which falls within the scope of the request and which is not held elsewhere on the public authority's own system, it will need to ask that individual to search their account for any relevant information.

The enquiries made should be directed towards deciding whether any information which is so held was generated in the course of conducting the business of the public authority. If it was, it is likely to be within the scope of the request. It will therefore be held by the individual on behalf of the public authority for the purposes of FOIA."

148. Given the terms of the request, it is feasible that information is held by individual councillors on their own private email systems which could amount to council business falling within the scope of the request. Therefore, the council should ask the named councillors to search their private email accounts for information falling within the scope of the request and if any is held, the council should issue a fresh response in relation to that information under the applicable legislation.

Other matters

149. The Commissioner is concerned about the delay in responding to her enquiries in this case. She wrote to the Commissioner on 7 September 2016 requesting a response by 5 October 2016 but did not receive that response until 1 February 2017 and did not receive the withheld information until 7 February 2017. The council has explained that the delay was due to resourcing and technical issues and is not a reflection of the importance it attaches to its legal obligations pursuant to the various access to information regimes.

150. As covered under the "Scope of the case" heading above, it was only after the intervention of the Commissioner that the council reached a settled position on the legislation under which this request should have been handled and under which exemptions and exceptions it was being refused. Even then the Commissioner has identified information which should have been dealt with under the EIR rather than the FOIA.
151. As also mentioned under the "Scope of the case" heading above, in its response to the Commissioner, the council included information which does not fall within the scope of the complainants requests. It appears that the council did not give proper consideration as to whether all the information its searches produced is actually within the scope of the request. This led to a to further delay in dealing with the complaint.
152. The council both identified information to disclose to the complainant and relied on significantly more exemptions and exceptions in its response to the Commissioner than it had at its initial response and internal review. This could be an indication that the council did not apply a presumption of disclosure when considering the request and did not give the request proper or full consideration until the end of the Commissioner's investigation.
153. The Commissioner is also concerned about the council's lack of depth of arguments provided to the Commissioner in relation to the various exemptions and exceptions cited.
154. The council should ensure in future that its first step upon receiving an information request is to identify all the relevant information it holds and provide it unless a relevant exemption or exception applies. It should ensure that it is aware of the requirements of the EIR and of the necessity for a request for environmental information to be handled under the EIR .The council should also ensure that its responses to the Commissioner's enquiries are as thorough and timely as possible.

Right of appeal

155. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

156. 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.

157. 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
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