

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

Date: 4 September 2018

Public Authority: South Lakeland District Council
Address: South Lakeland House
Lowther Street
Kendal
Cumbria
LA9 4DQ

Decision (including any steps ordered)

1. The complainant has requested information relating to a planning application. The Council handled the request under the FOIA and refused to disclose the information it held under the exemptions provided by section 21 – information accessible to the applicant by other means, section 36 – prejudice to effective conduct of public affairs, section 40(1) – information which is the applicant’s own personal data, section 40(2) – third party personal data and section 41 – information provided in confidence. When the Commissioner advised the Council that much of the requested information constituted environmental information the Council claimed that the information would be exempt under regulation 12(4)(e) – internal communications, regulation 5(3) – personal data of the applicant, 13 – third party personal data, regulation 12(5)(e) – commercially confidential information and regulation 12(5)(f) – interests of the provider of the information.
2. During the course of the Commissioner’s investigation the Council did disclose some information. The complainant also confirmed that he was no longer interested in any information that had previously been supplied to him or that was available on the internet; this accounted for much of the information that had originally been withheld under section 40(1) and section 21.

3. The Commissioner's decision is that only a limited amount of the requested information should have been considered under the FOIA. That information has been withheld under section 36. The Commissioner finds that section 36 only applies to some of that information.
4. In respect of the environmental information the Commissioner finds that part of the request can be refused under regulation 5(3). Only some of the information to which regulation 12(4)(e) has been applied can be withheld under that exception.
5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information set out in the confidential annex which accompanies this notice and which will be made available exclusively to the Council.
6. 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

7. On 12 June 2017 the complainant made a request to the Council for information related to a particular planning application and which read as follows:

"I would like to see all records, correspondence (written, email, direct messaging or other medium), photographs, measurements, notes, direct messages via mobile or any other apps, relating to the planning application SL/xxxx/xxxx including any amendments, complaints, investigations, enforcement or other matter."
8. The Council responded to the request on 6 July 2017 when it explained that it was withholding the requested information under the exemptions in section 40(1) (personal data of the applicant), section 41 (information provided in confidence), section 30(1)(a)(i) (investigations), section 21 (information accessible by other means) and section 36 (prejudice to effective conduct of public affairs).
9. The complainant subsequently asked the Council to carry out an internal review of its handling of his request. The review upheld the initial response to the request.

Scope of the case

10. On 17 August 2018 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
11. In January 2018 the Council disclosed some information to the complainant but continued to withhold the majority of the requested information.
12. Requests for information regarding planning matters are usually considered under the EIR since the information is likely to fall within the definition of environmental information under regulation 2 of that legislation. Therefore the Commissioner considers the scope of her investigation to be to decide whether and to what extent the information is environmental and whether FOIA or the EIR is the correct regime to apply.
13. The Commissioner will then go on to consider whether any of the exemptions under FOIA and the EIR apply. The Council has confirmed that it is withholding the requested information under the exemptions in section 40(1) - personal data of the applicant, section 40(2) - third party personal data, section 41 - information provided in confidence, section 21 - information accessible by other means and section 36 - prejudice to effective conduct of public affairs of FOIA. In the event that the Commissioner decides that the request should have been considered under the EIR the Council has said that it would seek to rely on the exemptions in regulations 12(4)(e) - internal communications to that withheld under section 36 and regulations 12(5)(e) - commercial confidentiality and 12(5)(f) - interests of the provider of the information, to that withheld under section 41. The Council has cited regulation 5(3) and 13 which the provisions provided by section 40(1) and 40(2) in respect of personal data about the person making the request and third party personal data respectively. The council has not cited any exception as an alternative to its application of section 21.
14. Originally the Council also applied section 30(1)(a)(i) - investigations, to some of the information. During the Commissioner's investigation it dropped its reliance on this exemption and released the information to which it had been applied.

A certain amount of information held by the Council comprises correspondence with the complainant himself, information that has already been made available via the planning portal of the Council's website and information relating to a complaint made to the Local Government Ombudsman which the Council says has already been made available to the complainant. The complainant has confirmed that he is not seeking any correspondence between him and the Council, any

information which has already been disclosed to him or any information which is otherwise publicly available.

15. One of the documents released to the complainant during the course of the Commissioner's investigation has been redacted to remove personal data. The complainant has asked the Commissioner to confirm that it is only personal data that has been withheld.

Reasons for decision

16. The complainant's request has captured a very significant amount of information comprising not just information on the planning application but also internal correspondence regarding complaints the complainant has made against the Council as well as previous information requests he has submitted to the Council.

Environmental Information

17. On receipt of the complaint the Commissioner asked the Council to consider whether the request ought to have been dealt with under the EIR rather than FOIA. In response the Council said that the withheld information could be considered non-environmental given that it is about the handling of a planning application rather than the planning application itself. It said that even some of its enforcement file was "correspondence with the complainant rather than specifically environmental". The Council also noted that the complainant had asked for his request to be considered as a FOI request.
18. Nevertheless, the Council went on to say that it acknowledged that in general, requests about planning matters should be considered under the EIR and that it would amend its processes to reflect this.
19. Environmental information is defined in the EIR as:

"...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;”

20. Depending on the nature of the withheld information, the Commissioner would usually take the view that the particular planning regulation under which the decision has been made is a measure affecting or likely to affect the factors and elements in 2(1)(a) and (b), or designed to protect those elements. Alternatively the planning application may be a measure (a plan) likely to affect the elements of the environment. In either case, this would fall under the definition of environmental information in regulation 2(1)(c). In this case the Commissioner is satisfied that information related to the planning application, complaints about that the handling of that application, including the complaint to the Local Government Ombudsman (LGO) and information on its planning and enforcement files all fall within the definition of environmental information. This is because it has the planning application and its potential effect on the landscape and environment as its focus. Where the information relates to the Council's handling of the complainant's previous FOI requests the Commissioner accepts that this is non-environmental information as its focus is in ensuring that the Council provides a proper response to the requests and that where the requests were refused, the Council's reasons for doing so were properly explained. This information does not have any connection to the environment and so FOIA is the correct regime to apply.
21. The Council provided the Commissioner with a series of files labelled A to M, some of which were themselves subdivided due to their size, for example file A is split into Ai and Aii.
22. File A in its entirety comprises of emails to and from the complainant. Its contents were originally withheld under section 40(1) – personal data about the requestor and section 21 – information already available by other means. As the complainant already has access to this information the Commissioner will not consider its contents any further.
23. File B has been labelled by reference to an earlier information request made by the complainant and is described as being 'All internal emails'. The file has been withheld under section 36 – prejudice the conduct public affairs of the FOIA. To the extent that any of the information within it is environmental the Commissioner understands the Council is relying regulation 12(4)(e) – internal communication. Having viewed the information contained in file B the Commissioner finds that it contains both internal and external communications, some of which appear to relate to the planning application itself and so constitutes environmental information. The other information does focus on the complainant's

earlier information request and how it should be handled by the Council and will be considered under the FOIA. The Commissioner will consider its contents in more detail later.

24. File C relates to the Council's handling of the complainant's current request. The information was generated in the process of handling the request and therefore did not exist at the time the request was received. This information is not captured by the request and the Commissioner will not consider its contents any further.
25. File D also contains information generated during the handling of the current request and like-wise is not captured by it. The Commissioner will not consider its contents any further.
26. File E contains the information published on the Council's planning register. It was originally withheld under section 21. This environmental information is already available to the complainant and as he has indicated that his complaint does not relate to such information the Commissioner has not considered it any further.
27. File F contains is labelled Planning Files and contains environmental information already released to complainant. It was originally withheld under section 21 and 40(1). The Commissioner has not considered its contents any further.
28. File G, again labelled 'Planning File' contains external documents held on the Council's planning file. It was originally withheld under section 21, 40(1) and 40(2) – third party personal data. Having reviewed the file the Commissioner is satisfied it contains correspondence between the complainant and the Council which the complainant will already have had access to. The Commissioner will not consider this file any further except in respect of one document. That document is an un-redacted version of the original planning application. A redacted version is contained in File E, i.e. the information on the planning register. The only information withheld from that document is the signature of the representative of the person seeking planning permission. This has been withheld under section 40(2) on the basis that it is the personal data of the representative of the person seeking planning permission. The Council has cited regulation 13 of the EIR in the alternative. Regulation 13 mirrors the provisions of section 40(2). Both allow third party personal data to be withheld if its disclosure would be unfair to the third party concerned. The Commissioner is satisfied that it would be unfair to make public the signature as to do so could potentially render the third party vulnerable to fraud. The signature can be withheld.
29. File H is also labelled 'Planning file' and described as internal documents. Its contents have been withheld under section 36 of the FOIA, with the Council citing regulation 12(4)(e) to the extent that any of the

information is environmental. Relating as it does to the consideration of the planning application, the Commissioner is satisfied the information falls to be considered under the EIR. Having viewed the file the Commissioner notes that although described as internal documents the file contains email exchanges between the complainant and the Council albeit that these have then been forwarded to appropriate members of staff to deal with. Similarly there is also correspondence from the representative the person seeking the planning permission. However much of these are duplicates of information already disclosed to the complainant. There are also a number of documents that contain only the address of the property which is the subject of that planning application; as this address is already known to the complainant the Commissioner has not considered those documents any further. Nor has she considered the complainant's right of access to information which he has already had access to. However there a few documents in the file that are purely internal documents such as draft decisions on the planning application, internal discussion of the issues raised by the planning application and an internal note summarising a phone call with a third party. The Commissioner will consider the complainant's right of access to this information and the emails forwarding the complainant's correspondence within the Council under the EIR.

30. File I is labelled 'Enforcement file' and is simply described as 'Correspondence'. The Council originally withheld the file under sections 40(1) – personal data about the person making the request, and section 21 – information already accessible to the person making the request. As it relates to issues around the enforcement of planning legislation the Commissioner is satisfied that the information should be considered under the EIR. Having viewed the file the Commissioner is satisfied that the vast majority of it is correspondence between the complainant and the Council, i.e. the sort of information which the complainant has indicated he is not concerned about. There is one document however that the Commissioner does not think the complainant will already have accessed and although by no means of any great significance, the Commissioner will consider the complainant's right of access to it under the EIR for completeness.
31. File J is labelled 'Complaints file' and is described as "All internal correspondence". It was originally withheld under section 36. It relates to a complaint raised by the complainant with the LGO regarding how the Council dealt with the planning application. As such the Commissioner is satisfied that it is information relating to that planning measure and is therefore environmental information which should have been considered under the EIR. The Council has applied regulation 12(4)(e) – internal communications to any environmental information which it originally withheld under section 36 of FOIA. Although much of the information does not comprise of internal communications, being communications with the LGO, the complainant is already privy to much

of it. Where this is the case the Commissioner will not consider the information any further. Where the Commissioner is not satisfied the complainant has already accessed the information she will consider the Council's application of regulation 12(4)(e).

32. File K also relates to the complaint to the LGO about the handling of the planning application. As part of that complaints process the originator of the complaint is provided with copies of the Council's comments and any evidence relied upon when reaching a decision. In light of this the council has advised the Commissioner that it considers the contents of this file would have been made available to the complainant. It has withheld the information under sections 41 – information provided in confidence, section 40(1) the complainant's own personal data and section 21 – information already available to the complainant. The Commissioner has reviewed file K and considers much of it will have been made available to the complainant and is therefore not of concern to the complainant. However there are a number of documents such as an initial letter from the investigator to the Council, some administrative correspondence, and what appears to be comments on the issues raised by the complaint produced by a council officer as part of the process of responding to that complaint which the Commissioner is not convinced the complainant will have already received.
33. As File K relates to a complaint about how the planning application was dealt with the Commissioner is satisfied its contents constitute environmental information. The Commissioner will therefore consider whether any of exceptions cited by the Council as alternatives to sections 40(1) and 41 apply.
34. File L consists of correspondence between the complainant and the Council. It was originally withheld under section 40(1) and 21. This is not information which the complainant is concerned about and the Commissioner has not considered it any further.
35. File M is information which the Council released to the complainant in January 2018 and as such is no longer of any concern to the Commissioner.
36. As can be seen the much of the information that is captured by the actual terms of the request is that which the complainant has already had access to, either through publicly available information, by virtue of it being correspondence exchanged by him with the Council, or through being party to complaints about the handling of that planning application. In addition some of the information the Council provided to the Commissioner was not captured by the request because it was generated after the time of the request.

37. Of the relatively small amount of information which is still in dispute, the majority is environmental information as it relates directly to consideration of the planning application, or complaints about that process. It is therefore information which needs to be considered under the EIR. As regulation 12(4)(e) has been used to withhold most of the environmental information the Commissioner will start by looking at that exception.

Regulation 12(4)(e) – internal communications

38. Regulation 12(4)(e) provides that a public authority may refuse to disclose information to the extent that it involves the disclosure of internal communications. The exception has been applied to information which was originally withheld under section 36 of the FOIA. The information in question is contained in files B, H and J.
39. It should be noted that it is the only exception that has been claimed as an alternative to section 36. Therefore if regulation 12(4)(e) does not apply the information should be disclosed. However, as is explained in more detail later, regulation 5(3) of the EIR provides that a public authority is not obliged to provide information which constitutes the personal data of the person making request. Also, as the Commissioner also regulates the Data Protection Act (DPA) she would not be prepared to order the disclosure of personal data which would breach the principles of the DPA 1998, the Act that was in force at the time of the request. Such information would be exempt from disclosure under the exception provided by regulation 13 of the EIR.
40. The concept of a communication is broad and will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it.
41. Starting with file B the Commissioner notes that although it is labelled as relating to a previous information request some of its contents are clearly about the planning application at the heart of the request. It is this information which the Commissioner has considered under 12(4)(e). Having viewed this information it is clear that it is correspondence with a third party; it is not internal communications and cannot be withheld under regulation 12(4) (e). In the absence of any other grounds provided by the council for withholding this information, the Commissioner requires it to be released once appropriate redactions have been made to remove the personal data of third parties. The council may also remove the complainant's own personal data.
42. The specific documents are listed in the confidential annex which accompanies this notice. There are many duplicates of documents in the file. The Commissioner only requires the Council to disclose one copy of

a document containing the information. This approach will apply to all information which this notice requires to be disclosed.

43. File H is labelled 'Planning file' and described as "Internal documents". Its contents include a number of emails originating from the complainant and then forwarded to the appropriate business area to deal with. The original emails from the complainant are obviously not internal documents even when forwarded internally. But the email which forwards the complainant's correspondence onto the appropriate business will be, as will any discussion of that follows in an internal exchange of email. Such information engages the exception provided by regulation 12(4)(e), but a final decision on whether the information can be withheld is dependent on the application of the public interest test. This will be considered later.
44. File H also contains a letter from the representative of the person making the planning application. This is not an internal communication and so does not engage regulation 12(4)(e). However before ordering its disclosure the Commissioner notes that it contains the name of the complainant which obviously constitutes his personal data which is exempt under regulation 5(3) of the EIR. Therefore the Council is entitled to redact the complainant's name from that letter. Furthermore the Council may choose to redact the name of the officer to whom the letter was sent if this is consistent with redactions that would be made to information publicly available on the planning pages of the Council's website.
45. The file also contains a note of a phone call from the same representative. Although it records an external contact it is nevertheless an internal communication for the purposes of regulation 12(4)(e). Similarly there are a number of internal documents which include draft decisions on the planning application and exchanges between council officers on issues raised by the application. All the information contained in these documents constitute internal communications and so engage the exception. They will be considered further under the public interest test.
46. File J is labelled 'Complaints file' and described as "All internal emails". They relate to a complaint about how the planning application was dealt with. It includes correspondence from the LGO and copies of the specific areas of concern the complainant raised in that complaint. However although such information could not attract regulation 12(4)(e), the Commissioner is satisfied that the complainant will already have access to some of this information and therefore is not the information which the complainant is concerned about.
47. There are other documents which the Commissioner is not convinced the complainant would necessarily already have access to and which cannot

be regarded as internal communications. These cannot be withheld under regulation 12(4)(e). Before ordering the disclosure of these documents though the Commissioner will consider whether they would be exempt from the right of access under regulation 5(3). This will be discussed in more detail in paragraph 61 below.

48. There is other information within file J which is contained internal communications, being exchanges between council officers which discuss issues arising out of the handling of the planning application and the subsequent complaint. These are wholly internal communications and clearly attract regulation 12(4)(e). They will be considered further under the public interest test.

Public interest test

49. Regulation 12(4)(e) is subject to the public interest test. This means that even though the information constitutes an internal communication and therefore attracts the exception provided by regulation 12(4)(e), the information can only be withheld if in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosure. Furthermore under regulation 12(2) a public authority is required to apply a presumption in favour of disclosure when considering this test.
50. Since none of the information from file B engaged the exception the Commissioner will start by looking at the information from file H which attracts regulation 12(4)(e). The first documents are those which simply forward on the complainant's emails to the appropriate officers within the Council. The Commissioner recognises that disclosing when and to whom the external correspondence was forwarded within a public authority can be informative. It can, for example, tell the reader at what level within the public authority a matter was considered and the promptness with which it was considered appropriate to deal with the issue. This together with any message included when forwarding the email may be sensitive. In this case however they actually contain very little information, one is in fact blank. The Council considers they is such little value in their disclosure that the public interest must favour withholding them. By the same token, it is very difficult to see how any harm would arise from their disclosure. Whilst the Commissioner recognises that these documents may be of very little interest to the complainant, applying the presumption in favour of disclosure the Commissioner finds that the public interest favours disclosure. These documents should be disclosed once redactions have been made to remove the personal data of the complainant and that of any council officers. The job titles of the more senior officers involved should be disclosed.

51. File H also contains the note of a phone call from the representative of person applying for planning permission. Although it records an external message in so doing it sets out what elements of the phone call the officer receiving it considered most relevant. The note is professional, appears factual and there is nothing objectively controversial in its contents. However its disclosure may make officers more hesitant in noting such conversations and this would leave gaps in their colleagues' understanding of the progress of an application and attempts to resolve any objections to an application. For this reason the Commissioner is satisfied the public interest favours maintaining the exception. The Council is entitled to withhold this information.
52. Finally file H also includes documents recording the planning decision itself and its progress through the planning process. One of these documents records the final decision. As that final decision is a public one the Commissioner considers there would be no harm caused by its disclosure. This document should be released. However other documents relate to a slightly earlier period in the planning process and therefore they record what were then only draft or preliminary decisions. The Commissioner considers Council officers should be free to record such preliminary decisions without being concerned about their potential disclosure regardless of what the final decision may be. Therefore the Commissioner finds the public interest favours withholding these documents. The last documents to be considered record a short email exchange in which officers clarify their response to issues that had been raised by the planning application. There are grounds for arguing such exchanges should be disclosed to provide transparency over how concerns about a planning application are dealt with. This would provide confidence in the integrity of the Council's processes. There are counter arguments. In many cases it is likely that neighbours may have raised the concerns or objections under discussion and this can make such discussions more sensitive. Officers need space to deal with matters professionally but swiftly and keep their colleagues up to date as appropriate. Each case needs to be judged on its own merits and given the actual content of the information in question, which does not appear particularly controversial the Commissioner finds that the public interest just favours disclosing these documents. The Council is required to disclose them. Again redactions can be made in respect of any of the complainant's own personal data or that of council officers,
53. File J relates to a complaint to the LGO about the planning process and includes information which comprises of email exchanges between officers which discuss officer's reaction to the outcome of the complaint before widening their discussion. The Commissioner is satisfied that there will be occasions when officers should be free to reflect on complaints and consider how best to move forward with all aspects of a planning issue without concern that such discussions will be made public at a later date. Although there is still a public interest in disclosing

information that would raise confidence in the Council's handling of planning issues and its interactions with the public on such issues, the Commissioner is satisfied that in respect of this information the public interest favours maintaining the exception and withholding the information.

54. The Commissioner will now consider the remainder of the environmental information that remains in dispute and which has been withheld under exceptions other than regulation 12(4)(e).
55. File I, labelled Enforcement file, contains one document which the Commissioner is not satisfied the complainant will have had access to. File I was originally withheld under the exemptions provided by sections 40(1) – personal data of the person making the request, and section 21 – information available to the applicant by other means. The Council is relying on regulation 5(3) to refuse to provide any information which is the personal data of the complainant. It has not cited any exception as an alternative to section 21. Having viewed the document in question the Commissioner finds that although the complainant is named in the document, by simply redacting his name the remainder of the document could be disclosed. Although the Commissioner doubts the information in question will be of any real interest to the complainant, the Council is required to disclose an appropriately redacted version of the document.
56. File K is labelled 'Complaints file'. Again its contents were originally withheld under sections 40(1) and 21. The Council also applied section 41 – information provided in confidence to this information. As discussed regulation 5(3) of the EIR mirrors the provisions of section 40(1). The Council has not cited an alternative to its use of section 21. It has however cited the exceptions provided by regulations 12(5)(e) – commercial confidentiality, and regulation 12(5)(f) – interests of the provider of the information, as alternatives to section 41. Both regulations 12(5)(e) and (f) have their own multi-part tests, each one of which has to be met before the Commissioner would be satisfied that the exception applies. In this case the Council has cited the exceptions but has not developed its arguments any further, or addressed the appropriate tests. The onus is on the public authority to demonstrate that an exception is engaged and therefore in the absence of any serious attempt to explain the engagement of these two exceptions the Commissioner is not satisfied that they apply. Therefore she will focus on the Council's application of regulation 5(3).

Regulation 5(3) – personal data about the person making the request.

57. Paragraph (1) of Regulation 5 sets out the general duty of a public authority to make environmental information available on request.

58. Regulation 5(3) states that to the extent that the information requested includes the personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data. In other words, a person has no right to their own personal data when making a request under the EIR.
59. Personal data is information which both identifies a living individual and relates to that person.
60. The Council split file K into two, Ki and Kii. The information under consideration is contained in Ki and consists of two letters from the LGO to the Council together with a copy of the issues raised by complainant which has then been annotated with comments by the relevant council officers in preparation for drafting a more formal response. These documents clearly identify the complainant and set out his concerns. The annotated copy of the complainant's concerns reveal details relating to himself and his property. The comments made by the council officer in response obviously address the same matters and so also constitute the personal data of the complainant. The Commissioner is therefore satisfied that the complainant is not entitled to this information under the EIR due to the application of regulation 5(3).
61. The Commissioner will also consider the application of regulation 5(3) to information previously referred to paragraph in 47 above. This was information from file J which also related to complaints about how the planning application was handled. The information was originally withheld under section 36 of the FOIA. However as it constituted environmental information that provision was not relevant and the Commissioner therefore considered the EIR alternative cited by the Council i.e. regulation 12(4)(e). That exception was not engaged because the information did not form part of an internal communication.
62. It should be noted that the Commissioner is not in a position to apply exceptions on behalf of a public authority. However regulation 5(3) is not an exception in the same way as those contained in regulation 12 or 13 are, which, when account is taken of the public interest test, all depend on the public authority being able to demonstrate some harm would result from disclosure. Instead regulation 5(3) simply provides that there is no right of access to environmental information which, as a matter of fact, constitutes the personal data of the person making the request. Therefore the Commissioner is not in a position to require a public authority to provide a complainant with information which they are clearly not entitled to under regulation 5(3).
63. The information in question is of the same character of that already discussed above from file K. It is correspondence from the LGO. Again, having reviewed the documents, the Commissioner finds that the personal data of the complainant is inextricably linked with the details

and handling of that complaint. Due to the application of regulation 5(3) the complainant is not entitled to this information.

Issues specifically raised by the complainant

64. Before looking at the Council's application of exemptions under the FOIA to the non-environmental information the Commissioner will address specific queries raised by the complainant in respect of redactions made to a particular document which has already been disclosed to him.
65. The complainant has been provided with a redacted version of an 'Enforcement Record Sheet'. He understands that the only information redacted from that document is personal data and he questions whether the information blacked out is in fact personal data. The Council has provided the Commissioner with a fully un-redacted copy of the Enforcement Record Sheet. It is clearly environmental information. The Commissioner is satisfied that the majority of the information redacted is either the complainant's own personal data (including his address) or that of other people, including the owner of the property about which the complaint was made about and the council officers looking into that complaint. Often the council officers are simply referred to by their initials. The one redaction which, on its own is not personal data and which could have been released is the third redaction from the 'Details' recorded on 5/4/2017. From his correspondence the complainant is under the impression that the information redacted is a numerical figure. It is not, it is simply a reference to the gender of the person who raised the enforcement issue. The Commissioner is satisfied that the complainant is entitled to this information and although it would add very little to his overall understanding of events, it would allay his concerns that information had been unnecessarily redacted. The Council are required to provide a fresh copy of this document without this one redaction.
66. The Council has also assured the Commissioner that it does not hold any additional information in respect of any measurements taken. It has explained that it has provided the Commissioner with all the file notes and measurements that it holds in relation to this planning application. Its normal operating practice is rely on brief notes recorded on documents such as the Enforcement Record Sheet which has already been provided to the complainant.

Section 36 – prejudice to the conduct of public affairs

67. The only information that remains to be considered is the non-environmental information from file B. File B is labelled by reference to an earlier information request made by the complainant. Having examined the file the Commissioner found that it also contained information that seemed to relate purely to the planning issue that is at

the heart of this request. That information has already been considered in paragraph 41 above. The remaining information does relate to the Council's handling of the previous request and as explained earlier the complainant's right of access to such information should be considered under the FOIA. The Council has withheld this information under section 36.

68. So far as is relevant section 36(2)(b) provides that information is exempt if in the opinion of the qualified person its 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 purpose of deliberation.
69. Section 36(2) is unique in that it depends on the reasonable opinion of qualified person in order to be engaged.
70. From the Council's submission the Commissioner understands that its main concern is the impact disclosure would have on the free and frank exchange of views. It has only very briefly referred to any inhibition to the free and frank provision of advice. In respect of the likelihood of these processes being inhibited the Council has stated that its qualified person is of the opinion that disclosing the information 'would be likely' to inhibit them. The term 'would be likely' is taken to mean that there is a real and significant likelihood of the inhibition envisaged occurring, even if this falls short of being more likely than not.
71. When considering the application of section 36 the Commissioner will:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person;
 - Ascertain when the opinion was given;
 - Consider whether the opinion was reasonable.
72. In the case of the South Lakeland District the person designated as its qualified person is its monitoring officer who also fulfils the role of its Director of Policy and Resources. The qualified person has confirmed to the Commissioner that they gave their opinion on 6 July 2017, i.e. the day the Council provided its initial, formal response to the request. The Commissioner is therefore satisfied that the requirements of the first three bullet points above have been met.
73. It is now necessary to consider whether the qualified person's opinion was a reasonable one. When considering reasonableness the

Commissioner relies on the Oxford English Dictionary definition of reasonableness, that is, the opinion must be "in accordance with reason; not irrational or absurd". There can be more than one reasonable opinion on a matter and it is not necessary for the Commissioner to agree with the qualified person's opinion. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person can hold.

74. Initially the qualified person's opinion was based on a verbal description of the information. However at the internal review stage the qualified person had access to all the information captured by the request. They were also provided with submissions setting out arguments for the exemption being engaged as well as counter arguments.
75. The Commissioner has reviewed the information being withheld from file B under section 36. A number of the documents concern the administrative process around dealing with an information request such as forwarding on the request, seeking any information captured by the request and explaining a public authority's responsibilities upon receipt of an information request. There are other email exchanges that capture internal discussions about the Council's formal response, these relate to the potential application of exemptions and the general request handling process. The Council has argued that the candour of exchanges between planning officers and other departments would be inhibited if those officers anticipated those discussions would be made public. Certainly the Commissioner can see that the qualified person would have grounds for considering the risk of making some of those exchanges public would inhibit the future discussion of such matters. In respect of the less sensitive exchanges that are more to do with the simple administration of the request the Commissioner considers that given the circumstances in which the exchanges took place it is not totally unreasonable to hold the opinion that their disclosure could make officers more hesitant when dealing with request in the future. The Commissioner is therefore satisfied that the qualified person's opinion is a reasonable and the exemption is engaged in respect of all the non-environmental information in file B to which it has been applied.

Public interest test

76. Section 36 of the FOIA is subject to the public interest. This means that although the exemption is engaged, the information can only be withheld if in all the circumstances of the case the public interest in maintaining the exemption is greater than the public interest in disclosure.
77. When considering the public interest in favour of maintaining section 36 the Commissioner will give some weight to the opinion of the qualified person. This means that the Commissioner accepts that it is likely that

there would be some inhibition of the free and frank exchange of views and provision of advice. However the Commissioner will go on to consider the severity, extent and frequency of that inhibition before weighing that against the value in disclosing the information.

78. In respect of the more sensitive email exchanges which discuss the request handling process and any grounds for withholding the requested information the Commissioner recognises that officers should be free to express their views as fully as possible in order that the Council is able to make sound judgements and properly assess the consequences of any disclosure. This is important when it is remembered that often the communications will be between officers with two distinct realms of expertise, one with knowledge of the how the FOIA works and the business area holding the information which will understand the sensitivities of that information. Furthermore having regard for the actual contents of the exchanges in question the Commissioner considers the inhibition would be quite severe. Given that those involved, the team responsible for request handling and the planning department, whose work may attract a number of requests, the Commissioner considers the inhibition would be relatively frequent.
79. The Council has recognised that there is a general public interest in openness and transparency. It has also said that it is important to involve the public in the decision making where possible, in order to further the public's understanding of the Council's decision. The Commissioner would add disclosure would provide information about how officers within the Council approached their responsibilities under the FOIA and the EIR which would reflect the Council's general stance on openness. However the actual information in question relates to one minor strand of what is essentially the private concern of the complainant and its disclosure is unlikely to further any wider public discussion on the Council's approach to information rights or its handling of planning applications.
80. In light of the above the Commissioner finds that in respect of this information the public interest in maintaining the exemption outweighs the public interest in disclosure. The Council is entitled to rely on section 36 to withhold the information.
81. In respect of the exchanges that relate more to the administrative processes around dealing with an information request, the Commissioner finds that the public interest in maintaining the exemption is much weaker. Not only is it questionable whether the emails themselves relate to either the free and frank exchange of views or advice, their contents do not appear to be controversial or in any way sensitive. They simply initiate the request handling process and the collection of the relevant information. It is difficult to see either how officers could meet their obligations without communicating in this way.

The emails are generally brief and to the point. The Commissioner does not accept that officers would be deterred from exchanging emails of this nature to any great extent. The severity of any inhibition caused by the disclosure of these emails would not be significant. The public interest in preventing this very limited inhibition is not great enough to outweigh the general public interest in favour of their disclosure, even if the disclosure would reveal little about the Council's approach to information rights.

82. Where the documents consist of email chains the Council may remove any from the complainant and any references to the complainant's name or other personal data contained in the subsequent emails between officers. The Council is also entitled to remove any personal data relating to its junior officers.

Right of appeal

83. 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

84. 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.

85. 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

Rob Mechan
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF