

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 8 January 2019

Public Authority: London Borough of Ealing
Address: Perceval House
14-16 Uxbridge Road
Ealing
London
W5 2HL

Decision (including any steps ordered)

1. The complainant has requested information concerning the internal planning procedures of London Borough of Ealing (the Council). The Council provided the complainant with relevant information held but withheld some information under regulation 13 (personal information) of the EIR.
2. The Commissioner's decision is that, following her investigation, the Council provided the complainant with all the relevant information held except that exempt under regulation 13 (third party personal data). However, the Council incorrectly applied the exception to the sender/recipient details of emails sent to and received by the applicant in the planning matter related to the complainant's request. The Commissioner therefore requires the Council to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the sender/recipient details of emails sent to and received by the applicant.
3. The Council 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.
4. The Commissioner has also found that in handling the complainant's request, the Council breached regulation 5(1) and 5(2) of the EIR by failing to make environmental information available. The Council also unreasonably and excessively delayed in providing the information to

the complainant. Additionally, the Council breached regulation 11(4) and 11(5) by failing to conduct an internal review within 40 working days.

Request and response

5. On 9 October 2017, the complainant wrote to the Council and requested information in the following terms:

'1. All internal procedure documents detailing how the planning department makes decisions under their delegated powers, in particular regarding residential properties.

2. All terms of reference of internal planning department decision making bodies and/or forums.

3. All authorities of planning department staff under any delegated powers.

4. All documents (including but not limited to emails, instant messages, telephone call notes (and recordings thereof) and manuscript notes) relating to:

1. The original grant of planning permission (redacted); and

2. The variation of condition 5 of that permission'.

6. The Council acknowledged receipt of the request on 10 October 2017. Having not received a substantive response by 13 November 2017 the complainant emailed the Council chasing the same.
7. On 22 November 2017 the complainant submitted a formal complaint to the Council about their failure to respond to her request (or chaser email). The Council replied on the same date and apologised for not having responded to the request as *'the FOI Team was without two staff members last week'*. The complainant was informed that the FOI Team had been actively chasing the Service Team for a response and had that day escalated it to the Acting Service Director.
8. Having not had a response from the Council in accordance with their 10 working day target, the complainant submitted another complaint on 11 December 2017 about the failure to respond to her request.
9. On 19 December 2017 the Council emailed the complainant and apologised for not acknowledging receipt of her complaints sooner. They advised her that the matter had been escalated to the Service Director.

10. On 21 December 2017, the Council provided the complainant with their belated response to her information request. With regard to points 1-3 of the request, the Council stated that, *'the Council constitution sets out some info for questions 1-3*

www.ealing.gov.uk/downloads/download/924/council_constitutionpart8-officer_delegated_powers under *Director of Regeneration of Regeneration and Planning'*. For questions 4(1) and 4(2) the Council advised that *'all information is available via our Planning Portal page at https://www.ealing.gov.uk/info/201155/planning_and_building_control/2030/search_for_a_planning_application.*

11. The complainant requested an internal review of the response on 2 January 2018. She asked the Council to provide details *'of who by function and name will undertake this review'* and stated that the response was *'wholly inadequate'* for the following reasons:

1) It failed to provide any information or details at all in answer to points 1 and 2. These documented processes must be in place to manage the day to day delivery of the service. Team Manager and Planner checklists appear to be in place so process documents etc supporting these should be provided.

2) It failed to provide any reasonable response to point 3. The provision of high level, non-specific website links to publicly available information setting out the high level functional delegations does not provide the authorities of the individual planning department staff. This is the level of detail requested and I would also expect to see the computer system access authorities and processes to support this. The complainant noted that under the general principles of officer delegations section 1.2 *"any function delegated to a specified officer may also be exercised by any officer who has been so authorised by the officer to whom the function is delegated. Such authorisations shall be recorded and held by the officer making the authorisation"*. It is the complete record of those authorities that I expected as a minimum to be provided with.

3) It failed to provide any reasonable response to point 4. Again, the provision of high level non-specific website links to publicly available information is inadequate. No documents as requested have been provided to answer this request. If the only documents available are on the system then there are no explanations provided on:

a) why the Council imposed the original condition 5 to include classes E and F;

b) how the comments from affected neighbours supporting the original condition in full (and thereby objecting to its removal) were taken into account; and

c) what factors therefore led to the variation of the condition which is the reason generating this request.

12. The complainant noted that it was unclear, in the absence of any reason, whether the answers provided by the Council constituted a refusal to provide information. She reminded the Council that they had an obligation to tell her whether they held information falling within scope of her request and, if so, provide her with that information. The complainant stated that her request sought *'to understand the planning process and how and why the original sensible condition could be changed, when objected to by two affected neighbours, without any open or transparent explanation for this change of approach'*.
13. On 3 January 2018 the Council provided the complainant with a further response to her request. This was not an internal review since the Council offered the complainant that facility at the end of their letter.
14. With regard to point 1 of the request the Council advised that, *'there are no specific internal procedures on the generic planning application process'*. The Council informed the complainant that, *'The Planning Service has procedure notes on perhaps hundreds of interrelated aspects of the overall process. These mainly concern the validation (administration) stage of the process. However, the Government's planning portal has provided advice on the general decision making process that most councils, including LB Ealing, adopt. This can be accessed via https://www.planningportal.co.uk/info/200126/applications/58/the_decision-making_process. The Council advised that 'the introduction page has a useful flow chart of the overall decision making process'*.
15. With regard to point 2 of the request the Council stated *'not applicable'* but did not explain why. With regard to point 3 of the request the Council provided the complainant with the information requested in an attached document. In respect of point 4 of the request, the Council advised the complainant that:

'The Council's planning access webpages give the relevant core documents to each of the applications, including comments received from neighbours. An officer who may hold further information is currently on maternity leave and the Planning Department are seeking to obtain access to her records to check if any further documents are held. We will update you further when this is known'.
16. The complainant emailed the Council on 4 January 2018 in reply to their additional response. The complainant emphasised that what she was

seeking were internal procedure documents, not a further link to the planning website. The complainant explained that:

'What we are asking for in this question are the internal procedure documents that supported and led to the original condition 5 being imposed so that we can understand the factors that were relevant to that and the hierarchy of decision making processes thereto. Also, what we want to see are the internal procedures documents on how to handle variations when affected parties object to this. This should include how concerns are weighed and how affected parties who have made representation are notified of this. The government website states this should happen so there must be processes in place in the planning department to do this'.

17. In regard to point 2 of the request, the complainant interpreted the Council's response as saying that *'there are no internal planning department decision making bodies and/or forums'*. The complainant advised that *'a forum has a wide interpretation and would include an internal meeting to discuss and oversee the work of a planning officer, i.e. when the report was submitted to the Development Planning Manager to sign off'*. The complainant asked the Council to review their response.
18. With regard to point 3 of the request and the document provided, the complainant queried that, *'this document has surely not just come to light as it must be used on a daily basis!'* The complainant stated that point 4 of her request remained unaddressed and stated that, *'reference to web pages are not sufficient. The fact that an officer is now on maternity leave is not my problem. The Council has access to email servers and all 'document' and should review these. They can also contact the individual concerned who remains an employee'*. The complainant confirmed that she wanted the Council to carry out an internal review and advised that she had contacted the ICO in respect of the matter and had provided the Commissioner with copies of all correspondence to date.
19. The Council provided the complainant with an internal review on 23 March 2018.
20. In respect of point 1 of the request, the Council explained that:

'The link to the external website was intended to provide a simplified explanation of the planning process. There is no written 'internal procedure' as such for the imposition of conditions. Planning officers are professionals trained to assess applications within the scope of the relevant legislation and planning policy. The case officer deals with an application, supported by and in discussion with his or her senior officers or indeed planning colleagues. A decision on the planning application is

arrived at through the consideration of an officer's report, recommending (in the main) refusal of planning permission or the grant of planning permission subject to conditions. The legislative basis for this is the Town and Country Planning Act 1990'.

21. The Council provided the complainant with a government website link to guidance on the use of planning conditions. The Council explained that:

'The officer's report (redacted) sets out the planning assessment of the case and makes reference to amenity space. In respect of that application, it was considered that a restrictive condition was appropriate in relation to the restriction on future permitted development extensions. This consideration would have been taken in the first instance by the case officer and ultimately by the senior planner signing off the report. There is no explicit procedure set out for this as it is so intrinsic to the way applications are handled. If the case officers do not know the process and rational for assessing applications, for imposing conditions and for liaising with senior officers, they would not be employed to do the job'.

22. The Council advised that the specific point (amenity space) was reassessed as part of the later application, which consented to the removal of the condition. This was based on a further evaluation of the scheme and existing property layouts in the local area. The Council informed the complainant that the consultation process for applications, relating to the erection of site notices initially, and the consideration of notification of amendments to schemes, is found in the 2015 Consultation document, and provided a link to the information on the Council website.

23. The Council further explained to the complainant that:

'Again, the way in which this applies to any particular scheme would be based on dialogue between the case officer and senior planners. The consideration of local representations is part of the assessment process. Residents' objections are part of the 'material' consideration of the scheme and are considered alongside planning policy. However, there must be a valid planning reason to refuse planning permission. A permission cannot be refused on the weight of third party representations alone. In terms of 'how affected parties who have made representation are notified of this' – there is no written procedure as such. Customers can register via on web planning access pages to receive updates on planning applications, including details of when they are decided'.

24. In respect of point 2 of the request the Council stated that *'our original response provided the scheme of delegation. This is the framework for the decision-making process. The senior officer will read the report and*

ask questions where necessary. We do not hold any further information'. In respect of point 3 of the request, the Council noted the complainant's comments and expressed regret at the delay in providing 'these details'. The Council stated that they strived to provide request responses within the statutory timescales and apologised for not having done so on this occasion.

25. The Council provided the complainant with a PDF file of information held (emails) in respect of point 4 of her request. They advised that the names of individuals had been redacted under Regulation 13(1) of the EIR.
26. The review concluded by asking the complainant to accept the Council's apologies for the delay *'in bringing this matter to a conclusion'* and trusted that the matter was satisfactory resolved.

Scope of the case

27. The complainant contacted the Commissioner on 18 April 2018 to complain about the way her request for information had been handled.
28. The complainant advised the Commissioner that to assist herself in identifying the failings and to understand what had happened, she had prepared an excel spreadsheet detailing the entire content of the PDF, reordering the documents chronologically. This spreadsheet was provided to the Commissioner. The complainant set out her concerns about the Council's final response to her request as follows:

'1. The PDF provided is not in a sensible readily accessible order – they are not even in email chain order, in fact some were split up and difficult to reconcile. The documents have also not been provided in date order. The document starts with an email disclaimer footer, the only 3 documents provided were not located in the PDF next to the email they would likely have been attached to.

2. Documents that form part of the planning process based on information on Ealing Council's website or responses to the FOI request have not been provided – I have not been provided with the officer's reports or drafts thereof (i.e. prior to those publicly accessible as final documents on the Council's Planning Portal), nor any validation sheet cross checked signed and dated as set out on the "Planner Checklist" on the Portal for this application. Additionally, there are no telephone call notes (despite there being references to numerous calls), agendas for meetings, notes of meetings and actions etc, that you would expect to find on a file from a professionally organised department.

3. The emails provided are clearly incomplete and also refer to documents that have not been provided – the 84 page PDF document provided in answer to request point 4 for “all documents” relating to this specific planning application (“including but not limited to, emails, instant messages, telephone call notes (and recordings thereof) and manuscript notes”) primarily comprises emails with three documents also included. There are also large gaps in the email communications provided which are evident in the excel spreadsheet attached. Given the number these are detailed in the comments column of the excel spreadsheet’.

4. Emails have been extensively redacted, the Council says the “names of individuals have been redacted as this is considered personal data” – in fact the redaction is far more extensive than this. It involves the deletion of extensive parts of text and even entire emails. Because of the duplication of some emails in the PDF the text of two that had been totally redacted are available. They contain no personal data or names of individuals! Therefore, I do not believe the other fully redacted ones (shown in red on the excel spreadsheet attached) are valid redactions’.

29. The scope of the Commissioner’s investigation has been to determine whether the Council has disclosed all of the requested information falling within scope of the complainant’s request, and whether the Council has correctly relied on Regulation 13(1) of the EIR to withhold some of the information.

Reasons for decision

Regulation 5 – Duty to make environmental information available on request

30. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request. Regulation 5(2) sets out that information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date or receipt of a request.
31. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant’s evidence and argument. She will also consider the actions taken by the public authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. The Commissioner is not expected to prove categorically whether the information is held, she is only

required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.

32. The Council advised the Commissioner that they had reviewed the case and the Chief Planning Officer (CPO) had met with the complainant on 31 August 2018. The Council advised that the meeting had been '*very informative and positive for both parties*' and the CPO was able to (verbally) cover and clarify the points raised by the complainant in anticipation of providing submissions to the Commissioner.
33. The Council provided the Commissioner with a clean copy of the original document bundle and a revised redacted copy of the original bundle. The Council also provided the Commissioner with an additional document bundle, which essentially cross referenced the points made by the complainant in her spreadsheet. The Council explained that the additional document bundle had been put together following analysis of the comments from the complainant on the spreadsheet.

Point 1 of the request

34. In respect of point 1 of the request, the Council clarified that it was not the case that they had purposely withheld information, rather it was their position that the documents which they hold do not fall within scope of the request. The Council noted the Commissioner's summary of the complainant's contention that disclosure of the requested information would allow consideration of factors that were relevant to the decision and that would disclose the decision-making hierarchy. The complainant had also stated that she wanted to see internal procedure documents on how to handle variations when affected parties object.

35. The Council explained as follows:

'The Council's position is that there is no one document that sets out the procedure for administering, processing, professional considering and making a decision on planning applications or subsequent revisions/variations. The Council is not in any way trying to withhold information or documents. If there were such documents they would have been disclosed'.

36. The Council advised the Commissioner that the decision-making process for planning applications is one that is reliant on the professional town planner's understanding of the limitations and requirements of relevant legislation and Development Plan documents. This was something which was learnt through a combination of academic training and 'on the job' experience. In the case of the Council's Planning Service, it is not a decision-making process that is based on a detailed set of procedures and processes. The understanding of legislation and policy and the consideration of the views of local residents (when consultation is

required) is a fundamental part of a professional town planner's skill base.

37. The Council advised that Town and Country Planning Act 1990 sets out the requirements to take into account Local plan policy, and that *'having a local procedure document that advises planners that they have to take into account local policy will add nothing to the consideration or assessment process'*. Likewise, the Council stated that it would be counter-productive to produce any manual that attempted to take into account every eventuality in the consideration of planning policy across the huge variety of applications submitted.
38. The Council explained that they had provided the complainant with the web-link to the Planning Portal process chart as it is a useful 'generic' guide to the main parts of the planning process. The Council advised that they do not consider it necessary to reproduce this document as a 'local' document, and that, in relation to their digital initiatives, the Council is moving away from 'reinventing the wheel' by producing tailored Council documents, to a position where the Council 'signposts' customers to relevant information held elsewhere on the internet. This is exactly what the Council had done in this instance.
39. The Council confirmed that their consideration of the request centred on the process of determining the application. Although the Code of Practice for neighbour notifications on planning applications (May 2015) had not been considered relevant to the request, the Council provided the Commissioner with a copy of the same by way of further background.
40. In their detailed submissions to the Commissioner, The Council provided the following information in response to the Commissioner's questions about the checks and searches carried out for relevant recorded held information.
41. The Council advised that any information on processes would be held as word files or pdf's within a variety of electronic folders kept on shared drives and under the main folder names 'Planning Management' and 'Planning Services'. These folders contained further sub-folder names including 'DC admin' and 'Procedure Manual'. The CPO undertook a manual trawl of these folders when the request was initially received, and again both at the internal review stage and in response to the Commissioner's enquiries. The Council confirmed that *'there are no files that present a process or procedure for the whole of the decision-making process or in relation to the use of conditions'*. The Council provided the Commissioner with a photo-shot of the file directory for information.

42. The Council confirmed that the searches were made on networked folders, and that if the documents were available they would be on the shared drive. The Council confirmed that a manual search was made of the files and Outlook folders. The Council confirmed that there was no record of the search terms used by the various officers involved, but advised these would have included terms such as the address, the name of the applicant and agent, and relevant officers.
43. The Council confirmed that the requested information (if held) would be mainly held electronically, with isolated documents being held on an archived hard copy file. In response to the Commissioner's enquiry as to whether any relevant recorded information was ever held by the Council but had subsequently been deleted or destroyed, the Council advised that this was not known, but was unlikely. They noted that some of the documents viewed dated from the early 2000's so it was unlikely that any relating to the overall process would have been deleted.
44. Asked whether there was a business purpose for which the requested information should be held, the Council stated that, *'it is not considered that a 'start-to-finish' process flow chart for decision making would aid either the public understanding of the planning decision-making process or the knowledge or skills of professional town planners, given the scope and complexity of any such document'*. The Council stated that they had pointed the complainant towards generic advice given by a Government agency and reiterated that they had *'not sought to ignore the request'*.

Point 2 of the request

45. In respect of point 2 of the request, the Council advised that:

'The decision-making process is framed within the scheme of delegation which was provided and accepted under point 3. There are simply no other decision-making bodies or forum that would have been involved in the decision-making process and as such no further information or documents can be provided in relation to this point'.

Point 4 of the request

46. In respect of the email information disclosed to the complainant, the Commissioner asked the Council to explain why this information had been provided to the complainant in the way that it had (ie. in unstructured format). The Council advised that they considered that they had provided the information requested as part of their disclosure of information relevant to the request and they *'were not aware that there was the expectation to provide such documents in any specific order, or to separate email trails or to 'process' the information in any other way'*. The Council advised that the emails were given in a form

that officers would have had to consider in their assessment of content and *'it is often the case, when reviews of cases are carried out, that cross checking of email chains is required by any party involved'*. The Council advised that the CPO had apologised to the complainant for any obvious errors in providing the information in an understandable form but had also advised the complainant of the necessary time resource needed by all parties when *'unravelling'* email conversations.

47. In response to the complainant's contention that the emails disclosed are not complete and make reference to other documents which have not been disclosed, the Council advised the Commissioner that, *'the disclosure relates to the primary document associated with the response. Where secondary documents have been referred to it has been assumed that these were outside the scope of the request or would have been in the public realm in any case as part of the public access document set'*.
48. The Council provided the following information in response to the Commissioner's questions about the checks and searches carried out for relevant recorded held information.
49. The Council confirmed that electronic searches of email and electronic folders were undertaken as these would be the primary source of information given that almost all written information on planning applications is dealt with electronically. The Council confirmed that searches had included both networked and local electronic folders. The Council confirmed that, as with point 1 of the request, the search terms used had not been recorded but that the usual practice would be to search on the application reference number, the application address, the applicant and/or agent's name, any previous EIR/FOI request or formal complaint, and information contained on the Council's Public Access web pages for the applications which were the subject of the request.
50. The Council confirmed that the searches would have been made in relation to any persons considered to have had involvement in the applications, including case officers, managers, associated officers (eg. Complaints Officer/ Legal Officer). The Council advised that in this case the case officer had been absent from work and therefore it was necessary for the CPO to conduct the electronic search of the case officer's electronic files.
51. Confirming that the information (if held) would be held in electronic format, the Council advised that it was not known whether any relevant information had subsequently been deleted/destroyed, but there would be no reason to delete the electronic information.
52. Asked whether there was a business purpose for which the requested information should be held, the Council confirmed that there was such a

purpose, and that it was *'to aid the consideration of the planning application'*. In respect of whether there was any formal records management policy or statutory requirement upon the Council to retain the requested information, the Council provided the Commissioner with a copy of their Corporate Retention and Disposal Schedule Guidelines. The Commissioner notes that the Guidelines state that with regard to information concerning *'the process of controlling development of areas through applications for planning permission'* (including correspondence relating to any objections), the planning application register should be transferred to the Archivist once the register has been completed (or at arranged intervals if it is held electronically).

53. In her spreadsheet questions and queries concerning the Council's revised disclosure of information, the complainant stated that *'no documents have been produced from (the Council's planning) system (screenprints etc) to show the process of the application. The request was for all documents, which would include any computer screen print and history'*. In submissions to the Commissioner, the Council provided explanation and information as regards its planning system.
54. The Council explained that the 'planning system' referred to in one of the disclosed emails is the ICT operating system for the planning service (essentially a data management system). At key points in the overall planning application process (such as during the initial validation phase and when the application is formally decided) key dates and fields are 'populated' either manually or electronically. The 'planning system' thus gives the officer information of where the application is in relation to the decision-making process. The system also acts as a document management system, holding relevant documents relating to the planning application. These documents are available through the Public Access Module (ie the web pages). Some documents are not published where these relate to sensitive financial information (such as the CIL charging forms). Redacted copies of those had been provided. The Council did not consider that screenshots of the ICT operating system fell within the scope of the request.
55. The Commissioner considers that the complainant's request would encompass any documents or information stored or held on the ICT operating system relating to the planning application in question. However, it would not extend to screenshots of the operating system itself. Any screenshot of the planning application would change as the application progresses, with information being added/deleted/amended as appropriate. By contrast, any documents stored or held on the system will retain their structural integrity and be capable of identification and retrieval at the time of the complainant's request. Such documents would be recorded information held by the Council and therefore within scope of the complainant's request.

56. The Commissioner acknowledges (as has the complainant), that during her investigation the Council have done considerable work to provide information in response to her request (including responses to the complainant's questions and queries on her spreadsheet).
57. However, this was clearly not the case prior to the Commissioner's involvement in this matter. The complainant's request was very clearly seeking internal relevant information held by the planning department and not external documents/information available on the Council website or otherwise in the public domain. Nor had the complainant requested (or expected to be provided with) a single document containing the information sought, but rather all relevant documents and information.
58. The Council's original substantive response of 21 December 2017 was (as the complainant correctly noted in her subsequent request for an internal review) wholly inadequate as it failed to confirm whether information was held in respect of the four points in the request and referred the complainant, via web-links, to information already publicly available, rather than internal documents/information held. The Council stated that the Council constitution to which the complainant was directed, set out '*some*' of the information for points 1-3 of the request, implying that further information could be held by the Council (as later transpired to be the case).
59. The Council provided the complainant with the information requested in point 3 of the request ('*all authorities of planning department staff under any delegated powers*') in its addendum response of 3 January 2018, but this information, as the complainant correctly noted, should have been provided to her in the original request response. The Commissioner notes that the Council apologised to the complainant for this delay in its internal review of 23 March 2018.
60. The Council's original response of 21 December 2017 stated that '*all information*' was available via the Council's Planning Portal. This was not correct and the Council later provided the complainant with a disclosure bundle of relevant information (emails) in its internal review of 23 March 2018, and a further disclosure bundle (with revised regulation 13(1) redactions) in September 2018 during the Commissioner's investigation.
61. The EIR do not provide the Commissioner with powers to require public authorities to record information. Rather, they provide the right for individuals to access information held in a recorded form by a public authority. However, the Section 46 Code of Practice does address records management by public authorities. Section 8 states that, '*authorities should ensure they keep the records they will need for business, regulatory, legal and accountability purposes*'. It is therefore

a matter for a public authority to decide what information it is required to record and retain in order to be able to be accountable for its actions and to meet its business and statutory requirements.

62. The complainant has questioned the amount of information provided by the Council and has contended that the Council must hold further information within the scope of her request. The Commissioner considers that there would be a reasonable presumption that the council would hold further information of the type described by the complainant. However, in detailed submissions to the Commissioner, the Council has explained its records keeping systems and processes with regard to internal planning decisions and why it does not hold further relevant recorded information. The Council's system and approach clearly has significant implications for accountability and audit purposes (the unsatisfactory failure to keep a record of the actual key words used in the checks and searches being illustrative of this), but that is a matter for the Council.
63. Based on the submissions and evidence provided by the Council the Commissioner is satisfied that the Council (in the course of the Commissioner's enquiries but not before) has carried out adequate searches of where relevant information would be held. Based on the searches undertaken and the other explanations provided the Commissioner is satisfied that, on the balance of probabilities, the Council does not hold any further recorded information relating to the request, other than that which it has now disclosed to the complainant. Whether the Council *should* hold further information is not a matter for the Commissioner.
64. It is clear that the Council did not apply sufficient care and attention to the complainant's clearly worded request in its original response of 21 December 2017. This resulted in significant delay in the complainant receiving the held information.
65. The Commissioner therefore finds that the Council breached Regulation 5(1) and 5(2) by failing to provide environmental information in timely fashion. In addition, the Council breached Regulation 11(4) and 11(5) by failing to conduct an internal review within 40 working days.

Regulation 13 personal information

66. Regulation 13(1) of the EIR provides an exception for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in regulation 13(2) or 13(3) of the EIR is satisfied.
67. The Commissioner has first considered whether the withheld information (ie. that redacted from the emails disclosed to the complainant) would constitute the personal data of third parties.

Is the withheld information personal data?

68. The definition of personal data is set out in Section 1 of the Data Protection Act 1998 (DPA), the legislation in force at the time the Council dealt with the request. Section 1 defines personal data as:

'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 intention of the data controller or any other person in respect of the individual'.

69. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable.
70. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
71. Having reviewed the withheld information, the Commissioner is satisfied that it comprises personal information of individuals connected to the application which is the subject of the complainant's request.

Would disclosure breach the Data Protection Principles?

72. Having concluded that the information comprises personal information, the Commissioner has gone on to consider whether one of the conditions listed in regulation 13(2) or 13(3) of the EIR is satisfied.
73. One of the conditions listed in regulation 13(2)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.
74. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle, which is the most relevant in this case, requires that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focussed on the issue of fairness.
75. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual, the potential consequences of the disclosure, and whether there is a legitimate public interest in the disclosure of the information in question.

Reasonable expectations

76. The Council did not explain, either during the initial disclosure at internal review stage, nor subsequently during the Commissioner's investigation, why they considered that disclosure of the third party personal data would be unfair to the individuals concerned. In submissions to the Commissioner the Council simply confirmed that the original redactions (made in the disclosure bundle of 23 March 2018) were *'solely based on the information being either 'personal data' and 'sensitive personal data' as defined by Section 1(1) of the Data Protection Act 1998'*. The Council advised that the level of redaction in the original disclosure bundle had been reviewed following analysis of the complainant's comments on her spreadsheet and a revised redacted disclosure of the emails had been made to the complainant in September 2018.
77. Advising the Commissioner that the level of redaction in the original disclosure bundle had been reviewed, the Council stated that whilst they were satisfied that the original redaction complied with its procedures for protecting the identity of individuals, it had *'assumed a degree of risk in revising (and reducing) its level of redaction'*. The Council explained that:
- 'The redacted elements relating to the agents details (name, address and contact details) have been shown as these are in any case public information shown on the application forms. In addition, the names of those Council officers the agent or applicant was contacting have not been redacted. The only redaction relates to the name and contact details of the applicant or other third party connected to the applicant. In making a greater level of information available, the Council is assuming a greater level of risk of challenge'.*
78. Although the Council has not explicitly stated as such, by withholding the personal data it presumably considers that the individuals concerned would not have a reasonable expectation that their personal data would be disclosed into the public domain. Whilst the Commissioner considers that this is correct in respect of most of the (small number) of individuals concerned, she considers that both the applicant and her agent (the latter of who's details are readily accessible via internet search) should have had a reasonable expectation that at least some of their information (for example sender and recipient details) would be disclosed into the public domain.
79. As the Council itself belatedly recognised, the identity of the applicant and her address details were already in the public domain via the documentation published on the Planning Portal. Similarly, the identity and contact details of her agent were also visible and accessible. Whilst the Commissioner would agree that the applicant would have a reasonable expectation that some of her personal data (and that of her family) contained in the emails would not be disclosed into the public domain, this expectation would not extend to the recipient and sender

details of the emails. The Commissioner notes that the Council has correctly removed the redactions to the sender and recipient details of the applicant's agent, but has maintained redactions to the same details of the applicant. The Council will need to provide the complainant with the sender/recipient details of the relevant emails concerning the applicant.

Consequences of disclosure

80. As to the consequences of disclosure upon the data subjects, the question – in respect of fairness – is whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
81. The Commissioner considers that disclosure of the non-sender/recipient related information contained in some of the applicant's emails to the Council has the potential to cause damage and distress, particularly as she has found that disclosure of the information would not have been within the reasonable expectations of the data subject.

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

82. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure to the public. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public and the private interests of the requester.
83. Because of an inconsistent approach taken to redaction by the Council, with personal data being redacted in the revised bundle which had previously been (wrongly) disclosed to the complainant in the original bundle, the complainant had prior sight of some of the withheld personal data. In respect of one particular very small (one sentence) part of the withheld information, the complainant stated that it was '*extremely pertinent*' to concerns which had been raised with the Council about the application.
84. In reaching a decision about the application of regulation 13 to the redacted email information, the Commissioner must consider whether there is a legitimate interest in the public or the requester having access to the information and the balance between this and the rights and freedoms of the data subjects.
85. After considering the nature of the withheld information (including the context in which it was given) and the reasonable expectations of the data subjects (primarily the applicant), the Commissioner considers that

disclosure under the EIR would be unfair and in breach of the first principle of the DPA and that any legitimate public interest would not outweigh the rights of the data subjects.

86. The Commissioner is mindful that the public interest in the context of the EIR refers to the broader public good, and providing the wider public with access to environmental information which encourages greater awareness of issues that affect the environment. This is the principle behind the European law from which the EIR are derived. It is important to be aware that the planning process provides mechanisms for private or third party planning disputes and concerns to be addressed, and the EIR will often not be the most suitable or proportionate mechanism for pursuing such concerns and having them appropriately addressed.
87. The Commissioner is satisfied that regulation 13 of the EIR is engaged, and provides an exception from disclosure in this case. However, in reaching this decision, the Commissioner would emphasise that the Council's approach to the redaction of the relevant personal data was not as careful or consistent as it should have been. This led to the complainant having sight of third party personal data (albeit a very small amount) which should have been redacted under the exception. The Council also paid insufficient attention to the fact that the identity of the applicant and her agent was already in the public domain via the Council's Planning Portal, and the general (though not total) openness and transparency of the planning process/system.

Other matters

88. The Council's engagement and communication with the Commissioner during her investigation in this matter was good, with appropriately detailed and helpful submissions being provided and additional information being provided to the complainant. However, the Council's communication and engagement with the complainant at the request stage was extremely poor and unacceptable. The complainant had to chase the Council on repeated occasions to obtain a response to her request and when that response was provided (21 December 2017) it was wholly inadequate in that it did not address the actual information requested. The complainant was not provided with the information pertinent to point 4 of her request (emails) until the internal review of 23 March 2018 and as the Commissioner has noted above, the redactions made to the emails were inconsistent and some should not have been made.

89. The Council's dilatory response to this request was contrary to both the letter and spirit of the EIR. The Commissioner would expect to see a much better level of response to future requests, and would need to consider taking appropriate formal steps in the event that this did not occur.

Right of appeal

90. 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

91. 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.
92. 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

**Gerrard Tracey
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Information Commissioner's Office
Wycliffe House
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SK9 5AF**