

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 October 2013

Public Authority: South Kesteven District Council
Address: Council Offices
St Peter's Hill
Grantham
Lincolnshire
NG31 6PZ

Decision (including any steps ordered)

1. The complainant has requested information relating to a proposed skate park at Stamford Recreation Ground. South Kesteven District Council refused the request, citing the exceptions for internal communications, personal data and adverse affect to the course of justice.
2. The Commissioner's decision is that, in its handling of the request, South Kesteven District Council:
 - failed to provide advice and assistance and breached regulation 9(1) of the EIR;
 - correctly applied regulation 12(5)(b) to withhold information;
 - failed to demonstrate that some of the information engaged the exception at regulation 12(4)(e) and, in relation to information engaging the exception, failed to show that the public interest supported maintaining the exception;
 - correctly applied regulation 13(1) to withhold some of the requested information but that the legitimate interests of the public favours disclosing some of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under the exception for internal communications;

- Disclose the following information withheld under the exception for personal data: correspondence between council officers, external noise consultants, elected members and members of Stamford Town council. The council should ensure that any personal email addresses are redacted.
 - Contact the complainant and provide advice and assistance in relation to the additional relevant information identified by the council which predates the date of the request.
4. 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

5. On 27 January 2013, the complainant wrote to South Kesteven District Council (the "council") and requested information in the following terms:
- "Please will you send me copies of all correspondence (postal and email; internal and external) received and sent since 1 Jan this year concerning the Stamford Recreation Ground skatepark proposal, together with a similar record of telephone conversations."*
6. The council responded on 18 February 2013. It stated that it was refusing the request, citing the EIR exceptions for internal communications, personal data and adverse affect to the course of justice.
7. Following an internal review the council wrote to the complainant on 25 March 2013. It stated that it was maintaining its original decision to refuse the request.

Scope of the case

8. On 4 April 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly applied exceptions to refuse the request.
10. During the course of his investigation it occurred to the Commissioner that conditional approval for the skate park planning application had

been granted in November 2012. As it appeared that the decision making process relating to this was complete at the time of the request; the Commissioner invited the council to reconsider whether the balance of the public interest favoured disclosing the information or maintaining the exceptions.

11. The council confirmed that it wished to maintain its reliance on the exceptions to refuse the request. The Commissioner has, therefore, set out his conclusions in this decision notice.

Reasons for decision

Regulation 9 – advice and assistance

12. Regulation 9(1) of the EIR states:

"A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."

13. Regulation 9(3) of the EIR states:

"Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case."

14. Part III of the code of practice issued under regulation 16 of the EIR (the "EIR code") gives examples of the types of advice and assistance which authorities might provide to requesters. Paragraph 10 states that appropriate assistance might include:

"...providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority; and

providing a general response to the request setting out options for further information that could be provided on request."¹

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http://www.ico.org.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/environmental_information_regulations_code_of_practice.pdf

15. In this instance, the request asked for all information relating to the Stamford Recreation Ground Skatepark issue generated between 1 January 2013 and the date of their request (27 January 2013).
16. Having viewed the withheld information provided by the council, the Commissioner notes that this consists of information which was generated prior to 1 January 2013. Whilst the information falls within the scope of the subject of the request, it is not within the scope of the request timeframe.
17. The council confirmed to the Commissioner that it had received other requests for information relating to the issue in question during January. Although these requests identified information which predated 1 January, the council incorporated this information into the scope of the complainant's request. As this information forms part of the information which the council has withheld from the complainant, the Commissioner considers that the council has, in effect, applied exceptions to information which the complainant has not explicitly asked for, i.e., information held by the council prior to 1 January 2013.
18. The Commissioner considers that, in this case, it would have been appropriate, and in conformity with the EIR code, for the council to have contacted the complainant to set out that this further information, relevant to the subject matter of their request, was held. This would have given the complainant an opportunity to decide whether the additional information should be incorporated within the scope of the request.
19. As the council failed to conform to the recommendations of the EIR code in this case, the Commissioner has concluded that it failed to provide advice and assistance in accordance with regulation 9(1). In order to comply with regulation 9(1) the council should now write to the complainant and ask whether they would be interested in receiving the additional information which it has identified.

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

20. Regulation 12(5)(b) provides that the disclosure of information can be refused if its disclosure would adversely affect, "the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature."
21. In the Information Tribunal hearing of *Kirkaldie v Information Commissioner and Thanet District Council* (EA2006/001) the Tribunal stated that the purpose of this exception was reasonably clear and that:

"...it exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the right of individuals or organisations to a fair trial. In

order to achieve this it covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation”.

In this hearing the Tribunal decided that legal professional privilege (LPP) is a key element in the administration of justice and that advice on the rights and liabilities of a public authority is a key part of the activities that will be encompassed by the phrase “course of justice”.

22. Legal advice privilege may apply where no litigation is in progress or being contemplated. In order for information to be covered by LPP, the communications must be:

- confidential,
- made between a client and professional legal adviser acting in their professional capacity and;
- made for the sole or dominant purpose of obtaining legal advice.

Communications made between adviser and client in a relevant legal context will therefore attract privilege.

23. For the purposes of LPP, it makes no difference whether the legal adviser is an external lawyer or a professional in-house lawyer employed by the public authority itself. The Commissioner’s view is that information which comments on legal advice or discusses the circumstances surrounding the obtaining of that legal advice is also capable of attracting LPP. However, this is only to the extent that the comment or discussion, if disclosed, would be disclosing legally privileged information.

24. The council has stated that the withheld information constitutes legal advice provided by its own solicitors. It has argued that the information constitutes both legal advice and litigation advice. The council has stated that the advice was given in relation to the Skatepark and it has argued that parties opposed to the development have threatened to take legal proceedings against the council’s decision in this regard. It considers that, were the content of the advice to be disclosed, the council’s ability to contribute towards a fair hearing of any appeal would be adversely affected. The council has argued that a further outcome of this would be that confidence in free, open and transparent communications between lawyers and council officers would be weakened.

25. Having considered the withheld information and the council’s submissions the Commissioner is satisfied that disclosure of the information would provide opponents of the development with an insight into the council’s legal position. This would provide parties with an unfair advantage over the council in any proceedings and would

adversely affect the course of justice. The Commissioner has gone on to consider the public interest test.

Public interest in disclosing the information

26. The EIR state clearly under section 12(2) that when considering exceptions to the duty to disclose environmental information, a public authority must apply a presumption in favour of disclosure and only where there is an overriding public interest in maintaining the exception should information not be released in response to a request.
27. In this case the council has not provided any specific public interest arguments in favour of disclosing the information.
28. In considering this matter, the Commissioner considers that the general public interest in transparency and accountability in relation to the council's decision-making and the public interest in being assured that decisions are made on the basis of good quality legal advice are relevant factors.
29. The Commissioner also notes that the development is of concern to local residents and disclosure would enable them to understand the legal basis for the council's approach.

Public interest in maintaining the exception

30. The Commissioner considers that there is a strong public interest in the council not being discouraged from obtaining full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions for fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have an impact upon the extent to which legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by the council which would not be in the public interest. He accepts the weighting of such arguments, as they have been submitted to him by the council.
31. The Commissioner notes that disclosure of the information would be unfair since parties seeking to challenge the council's legal position would not be obliged to disclose any equivalent advice they had received in relation to this issue. Disclosure would, therefore, adversely affect the council's ability to defend its legal position. There is a public interest in maintaining the integrity and fairness of the course of justice and there are legal mechanisms, such as the right to appeal planning applications, in place for those wishing to challenge the council's decision in this matter.
32. The council has also argued that, in relation to adverse affect, disclosure of the information would stir up tension between supporters and

objectors to the development. It considers that an outcome of this would be that decision makers, specifically those providing legal advice would feel that their ability to provide confidential advice would be inhibited because of fears for their personal safety.

Balance of the public interest

33. In considering where the balance of the public interest lies, the Commissioner has given due weighting to the fact that the general public interest inherent in this exception will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the course of justice.
34. The Commissioner notes that the issues to which the legal advice relate were still live at the time of the request. He accepts that this factor carries considerable weight in favour of maintaining the exception as disclosure would result in adverse effect to the course of justice by revealing the Council's legal strategy to potential opponents and undermining the principle that legal advice remains confidential. In the Commissioner's view, this weighs heavily in the balance of the public interest test in this case.
35. The Commissioner is satisfied that disclosure would be likely to affect the candour of future exchanges between the council and its legal advisers and that this would lead to advice that is not informed by all the relevant facts. In turn this would be likely to result in poorer decisions being made by the public authority because it would not have the benefit of thorough legal advice.
36. The Commissioner acknowledges that the complainant has a personal interest in accessing the information. However, the Commissioner considers that the planning appeal process provides mechanisms for concerns to be raised and decisions to be challenged.
37. Having inspected the information, the Commissioner can see no obvious sign of unlawful activity, evidence that the council has misrepresented any legal advice it had received or evidence of a significant lack of transparency where it would have been appropriate. Whilst he accepts there is a public interest in authorities being held accountable for decisions which impact on a number of people and involve public expenditure he considers that, in this instance, these do not outweigh the public interest in maintaining the exception and other remedies are available for testing the council's actions in this case.
38. The Commissioner has concluded that, in this case, the balance of the public interest favours maintaining the exception. He has, therefore, concluded that the council has correctly applied the exception to the withheld information.

Regulation 12(4)(e) – internal communications

39. Regulation 12(4)(e) of the EIR states:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(e) the request involves the disclosure of internal communications."

40. Regulation 12(4)(e) is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. It is only necessary to demonstrate that the information falls within the category defined by the exception.
41. However, as with all EIR exceptions, even if the exception is engaged, public authorities must go on to apply the public interest test set out in regulation 12(1)(b). A public authority can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.
42. The Commissioner considers that the concept of a communication in this context 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. An internal communication is also a communication that stays within one public authority.

The council's position

43. The council has confirmed to the Commissioner that, in relation to the application of this exception, it maintains the position set out in its refusal notice. This states that emails, memos and correspondence between council officers involved in work relating to the relevant planning application constitute internal communications as defined by the exception.
44. The council has also argued that the information identified as being subject to the course of justice exception also constitutes internal communications. As the Commissioner has found that the council has correctly withheld this information under regulation 12(5)(b), he has not considered whether regulation 12(4)(e) is applicable.
45. In its submissions to the Commissioner, the council identified that some of the withheld communications involve third parties who are not employed by the council. The council acknowledged the Commissioner's guidance, which advises that communications between a public authority and a third party will not generally constitute internal communications. However, it has argued that the form and substance of the relationship

with the third party in this case warrants the communication being seen as internal.

46. In support of this position the council has explained that the third party in question is a consultant retained to provide expert advice in relation to noise matters in cases where the council does not have the required specialist experience. The council has argued that the consultant in question is so embedded within the council that their communications should be regarded as internal. It maintains that a review of the communications between the consultant and council officers shows that they are treated as a council employee, albeit without an employee-employer relationship.
47. The council has submitted to the Commissioner that, in reaching this conclusion, it has applied the reasoning in *DFT v Information Commissioner (EA/2008/0052, 5 May 2009)*.

The Commissioner's analysis and conclusions

48. Having viewed the withheld information the Commissioner considers that, where this constitutes a communication between officers at the council, it falls within the scope of the exception. As the exception is class-based, the Commissioner has concluded that, in respect of this information, the exception is engaged.
49. In relation to communications between the council and its noise consultant the Commissioner has considered the council's arguments, his own guidance and the relevant First-Tier (Information Rights) Tribunal decisions.
50. The Tribunal decision cited by the council, *DFT v Information Commissioner (EA/2008/0052, 5 May 2009)*, related to a request for a first draft of a transport study, produced by Sir Rod Eddington, an unpaid independent expert who was asked to advise the government on transport and productivity. Despite being an unpaid external advisor with no contract, the Tribunal found that, in the particular circumstances of the case, the draft report was an internal communication. The Tribunal found that Sir Rod was "embedded" within the civil service and was acting as the head of an internal working group of civil servants and Sir Rod who was responsible for the study's ultimate conclusions and recommendations².

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i307/Sec%20of%20State%20for%20Transport%20v%20IC%20\(EA-2008-0052\)%20-%20Decision%2005-05-09.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i307/Sec%20of%20State%20for%20Transport%20v%20IC%20(EA-2008-0052)%20-%20Decision%2005-05-09.pdf)

51. The Commissioner notes that the language used by the council in arguing that the noise consultant forms part of its internal communications, i.e., that he is "embedded" within the council, echoes the language used by the Tribunal in describing Sir Rod's relationship in *EA/2008/0052*.
52. The Commissioner's guidance, with reference to this Tribunal decision, notes that such a scenario will be rare and the default position where the exception is being applied is that communications with external advisers are not internal communications³.
53. In assessing the council's position the Commissioner has referred to another Tribunal decision, *South Gloucestershire Council v Information Commissioner and Bovis Homes Ltd (EA/2009/0032, 20 October 2009)*. In this case, the council had argued that reports written for the council by external consultants constituted internal communications. In evaluating this argument the Tribunal noted the following:

"The engagement of the consultants was made in the ordinary way by means of contracts for the provision of expert services to the Council. The contracts contained appropriate confidentiality clauses which bound the consultants. The consultants worked closely with the Council but were not seconded to the Council or otherwise embedded within the Council's organisation. Nor did they take decisions or otherwise act on the Council's behalf. The Council regarded the consultants' role as important not only because the same expertise was not held in house but also because the consultants brought an independent view from outside the Council which acted as a reality check on the Council's perception of the issues."⁴

54. The Tribunal in *EA/2009/0032* concluded that the external consultants in that case were not embedded into the council in the same way that Sir Rod was in *EA/2009/0052* and that correspondence involving them did not constitute internal communications for the purposes of the exception.

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_internal_communications.ashx

⁴ Paragraph 23(h), here:

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i347/South%20Gloucestershire%20decision%20final%20without%20signature%2020.10.09.pdf>

55. Having considered these decisions and applied them to the facts of the current case, the Commissioner considers that the relationship between the noise consultant and the council more closely resembles that described in *EA/2009/0032* and does not appear to satisfy the special conditions which were present in Sir Rod's relationship, as explored in *EA/2009/0052*. In the absence of compelling arguments from the council which demonstrate that the noise consultant's relationship transcends that of a normal external consultant, as defined by the Tribunal in *EA/2009/0032*, the Commissioner has concluded that, in relation to this information, the exception is not engaged.
56. In relation to the information which engages the exception, the Commissioner has gone on to consider the public interest arguments.

Public interest in favour of disclosure

57. The Commissioner notes that, whilst a range of internal information will be caught by the exception, public interest arguments should be focussed on the protection of internal deliberation and decision making processes. He considers that this reflects the underlying rationale for the exception: that it protects a public authority's need for a private thinking space.
58. The Commissioner is mindful that these factors must be balanced against the presumption in favour of disclosure which regulation 12(2) requires authorities to apply and factors which relate to the content and sensitivity of the information in question and the circumstances of the request.
59. The Commissioner considers that there will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental issues and more effective public participation in environmental decision making.
60. The council has submitted that there is a public interest in ensuring that the planning process has been administered properly and fairly. The Commissioner notes that there has been some opposition to the skate park from local residents and disclosure of the information would assist residents in understanding how the decision came to be made and provide reassurance that the council followed proper procedures.

Public interest in favour of maintaining the exception.

61. The council has argued that disclosure of the information could prevent the free and frank internal and deliberation process. It has argued that the application has been locally controversial and has generated strong opinions.

62. The council considers that disclosure of the information could result in a situation where individuals are hindered from giving professional opinions for fear that those opinions could be made available to others who have an opposing interest in the application. The council has stated that, since the disclosure of previous information relating to the application, some of those involved in the application have felt threatened by those with opposing views. The council has argued that it has concerns that disclosing the information would result in further threats to council officers.

Balance of the public interest

63. The Commissioner acknowledges that a public authority will need a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction. He considers that the need for a safe space will be strongest when the issue in question is still live. With this in mind, the Commissioner notes that the planning application associated with the proposed skate park was (conditionally) approved by the council on 27 November 2012, some 2 months prior to the date of the request. As the issue was, therefore, not technically live at the time of the request, the Commissioner considers that this provides a strong public interest factor in favour of disclosing the information.
64. In relation to the council's argument that disclosure would impact upon the process of free and frank deliberation, the Commissioner considers that this takes the form of a "chilling effect" argument. In essence, this states that the disclosure of internal communications would, in future, inhibit free and frank discussions, resulting in damage to the quality of any advice and poorer decision making. In this instance, the council has argued that the threat to the future candour of officials' participation in such matters is intensified because of the danger of disclosure resulting in their being identified and personally targeted.
65. In relation to the standard construction of the chilling effect argument, the Commissioner's guidance clarifies that public officials charged with giving advice or participating in decision making are expected to be impartial and robust in meeting their responsibilities. The Commissioner considers that officials who are expected, as part of their job description, to engage in such processes would be unlikely to refuse to do this and the threat of future disclosure might actually result in better quality decision making.
66. The Commissioner also considers that, where the issue in question is no longer live, as in the case of the planning application in this instance, chilling effects arguments do not carry significant weight. Furthermore, as the information in question relates to a planning matter which will have an impact on the environment of local residents, the Commissioner considers that this provides a further weighting in favour of disclosure.

Residents affected by environmental impact and the public more broadly, have an interest in accessing and understanding public authorities' decision-making processes where the end result is environmental impact, particularly where it relates to the use of publicly owned land.

67. In relation to the council's concerns about the fairness of disclosing information which identifies individuals and which might result in them being subject to threats, the Commissioner considers that the actual effect of disclosure on individuals is an argument more suited to the application of regulation 13. For the reasons set out above, he has concluded that, in this case and, in relation to the council's application of the internal communications exception, the public interest balance weighs in favour of disclosing the information.

Regulation 13 – personal data

68. Regulation 13(1) of the EIR states that a public authority is not obliged to disclose information if to do so would:
- constitute a disclosure of personal data, and
 - this disclosure would breach any of the data protection principles or section 10 of the DPA.
69. The council has argued that correspondence from local residents regarding the planning application falls within the scope of the exception.
70. Whilst the council has not applied the exception to information other than that defined above, its submissions in relation to its application of regulation of regulation 12(4)(e) (see above), highlight concerns about threats made to the personal safety of council officers or elected members.
71. In view of his role as regulator of the DPA the Commissioner has considered the extent to which correspondence from council officers, external noise consultants, elected members and members of Stamford Town council constitutes personal data and, where it does, whether its disclosure would be fair.

Is the information personal data?

72. Having viewed the information in question the Commissioner notes that it consists of correspondence between council officers, elected members, members of Stamford Town Council and external noise consultants in relation to the proposed skatepark.

73. The Commissioner considers that information about an employee's actions or decisions in carrying out their job is still personal data about that employee. He has, therefore, concluded that the information constitutes personal data.

Would disclosure of the information be fair?

74. The first data protection principle states that:

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

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

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

75. In assessing fairness, the Commissioner has considered the reasonable expectations of the individuals concerned, the nature of those expectations and the consequences of disclosure to the individuals. He has also weighed these factors against the public interest in disclosure.

Sensitive personal data

76. Where information constitutes sensitive personal data as defined by section 2 of the DPA, disclosure is unlikely to be fair. Having viewed the information the Commissioner is satisfied that it does not constitute sensitive personal data.

Consequences of disclosure and reasonable expectations

77. The Commissioner considers that disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, the Commissioner does not see this as a persuasive factor on its own, particularly if the information relates to their public role rather than their private life.
78. In this case, under its submissions regarding the exception for internal communications, the council has argued that the physical wellbeing of council officers or elected members has been threatened or that disclosure of the information would result in such threats being made. The council provided correspondence which purported to provide evidence of the alleged threats.
79. Having considered the evidence provided by the council the Commissioner is not convinced that the physical wellbeing of council officers or elected members has been threatened or that disclosure of the information would result in such threats being made.

80. Whilst the correspondence contains the names and contact details of the individuals in question, from the content of the correspondence, it is apparent to the Commissioner that these persons were acting in a work capacity, namely, contributing to the decision making process of the council.
81. Furthermore, the Commissioner notes that the officers in question appear to hold relatively senior positions and both they and the elected members were actively involved in the decision-making process. In view of the prominent role of the individuals, the Commissioner considers it likely that their involvement in the decision-making process is already publically known. The Commissioner considers that this significantly reduces any potential impact that disclosure might cause. He also notes that the specific instance of a purported threat being made relied upon by the council did not take place until several months after the time of the council's internal review of its handling of the request.
82. In relation to correspondence identifying members of Stamford Town Council who were involved in decision making regarding the development, the Commissioner notes that the role of these individuals in these matters was already in the public domain⁵, or they are of a sufficiently senior level to have an expectation that their role would be subject to public scrutiny.
83. In relation to information identifying external noise consultants employed by the council, the Commissioner notes that these individuals was acting in their work capacity and that their work details are already in the public domain via the website of their employer. In view of this, the Commissioner does not consider that they would have an expectation that information which identifies their place of work should not be publically available and he considers that disclosure would not, therefore, result in any harm.
84. Whilst the Commissioner accepts that the individuals in question may not feel comfortable about the information being disclosed and that they may have a reasonable expectation that it will not be disclosed, this does not mean that disclosure would necessarily be unfair.

Balancing rights and freedoms with legitimate interests

⁵ <http://www.stamfordtowncouncil.co.uk/wp-content/uploads/2012/02/Finance-Minutes-041212.pdf>

85. In considering whether disclosure of the information would be fair in this case the Commissioner has balanced the legitimate public interest in disclosure against the rights of the individuals.
86. In such cases the interest in disclosure must be a public interest, not the private interest of an individual requester. The Commissioner considers that requester's interests in such cases are only relevant in so far as they reflect a wider public interest. This is because disclosures made under the EIR are global rather than solely to an individual requester.
87. When considering the public interest in relation to the application of an exception, regulation 12(2) of the EIR requires public authorities to apply a presumption in favour of disclosure. In the case of regulation 13(1), the interaction with the DPA means that this presumption is reversed and an active justification is needed for disclosure.
88. For third party personal data to be disclosed under the EIR, disclosure not only has to be fair and lawful but also has to meet one of the conditions for processing in schedule 2 of the DPA. In this case the Commissioner considers that the most relevant condition is Condition 6. This states that:
- "...the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."*
89. In deciding whether condition 6 would be met in this case the Commissioner has considered the decision of the Information Tribunal in *House of Commons v Information Commissioner & Leapman, Brooke, Thomas [EA/2007/0060]*. In that case the Tribunal established the following three part test that must be satisfied before the sixth condition will be met:
- there must be legitimate interests in disclosing the information,
 - the disclosure must be necessary for a legitimate interest of the public,
 - even where disclosure is necessary it nevertheless must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.
90. The Commissioner has considered whether or not the disclosure of the information would assist with transparency and accountability in relation to the planning decision and whether disclosure is necessary for the legitimate interests of the public.

91. The Commissioner does not identify any specific harm in releasing the information in this case, and he considers that the release of the information would be fair. The Commissioner considers that, given the benefits of transparency and accountability, a legitimate interest arises from the disclosure on request of information by public bodies. More specifically, there is legitimate interest in the public knowing and understanding the full details regarding the planning matter and who was involved in the decision making process.
92. Following the Tribunal decision in *EA/2010/0012*, the Commissioner's guidance sets out that he considers that the particular public interest in public participation in planning matters is likely to carry a significant amount of weight in favour of disclosure in such cases. In particular, the Commissioner notes that the Tribunal gave weight to the Directive (2003/4/EC) which gave rise to the EIR, and in particular to recital (1) which provides the underlying rationale for disclosure of environmental information:

*"Increased public access to environmental Information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."*⁶

93. The National Planning Policy Framework (NPPF), which sets out the Government's vision for how local planning authorities should handle planning matters, states:

*"The planning system can play an important role in facilitating social interaction and creating healthy, inclusive communities. Local planning authorities should create a shared vision with communities of the residential environment and facilities they wish to see. To support this, local planning authorities should aim to involve all sections of the community in the development of Local Plans and in planning decisions...."*⁷

94. The Commissioner considers that disclosure of the information would, in this instance, enable the community affected by the development to

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_\(00_12\)_Decision_24-05-2010_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(00_12)_Decision_24-05-2010_(w).pdf)

⁷ Paragraph 69, published

here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6077/211650.pdf

understand and participate in the council's decision making and would assist the council in meeting one of the goals of the NPPF.

95. The Information Tribunal in the case of *The Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP* (EA/2006/0015 & 0016, 16 January 2007) said at paragraph 78:

*"...where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives."*⁸

96. The Commissioner considers that, as a local authority, the council should reasonably expect that matters which have a bearing on local residents will often arouse strong emotions and prompt robust communications. The Commissioner considers that senior council officials and publically elected members involved in decision making should expect to be subject to scrutiny and criticism from those they serve and represent. This is the outcome of the accountability and transparency which informs the democratic process. In addition, as the evidence relied upon by the council relates to an incident which took place several months after the request was made, the Commissioner considers that it is not something which the council is able to retrospectively consider to justify its application of the exception at the time of the request.
97. In relation to information identifying noise consultants employed by the council, this information contributes to the decision making process and involved the expenditure of public money. The Commissioner has already noted that the personal details of the consultants in question (their contact details and their function in their work capacity) are already in the public domain so he does not consider that disclosure would result in any harm or intrusion in to their private life.
98. In conclusion, the Commissioner finds that disclosure is necessary for the public to be able to establish the seniority of those involved. He also finds, in this case, that there would be no unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the individuals concerned.

⁸ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i83/HoC.pdf>

99. However, he notes that, where the individuals in question have engaged in communications as part of their public function but used their personal email addresses, disclosure of the address would not be necessary for a legitimate interest of the public and would be likely to result in unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the individuals concerned.

Is the information personal data?

Correspondence between the council and residents

100. The Commissioner has viewed the withheld information and notes that it contains the names and email addresses of residents. The Commissioner finds that the individuals in question are identifiable from this information and that the focus of the correspondence is residents' concerns about the effect of the proposed development on their home environment.

101. The Commissioner is satisfied that the withheld information constitutes the personal data of third parties.

Would disclosure of the information contravene any data protection principles?

102. The council has argued that disclosure of the information would breach the first data protection principle.

103. The first data protection principle states that:

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

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

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

Would disclosure of the information be fair?

104. In assessing fairness, the Commissioner has considered the reasonable expectations of the individuals concerned, the nature of those expectations and the consequences of disclosure to the individuals. He has also weighed these factors against the public interest in disclosure.

105. A data subject's expectations are likely in part to be shaped by generally accepted principles of everyday interaction and social norms, for example, privacy. It is accepted that every individual has the right to some degree of privacy and this right is so important that it is enshrined in Article 8 of the European Convention on Human Rights.

Information relating to individual residents

106. Residents referred to in the correspondence in question are acting in their capacity as private individuals rather than officials, and the correspondence in question involves them taking up concerns with the council about the matters referred to in the request. The council has argued that these private individuals would expect that such correspondence would not be publicly disclosed.
107. From the evidence provided, the Commissioner has no reason to believe that disclosure of the information requested is within the identified individuals' reasonable expectations. The Commissioner considers that the data subjects would have had a reasonable and legitimate expectation that their personal information would not be disclosed more widely without their consent.
108. In such situations, the Commissioner accepts that authorities are not obliged to approach individuals for their consent to disclosure if they are already of the view that the information in question should not be disclosed, and it is likely that such consent would not be given.
109. The Commissioner considers that the disclosure of personal data where that disclosure is not within an individual's reasonable expectations could be distressing to them as it could represent an unwarranted invasion of their privacy.
110. The Commissioner has balanced these factors against the legitimate public interest in public authorities being transparent in the way they discharge their duties in order to promote accountability and public confidence. There is also a legitimate interest in individuals having access to information that helps them understand the reasons why decisions that affect them are taken by public authorities, and in them having the ability to challenge those decisions and to participate in the debate around them.
111. The correspondence in question relates to the council's actions in respect of an issue of concern to a local community. However, this does not necessarily mean that the wider public interest is served by disclosure of the information requested. The Commissioner recognises that the legitimate interests of the public must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects, in this case, individuals who have raised concerns with their local authority.
112. Whilst the complainant and a relatively small number of residents affected by these issues might have a legitimate interest in viewing the correspondence, the Commissioner considers that it would not be proportionate to override the need for privacy in respect of this information, given the intrusion and distress disclosure may cause.

113. The Commissioner has come to the conclusion that the disclosure of the requested information would be unfair to the data subjects in question.

114. As the Commissioner has decided that disclosure would be unfair, there is no need for him to go on consider the other elements of the first data protection principle. The Commissioner therefore upholds the council's application of Regulation 13(1) because disclosure of this information would breach the first data protection principle.

Right of appeal

115. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

116. 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.

117. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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Wycliffe House
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SK9 5AF