

## Environmental Information Regulations 2004 (EIR)

### Decision notice

**Date:** 23 February 2017

**Public Authority:** The Royal Borough of Kensington and Chelsea  
**Address:** The Town Hall  
Hornton Street  
London  
W8 7NX

#### Decision (including any steps ordered)

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1. The complainant requested from the Royal Borough of Kensington and Chelsea its Cabinet's 'Confidential/Exempt Part B Appendix' dated 19 November 2015. The Royal Borough of Kensington and Chelsea withheld this information in its entirety under Regulation 12(5)(e) of the EIR
2. The Commissioner's decision is that the Royal Borough of Kensington and Chelsea has correctly applied Regulation 12(5)(e) of the EIR in respect of the information contained in the table under paragraph 57 of this Decision Notice but not the remaining information in the 'Confidential/Exempt Part B Appendix' dated 19 November 2015.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the Royal Borough of Kensington and Chelsea's Cabinet's 'Confidential/Exempt Part B Appendix' dated 19 November 2015 with the information in paragraph 57 of this Decision Notice redacted.
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

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5. On 12 April 2016 the complainant wrote to the Royal Borough of Kensington and Chelsea (the Council) and requested information in the following terms:

*'Any minutes or reports concerning Part B of the Council meeting to discuss the "approval to enter into Agreement to Lease and Lease for Westway Information Centre and North Kensington Library". This meeting involved the taking of an Executive Decision by RBKC Cabinet meeting and took place on 19 November 2015'.<sup>1</sup>*

6. The Council responded on 11 May 2016 and stated it was withholding the requested information in its entirety under Regulation 12(5)(e) of the EIR.
7. On 13 May 2016 the complainant requested an internal review.
8. Following an internal review the Council wrote to the complainant in or about May 2016 and stated it was upholding its original decision.

### Scope of the case

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9. The complainant contacted the Commissioner on 31 May 2016 to complain about the way his request for information had been handled.

### Chronology

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10. The Commissioner contacted the Council on 19 July 2016 and requested a copy of the withheld information together with any further arguments it wished to raise in support of its application of Regulation 12(5)(e) of the EIR.
11. The Council responded on 17 August 2016 and enclosed a copy of the publicly available Part A15 'Executive Decision Report'<sup>2</sup> and the withheld

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<sup>1</sup> See A15 and B7

<https://www.rbkc.gov.uk/committees/Document.ashx?czJKcaeAi5tUFL1DTL2UE4zNRBcoShgo=H7gCTyhODqHyCFS1Zd9zymru9XXpBxyhjgUoeE92L0Od%2Fdlh4%2Bu0%2FO%3D%3D&rUzwRPf%2BZ3zd4E7Ikn8LW%3D%3D=pwRE6AGJFLDNih225F5QMaQWcTPHwdhUfCZ%2FLUQzgA2uL5jNRG4jdQ%3D%3D&mCTIbCubSFfXsDGW9IXnlq%3D%3D=hFfIUdN3100%3D&kCx1AnS9%2FpWZQ40DXFvdEw%3D%3D=hFfIUdN3100%3D&uJovDxwdjMPoYv%2BAJvYtyA%3D%3D=ctNJFf55vVA%3D&FgPIIEJYlotS%2BYGoBi5oIA%3D%3D=NHdUROburHA%3D&d9Qjj0ag1Pd993jsyOJqFvmyB7X0CSQK=ctNJFf55vVA%3D&WGewmoAfeNR9xqBux0r1Q8Za60IavYmz=ctNJFf55vVA%3D&WGewmoAfeNQ16B2MHuCPMRKZMwaG1PaO=ctNJFf55vVA%3D>

<sup>2</sup>

<https://www.rbkc.gov.uk/committees/Document.ashx?czJKcaeAi5tUFL1DTL2UE4zNRBcoShgo=zfwrwf%2BojXRqrxM1Z2VWvikAekq22jtit6Wr3JKuYZ2xu%2B3uX7AZw%3D%3D&rUzwRPf%2BZ3zd4E7Ikn8LW%3D%3D=pwRE6AGJFLDNih225F5QMaQWcTPHwdhUfCZ%2FLUQzgA2uL5jNRG4jdQ%3D%3D&mCTIbCubSFfXsDGW9IXnlq%3D%3D=hFfIUdN3100%3D&kCx1AnS9%2FpWZQ40DXFvdEw%3D%3D=hFfIUdN3100%3D&uJovDxwdjMPoYv%2BAJvYtyA%3D%3D>

'Confidential/Exempt Part B Appendix' of the Cabinet Meeting on 19 November 2015. The Council added that its position remained the same regarding the application of Regulation 12(5)(e) of the EIR. It said that negotiations in relation to the Westway Information Centre (WIC) and the Old North Kensington Library (NKL) (which were the subject of the Executive Decision Report) were still ongoing and disclosure of the Confidential/Exempt Part B Appendix would adversely affect its commercial interests. However, the Council said it believed that the lease agreements for both WIC and NKL would be completed towards the end of August 2016.

12. The Commissioner replied on 18 August 2016 and requested evidence to confirm her understanding that the Council made a Key Decision on 23 November 2015 agreeing to grant leases for both WIC and NKL. She also enquired as to whether the Council would be prepared to disclose the withheld information once the lease agreements had been completed, which was predicted to be at the end of August 2016.
13. The Council replied on 26 August 2016 and provided a link to the decision it made on 23 November 2015<sup>3</sup> to approve entering into Agreement for Lease and Lease for WIC and NKL. With regard to the possibility of disclosing the requested information once the leases had been completed, it said it would discuss the matter with its Corporate Property Department.
14. After an exchange of emails with the Commissioner the Council stated on 12 October 2016 that as the leases had not been completed its position remained the same.
15. The Council confirmed that this was still the position in an email dated 15 December 2016.

## Background

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16. In September 2015 the Council's Cabinet recommended entering into agreements to lease and leases for the WIC and NKL in accordance with proposals set out in the 'Confidential/Exempt Part B Appendix'. The

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<sup>3</sup> <https://www.rbkc.gov.uk/howwegovern/keydecisions/decision.aspx?DecisionID=4651>

Cabinet agreed these proposals and the decision was implemented in November 2015.<sup>4</sup>

## Reasons for decision

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### The Environmental Information Regulations 2004 – The relevant law

17. The Council has dealt with the complainant's request under the EIR on the basis that the information requested is environmental.

18. Under Regulation 2(1) of the EIR environmental information is defined as;

*'any information in written, visual, aural, electronic or any other material form on: (a) the state of the elements of the environment such as ....land, landscape and natural sites including wetlands...biological diversity...(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements'.*

19. The requested information relates to the Council's proposal to lease two of its properties, namely, the Westway Information Centre (WIC) and North Kensington Library (NKL) to Notting Hill Preparatory School. The terms of the proposed lease would involve some internal and external works to the two buildings concerned.

20. The Commissioner has seen the requested information and is satisfied that it is environmental as it is a measure likely to affect the state of the elements of the environment, namely land and landscape and is also a measure designed to protect those elements. The Commission has therefore concluded that the EIR is the relevant law in this case.

### Regulation 12(2) - Presumption in favour of disclosure

21. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure.

## The Exceptions

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<sup>4</sup> <https://www.rbkc.gov.uk/howwegovern/keydecisions/decision.aspx?DecisionID=4651>

22. The Council has applied the exception under Regulation 12(5)(e) to withhold the entirety of the requested information.

**Regulation 12(5)(e) of the EIR – adversely affect the confidentiality of commercial information**

23. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
24. When assessing whether this exception is engaged the Commissioner will consider the following points:
- Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality required to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure? Although this is a necessary condition, the Information Tribunal has indicated that the disclosure of truly confidential information into the public domain would invariably harm the confidential nature of that information.

*Is the information commercial or industrial in nature?*

25. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods and/or the provision of services for a profit.
26. The withheld information consists of the 'Confidential/Exempt (Part B) Appendix' to the Public 'Executive Decision Report' of the Council's Cabinet on 19 November 2015<sup>5</sup> seeking 'approval to enter into Agreement to lease and lease for WIC and North Kensington Library'.

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<https://www.rbkc.gov.uk/committees/Document.ashx?czJKcaeAi5tUFL1DTL2UE4zNRBcoShgo=H7gCTyhODqHyCFS1Zd9zymru9XXpBxyhjgUoeE92L0Qd%2Fdlh4%2Bu0%2FO%3D%3D&UzwRPf%2BZ3zd4E7Ikn8Lyw%3D%3D=pwRE6AGJFLDNlh225F5QMaQWcTPHwdhUfCZ%2FLUQzgA2uL5jNRG4jdQ%3D%3D&mCTIbCubSFfXsDGW9IXnlq%3D%3D=hFflUdN3100%3D&kCx1AnS9%2FpWZO40DXFvdEw%3D%3D=hFflUdN3100%3D&uJovDxwdjMPoYv%2BAJvYtyA%3D%3D=ctNJFf55vVA%3D&FgPIIEJYlotS%2BYGoBi5oIA%3D%3D=NHdUROburHA%3D&d9Qjj0ag1Pd993jsyOJqFvmyB7X0CSQK=ctNJFf55vVA%3D&WGewmoAfeNR9xqBux0r1Q8Za60IavYmz=ctNJFf55vVA%3D&WGewmoAfeNQ16B2MHuCPMRKZMwaG1PaO=ctNJFf55vVA%3D>

27. The 'Confidential/Exempt (Part B) Appendix' states that it contains 'Information relating to the financial or business affairs of any particular person'. The actual information is about the commercial bids received by the Council for NKL and the WIC and the terms under which they would be leased. The Council has stated that the information is commercial in nature as it relates to the financial affairs of those bidding for NKL and the WIC and has added that the negotiations in respect of these properties was ongoing at the date of the request.
28. The Commissioner has seen the Confidential/Exempt (Part B) Appendix and considers that it relates to a commercial activity, namely the Council's decision to lease its two of its properties for rental income. The Commissioner is therefore satisfied that the information is commercial in nature.

*Is the information subject to confidentiality provided by law?*

29. Paragraph 19 of the Commissioner's guidance<sup>6</sup> on Regulation 12(5)(e), states:

*"In contrast to the section 41 exemption under FOIA, there is no need for public authorities to have obtained the information from another. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself. For purely internal information, the question will be whether the employees of the public authority are under an obligation of confidence imposed by the common law, contract, or statute."*

30. In relation to this element of the exception, the Commissioner has considered whether the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.
31. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
32. The Council has argued that as the Confidential/Exempt (Part B) Appendix is not in the public domain and is not trivial, it possesses the necessary quality of confidence.

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<sup>6</sup> [https://ico.org.uk/media/for-organisations/documents/1624/eir\\_confidentiality\\_of\\_commercial\\_or\\_industrial\\_information.pdf](https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf)

33. Having viewed the Confidential/Exempt (Part B) Appendix, the Commissioner is satisfied that some of the information contained within it is already in the public domain. For example, there is information on the Council's website relating to the Cabinet's approval to let NKL and the WIC to Notting Hill Preparatory School.<sup>7</sup>
34. So far as the remaining information is concerned the Commissioner is satisfied that it is not trivial as it relates to a commercial decision to lease two of its properties for rental income.
35. The Commissioner is therefore satisfied that the information which is not already in the public domain does have the necessary quality of confidence.
36. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*<sup>8</sup> suggested that the 'reasonable person' test may be a useful one. He explained:

*"if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence"*.
37. In *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012), the Tribunal accepted evidence that it was "usual practice" for all documents containing costings to be provided to a planning authority on a confidential basis, even though planning guidance meant that the developer was actually obliged to provide the information in this case as part of the public planning process.
38. Applying the test of a reasonable person, the Commissioner takes the view that information in the Confidential/Exempt (Part B) Appendix which is not already in the public domain and is expressly marked 'confidential' was imparted in circumstances to create a duty of confidence.

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<http://www.rbkc.gov.uk/committees/Document.ashx?czJKcaeAi5tUFL1DTL2UE4zNRBcoShgo=6XQoj%2b3oaF1fQnLMvju8NFD0vtStlcZD5m7X1rkjf33iEkb2kb9L3Q%3d%3d&rUzwRPf%2bZ3zd4E7Ikn8Lyw%3d%3d=pwRE6AGJFLDNih225F5QMaQWCtPHwdhUfCZ%2fLUQzgA2uL5jNRG4jdQ%3d%3d&mCTIbCubSFfXsDGW9IXnlq%3d%3d=hFfIUdN3100%3d&kCx1AnS9%2fpWZO40DXFvdEw%3d%3d=hFfIUdN3100%3d&uJovDxwdjMPoYv%2bAJvYtyA%3d%3d=ctNJFf55vVA%3d&FgPIIEJYlotS%2bYGoBi5oIA%3d%3d=NHdUROburHA%3d&d9Qjj0ag1Pd993jsyOJqFvmyB7XOCSOK=ctNJFf55vVA%3d&WGewmoAfeNR9xqBux0r1O8Za60lavYmz=ctNJFf55vVA%3d&WGewmoAfeNO16B2MHuCPMRKZMwaG1PaO=ctNJFf55vVA%3d>

<sup>8</sup> *Coco v A N Clark (Engineers) LTD* [1969] RPC 41.



*Is the confidentiality required to protect a legitimate economic interest?*

39. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
40. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probably than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests:

*"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors".*

41. The Council has argued that disclosure of the requested information would adversely affect its legitimate economic interests as the negotiations in relation to the leases for both NKL and the WIC are ongoing. The Council believes that disclosure of the requested information would weaken its negotiating position which would have an adverse effect on its finances. However, it did indicate that it would be prepared to review its position once the leases had been completed.
42. In relation to NKL, the Council has stated that the property is under offer to a prospective tenant and the legal documentation has not been completed. It has added that the prospective tenant is effectively a 'special purchaser' having accommodation immediately next to the building and for this reason has agreed to pay a rent in excess of the market value. The Council has pointed out that as it is planning to make a significant investment to provide a brand new library and other community facilities, it was important to secure, if possible, a pre-let of the old NKL space to support its business case.
43. In relation to the WIC, the Council has stated that this property is also under offer to a prospective tenant and the legal documentation has not been completed. It added that the space in question was subject to a full and normal marketing campaign by its commercial agents, HNG, which drew a number of offers. These offers were submitted in the normal manner with two eventually proceeding to best and final offers. The prospective tenant was the most economically advantageous.



44. The Commissioner accepts that until the leases for NKL and the WIC are completed, the terms are commercially sensitive and disclosure would adversely affect the Council's current and possibly its future negotiating position. The Commissioner recognises that it is important for the Council to secure best value for the leases, especially as the revenue generated could be used as a contribution towards other capital projects, such as the cost of the new library building. The Commissioner accepts that disclosure of the requested information at this stage would have the potential to prejudice the Council's position in relation to its current negotiations and any future negotiations should the current ones not complete for any reason. This would be especially true in relation to the valuations obtained and rental offers made for the NKL and the WIC. The Commissioner therefore accepts that disclosure of the requested information would, on a balance of probabilities, adversely affect the Council's legitimate economic interests.

*Would the confidentiality be adversely affected by disclosure?*

45. As stated above, the Commissioner will find that the fourth stage of the test incorporated into the exception will automatically be met where the three previous stages are satisfied. On the basis of her findings, the Commissioner has determined that regulation 12(5)(e) of the EIR is engaged. She has therefore gone on to assess the public interest test.

#### **Public interest arguments in favour of disclosure**

46. The Commissioner recognises that there is a general public interest in favour of disclosing information in relation to the leasing of publically owned property by a Council to promote transparency and accountability. The complainant believes this is especially true where a publicly owned asset like NKL is being leased to an organisation operating in the private sector, namely Notting Hill Preparatory School.
47. The complainant has pointed out NKL is a Grade II listed building of some historical significance and therefore there is a public interest in knowing what the Council and the prospective lessee propose to do with it.
48. The complainant believes that the Council's decision to lease both NKL and the WIC is flawed. He has cited a number of reasons to support this belief. As far as he is aware the Council did not conduct an 'open tender' in respect of both properties; there was little or no public consultation and the application by some members of the Council to 'call in' the decision was never heard due to it being submitted too late.
49. The complainant does not believe there would be any prejudice in the disclosure of the requested information as the Council has already agreed a financial deal with Notting Hill Preparatory School in respect of

the leases for NKL and the WIC and therefore the bidding process had been completed.

### Public interest arguments in favour of maintaining the exception

50. The Council has argued that there is a strong public interest in favour of it being able to secure the best financial deals for its residents. Although the Council accepts that agreement has been reached in principal in relation to the two properties it intends to lease to Notting Hill Preparatory School it has pointed out that the negotiations have not yet been completed. Therefore to disclose the requested information at this stage would prejudice the Council's negotiating position now and possibly in the future, should the negotiations break down.
51. The Council believes that there is adequate information in the public domain about its decision to lease NKL and the WIC. For example, in the Cabinet's Executive Decision Report Appendix A dated 19 November 2015.<sup>9</sup>

### The balance of the public interest

52. The Commissioner has seen the requested information which consists of the Cabinet's 'Confidential/Exempt Part B Appendix' dated 19 November 2015. She has already pointed out that some of the information contained in it is already in the public domain.
53. The Commissioner accepts that there is a public interest in not disclosing information which would prejudice the Council's negotiating position and its ability to negotiate lease agreements for best value. She believes that such information would include the cost of the 'fit-out works', the 'rental levels', the 'annual rent' offered and the 'open market rental value'. However, she does believe that there is a public interest in disclosing the remaining information in the Confidential/Exempt Part B Appendix as it will illustrate the steps taken by the Council to achieve best value for NKL and the WIC and allow for a better understanding as to why the Council made the decision to accept the offers from Notting Hill Preparatory School.

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<https://www.rbkc.gov.uk/committees/Document.ashx?czJKcaeAi5tUFL1DTL2UE4zNRBcoShgo=zfwrwf%2bojXRqrxXm1Z2VWvikAekq22jtit6Wr3JKuYZ2xu%2b3uX7AZw%3d%3d&rUzwRpf%2bZ3zd4E7Ikn8Lyw%3d%3d=pwRE6AGJFLDNIh225F5QMaQWctPHwdhUfCZ%2fLUQzgA2uL5jNRG4jdQ%3d%3d&mCT1bCubSFfXsDGW9IXnlq%3d%3d=hFfiUdN3100%3d&kCx1AnS9%2fpWZQ40DXFvdEw%3d%3d=hFfiUdN3100%3d&uJovDxwdjMPoYv%2bAJvYtyA%3d%3d=ctNJFf55vVA%3d&FgPIIEJYlotS%2bYGoBi5oIA%3d%3d=NHdUROburHA%3d&d9Qjj0ag1Pd993jsyOJqFvmyB7X0CSOK=ctNJFf55vVA%3d&WGewmoAfeNR9xqBux0r1Q8Za60lavYmz=ctNJFf55vVA%3d&WGewmoAfeNQ16B2MHuCpMRKZMwaG1PaO=ctNJFf55vVA%3d>

54. Taking into account the weight of the competing arguments, the Commissioner has concluded that in all the circumstances the public interest in disclosure outweighs the public interest in withholding the information with the exception of the cost of the 'fit-out works', the 'rental levels', the 'annual rent' offered and the 'open market rental value', the details of which are set out in the table below.
55. The Commissioner therefore finds that Regulation 12(5)(e) of the EIR applies to the Confidential/Exempt Part B Appendix dated 19 November 2015 (apart from that already in the public domain) with the public interest balanced in favour of disclosing the information with the exception of the information set out in the table below.
56. Listed below is a table showing the information in the Confidential/Exempt Part B Appendix dated 19 November 2015 to which the public interest is balanced in favour of maintaining the exception under Regulation 12(5)(e) of the EIR.
57. Table of information.

Page	Paragraph	Heading	Line(s)	Description
3	4.3	Specification	3	fit-out works £
3	4.3	Specification	5	fit-out works £ & cost £psf
3	4.5	Rental Income stream/rent free	2 & 3	rental bids £
4	4.5	Rental Income stream/rent free	13 & 14	annual rents
4	4.6	Other factors	6	current open market value & average £psf
4	4.6	Other factors	10	offer £
4	4.6	Other factors	11	£psf & premium £
4	4.6	Other factors	19	£psf
5	5.1	Confidential: Est Rental Income	2	rental income £
6	Rent free period	Confidential: Heads of Terms: Rent free period	3	rent per annum £
6	Rent	Confidential: Heads of Terms: Rent	1	Rent per annum £

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ty 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,

Reference: FS50631615

LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

59. 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.
60. 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** .....

**Rachael Cragg  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**