

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 9 October 2018

**Public Authority:** Homes & Communities Agency  
(trading as Homes England)

**Address:** Fry Building  
2 Marsham Street  
London  
SW1P 4DF

### **Decision (including any steps ordered)**

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1. The complainant requested information from the Homes & Communities Agency, now trading as Homes England ("Homes England"), relating to the calculation of the size of an endowment provided to Preston City Council under the terms of a Community Related Assets Agreement entered into by Homes England and Preston City Council in 2010. Homes England provided the complainant with some information, but withheld some detailed costings under regulation 12(5)(e) of the EIR, since it considered that disclosure would adversely affect the confidentiality of commercial information.
2. The Commissioner's decision is that Homes England correctly considered the request under the EIR. However, she has determined that the exception at regulation 12(5)(e) is not engaged in respect of the withheld information. In addition, Homes England breached regulations 5(2) and 14(2) of the EIR, since it failed to respond to the complainant within 20 working days.
3. The Commissioner requires Homes England to take the following step to ensure compliance with the legislation:
  - Disclose the withheld information to the complainant.

4. Homes England must take this step 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 2 September 2017, the complainant made the following request for information:

*"I wish to make a Freedom of Information request in regard to the Community Related Assets Agreement between Homes and Communities Agency (HCA) and Preston City Council dated 31 March 2010 and ask that you provide me with:*

- *the final draft of the spreadsheet information which enabled both Homes England and Preston City Council to test the assumptions and cost rates etc in negotiating the Contract contained in the Community Related Assets Agreement*
- *the stress test used to check the robustness of the proposed endowment*
- *the summary spreadsheet 'fact sheet' for each site which was used as the basis of Homes England working with Preston City Council to conclude negotiations for the eventual size of the endowment*
- *an explanation of the source used to benchmark to the satisfaction of both parties to the Community Assets Agreement the cost element included in the 'fact sheet' for the maintenance in perpetuity of the community assets scheduled in the Community Related Assets Agreement*
- *advice as to the criteria used to establish the date Preston City Council took complete responsibility for the ongoing maintenance of the community assets scheduled in the Community Related Assets Agreement as the 2015/16 Preston City Council annual accounts states legal transfers of community related assets were still in progress with HCA's legal advisors*
- *confirmation that both parties to the Community Assets Agreement understood that the scale of the Endowment had been established in the final assessment to be wholly associated with the ongoing maintenance of the community assets scheduled in the Community Assets Agreement in perpetuity and as such represented a legal obligation on Preston City Council*

- *the composite spreadsheet for the whole programme which was used as the basis for working with HM Treasury at programme level*
  - *a description of the monitoring procedure applied by HCA to ensure compliance by Preston City Council to the ongoing provision of maintenance assets wholly on the basis detailed in the Contract contained in the Community Related Assets Agreement."*
6. On 26 October 2017, Homes England responded and stated that it did not hold any recorded information falling within the scope of the request. It also offered some general explanation as to its understanding of Preston City Council ("the Council")'s requirements regarding the Community Related Assets Agreement ("the CRA Agreement").
  7. The complainant requested an internal review on 13 November 2017, and also asked for Homes England's views and explanations for various matters. Homes England wrote to the complainant on 15 December 2017 and explained that it had now identified some files which may contain recorded information relevant to the request, which needed to be reviewed; accordingly it required an additional 20 working days to respond. It sent him the outcome of its internal review on 18 January 2018.
  8. In the internal review response, Homes England explained that it was dealing with the request under the EIR due to the subject matter of the request. It acknowledged that its original response had been late.
  9. With regard to the files which it had now located, it provided the complainant with some information, and made some redactions under regulation 12(3) – third party personal data – and regulation 12(5)(e) – adversely affect the confidentiality of commercial or industrial information. It also redacted some information which it considered fell outside the scope of the request, as it related to areas in other local authorities.
  10. In addition, Homes England offered some responses to the other queries, despite considering that they were not valid requests for the purposes of FOI legislation.

## **Background to the request**

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11. The request relates to an £8m endowment which Preston City Council ("the Council") received in 2009/2010 in relation to the transfer, to the Council, of community-related assets. The complainant explained that

he had already obtained some information relating to the endowment from the Council.

12. The community-related assets included, in this case, landscaped areas, nature reserves and playgrounds.
13. The complainant has explained he has concerns over the use of some of the endowment monies, the use of which is controlled by the terms of the CRA Agreement.
14. He considered that certain calculations would have been carried out, and procedures followed, to establish the amount and robustness of the endowment, and to ensure the appropriate use of the funds going forward. He considered that this would have been necessary in order to ensure that the Council would be able to maintain specific sites to a certain standard in perpetuity, while representing good value for money.
15. Having located some information, the Council provided it to the complainant with some redactions, as explained in paragraph 8. The Council has confirmed to the Commissioner that no documents were withheld in their entirety.

### **Scope of the case**

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16. The complainant contacted the Commissioner on 5 February 2018 to complain about the way his request for information had been handled.
17. He wished to challenge the application of regulation 12(5)(e) to some of the information. He did not challenge the redactions which had been made under regulation 12(3) nor request the information which had been deemed to fall outside the scope of his request.
18. He stated, in addition, that he considered that other information, such as a Memorandum of Understanding or other summary of the terms being agreed between the parties to the CRA Agreement, would be held.
19. The analysis which follows considers whether Homes England was correct to consider the request under the EIR, whether it has located all of the information which it holds falling within the scope of the request, whether some information was withheld correctly under regulation 12(5)(e), and whether Homes England complied with the request within the statutory time period.

## Reasons for decision

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### Is the request a request for environmental information?

20. Regulation 2(1) of the EIR provides the following definition of environmental information:

*"...any information in written, visual, aural, electronic or any other material form on-*

*(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

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

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

*(d) reports on the implementation of environmental legislation;*

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

*(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);"*

21. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.

22. The Commissioner has produced guidance<sup>1</sup> to assist public authorities and applicants in identifying environmental information. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
23. The Commissioner notes that the withheld information comprises specific columns from two main documents. One document is entitled *List of Sites March 2009* and is a table of detailed costings, prepared in 2010, broken down by specific site: the columns headed *annual cost* and *total endowment* have been withheld. The other document, from 2008, is entitled *Total Measures and Costs*. The columns headed *unit rate* and *cost* have been redacted; these costings relate to 'measures', such as fencing and ditches.
24. Homes England has stated that it considered that the information fell within the definition at regulation 2(1)(e) of the EIR, above. This is because it considered that the CRA Agreement was a "*measure... affecting or likely to affect*" the environment, within the definition at regulation 2(1)(c), and the information held was "*a financial analysis*" relating to this measure.
25. The Commissioner has considered the information in light of the definition at regulation 2(1).
26. She considers that the interpretation of the phrase "*any information... on*" will usually include information concerning, about, or relating to the measure, activity, factor etc., in question. It is not necessary for the information itself to have a direct effect on the elements of the environment in order to be environmental.
27. The Commissioner understands that, in calculating the amount of the endowment to be provided to the Council, Homes England aimed to ensure that the Council would be able to maintain the specific sites going forward; for example, by securing appropriate maintenance contracts and procuring hard and soft landscaping materials. The sites are mainly open spaces.

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[https://ico.org.uk/media/fororganisations/documents/1146/eir\\_what\\_is\\_environmental\\_information.pdf](https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf)

28. The Commissioner is satisfied that the withheld information relates to a measure likely to affect the elements of the environment. She agrees that the CRA Agreement which resulted from the negotiations over the endowment is a 'measure' within the definition at regulation 2(1)(c); the specific figures that have been withheld are part of what is essentially an economic analysis relating to this measure. The information therefore falls within the definition of environmental information at regulation 2(1)(e) of the EIR, and the Commissioner is satisfied that Homes England considered the request under the correct access regime.

**Regulation 5(1) – what information is held?**

29. Regulation 5(1) of the EIR states that a public authority that holds environmental information shall make it available on request.
30. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, must decide, on the balance of probabilities, whether the public authority holds any further information which falls within the scope of the request (or did, at the time of the request).
31. Homes England explained what searches had been carried out for information. It explained that it stored project information in both manual and electronic project folders. It had not located any electronically-stored information relevant to the request, but had located some information in manual folders.
32. Homes England also explained that, in view of the fact that the CRA Agreement had been signed in 2010, some information, which it was not required to retain, would have been destroyed in line with routine retention periods.
33. Specifically, Homes England explained that clause 22 of the CRA Agreement comprises an *Entire Agreement clause* which confirms that all conditions of the agreement are contained within the CRA Agreement itself, and that there was in its view no requirement to retain other documentation relating to the terms of the agreement.
34. The Commissioner is satisfied that, in view of the time that has elapsed since the endowment and the terms of the CRA Agreement were being negotiated, Homes England has, on the balance of probabilities, located and considered for disclosure all of the relevant information which it holds, and that no further information falling within the scope of the request is held.

## **Regulation 12(5)(e) – adversely affect the confidentiality of commercial or industrial information**

35. Regulation 12(5)(e) states that a public authority may refuse to disclose environmental information to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information, where such confidentiality is provided by law to protect a legitimate economic interest. If engaged, regulation 12(5)(e) is subject to the public interest test.
36. The Commissioner has published guidance<sup>2</sup> on the application of the exception at regulation 12(5)(e). As the guidance explains, she considers that in order for this exception to be applicable, there are a number of conditions that need to be met. She has considered how each of the following conditions apply to the facts of this case:
- Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality provided to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?

*Is the information commercial or industrial in nature?*

37. The Commissioner's guidance advises that, for information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party. The essence of commerce is trade, and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information.
38. The withheld information in this case was generated during the course of negotiations between the Council and Homes England over the amount of the endowment. It comprises the detailed breakdown of the budget for each of the specific sites which the Council would be required to maintain and/or manage, under the terms of the CRA Agreement.

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[https://ico.org.uk/media/1624/eir\\_confidentiality\\_of\\_commercial\\_or\\_industrial\\_information.pdf](https://ico.org.uk/media/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf)



39. The Council, under the terms of the endowment, is required to maintain all of the managed sites, and the figures represent a detailed budget of what could be spent on carrying out this function with regard to the purchase of goods, such as hard landscaping, and services, such as maintenance by its own or by contracted staff.
40. The Commissioner is therefore satisfied that the information is commercial in nature.

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

41. Homes England has explained that it considers that the information is subject to a duty of confidence at common law. In these circumstances, the Commissioner will consider whether the information has the necessary quality of confidence, and whether it has been shared in circumstances creating an obligation of confidence.
42. In assessing whether the information has the necessary quality of confidence, as is explained in the guidance, the Commissioner will consider whether the information is more than trivial, and whether or not it is in the public domain.
43. Homes England has argued that the information is not trivial since it related to the final amount of the endowment which the Council would receive. It explained that the endowment was designed to be a one-off payment, made alongside the transfer of the assets, and which would enable the Council to maintain the assets going forward. As previously stated, the amount of the endowment was £8m.
44. The Commissioner agrees that the information in itself is not trivial, since it relates to the endowment.
45. The Commissioner has also considered whether or not the information is in the public domain. Homes England has confirmed that it has not previously been shared. The Commissioner is satisfied that the redacted information is not in the public domain.
46. In considering whether the information was shared in circumstances creating an obligation of confidence, Homes England has argued that the purpose of the information was to "*recite*" that the Council was being provided with sufficient funds for it to maintain the assets which were being transferred. It argues that the risk inherent in this process – since the endowment was to be a one-off payment, with no opportunity for the Council to return to Homes England for future funding – "*gives rise to an implicit obligation that the amount of funding available for each site should not be disclosed to contractors bidding for the maintenance contracts for those sites*". In support of this, Homes England also asserted that there would be potentially serious consequences if the

Council was unable to obtain value for money from its contractors and ultimately spent more money than it would have needed to.

47. The Commissioner's guidance on the exception at regulation 12(5)(e), referenced previously, sets out that the circumstances creating an obligation of confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information. The guidance also states that a useful test is to consider whether a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence.
48. In considering this criterion, the Commissioner is naturally considering the circumstances at the time when the information was shared. She is aware that the information was generated during a period of negotiation, prior to the endowment being paid and the terms of the CRA Agreement being settled. In her view, it is reasonable to consider that the detailed costings were shared with an expectation of confidentiality, since disclosure could potentially lead to difficulty in negotiating for the provision of the goods and services necessary for the Council to fulfil its obligations.
49. She is satisfied that this criterion is met.

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

50. The Information Rights Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) that, to satisfy this element of the exception, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
51. In citing the exception, as the Commissioner's guidance explains, public authorities will need to consider the sensitivity of the information at the date of the request.
52. Specifically, the guidance states that the timing of the request and whether the commercial information is still current are likely to be key factors. This is in part due to the provisions of European Directive 2003/4/EC<sup>3</sup>, which are implemented by the EIR, and which establish a

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<sup>3</sup> <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

duty to interpret the wording of the exception narrowly. The exception is stated to apply "*where such confidentiality is provided by law*" (rather than "*was*" provided). In the Commissioner's view, this indicates that the confidentiality of the withheld information must be objectively required at the time of the request. This point is considered further, below.

53. In addition, it is the Commissioner's view that 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.
54. The Commissioner has been assisted by the Tribunal in determining how 'would' needs to be interpreted. She accepts that 'would' means *more probable than not*. In support of this approach, the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This 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".*

55. The Commissioner has therefore considered Homes England's arguments in light of the timing of the request, and in light of the requirement to demonstrate that harm would be caused to the relevant party's economic interests if the information were disclosed.
56. Homes England argued that disclosure of the information would adversely affect its own, and the Council's, legitimate economic interests. It stated that disclosure would:

*"inform bidders of the total budgets for the services and works on each of the sites. This would prevent the Council from achieving value for money as they would not receive "best price" bids; instead they would be priced to meet the budget. The release of the information, and in doing so breaching the confidence of the [CRA Agreement], would directly have an adverse effect on the Council's and Homes England's economic interest in the endowment".*

57. Homes England also explained that it considered that "*the release of the commercial information held would hinder the ability of Preston City Council to obtain value for money in a competitive bidding process for services. The information would inform potential bidders of the budget available to the council to carry out the services. This would lead to bids being tailored to that amount, adversely affecting the ability of the Council to get the best price for the contract*".

58. The Commissioner notes that Homes England referred to its own economic interests as well as to those of the Council. However, she is aware that the amount of the endowment was agreed in 2009, and notes Homes England's own explanation that the Council cannot return to it for more funding in respect of the transferred assets. She is, therefore, not satisfied that there would be harm to Homes England's economic interests if the information were disclosed in response to the request, which was made in February 2018, since Homes England's role in proceedings had concluded by that date.
59. Homes England's arguments, as set out above, in any event appear to focus on the potential adverse effect on the economic interests of the Council, and so the Commissioner has focused her considerations on the economic interests of the Council.
60. In writing to Homes England, the Commissioner asked it to explain how disclosure of the withheld information would adversely affect the particular economic interest that had been identified, and to ensure that this explanation demonstrated a clear link between disclosure of the withheld information and any adverse effect.
61. While Homes England has made clear that the Council would be required to obtain competitive bids for the various goods and services necessary for the various sites to be maintained, it has not explained why the information was still commercially sensitive at the date of the request.
62. The Commissioner recognises the general principle that harm can be caused by disclosing information which would undermine a negotiating strategy, benefitting the recipients of the information to the detriment of the party to which the information relates. However, she considers that it is for public authorities to demonstrate how such harm would occur in any given case, and to identify a causal link between the release of specific information and specific adverse effects. This is particularly important where the information dates from several years ago, as in this case.
63. In this case, and being mindful of the age of the information, the Commissioner does not consider that Homes England has provided her with evidence that there is a causal link between the disclosure of the information and the potential harm.
64. Although the Commissioner is aware that the Council is expected to maintain the sites in perpetuity, in her view Homes England has not demonstrated that the bidding process and contracts which the Council would need to negotiate to carry out its duties remain a 'live' issue with regard to the detailed costings.

65. In considering this matter, the Commissioner has had regard for the decision of the First-Tier (Information Rights) Tribunal (the "Tribunal") decision in Hartlepool Borough Council vs the Information Commissioner (EA/2017/0057)<sup>4</sup>. In that case, in paragraph 54 of the decision, the Tribunal stated the following in relation to the affected party ("Peel"):

*"What Peel has completely failed to do, however, is to support its assertions with evidence. There are no witness statements, and no evidence or even arguments to link the disclosure of any specific aspect of the information with any specific business interests that would or would be likely to be prejudiced by its disclosure. Peel has not said, for example, that it is in the process of tendering for another development project which is comparable..."*

66. In paragraph 55 the Tribunal goes on to say:

*"The need for... explanation does not arise from the Commissioner's request. It arises because the onus rests with the party making the assertion that the exemption is engaged to make good its claim. So, for example, if a manufacturer of widgets were to claim that disclosure of information relating to its dealings with a particular commercial partner would or would be likely to prejudice its commercial interests, it would not be sufficient for it to say simply that the manufacture of widgets is a competitive business, that it enters into similar agreements as part of its business and will therefore suffer prejudice if the information became available to its competitors. It would need to demonstrate the link between the specific information in issue and the claimed prejudice. So for example, it might show that the information would disclose that it manufactures its widgets in a particular way that is cost effective, and that is not known by its competitors, or that it had structured its agreement in a way that is unusual in the industry by charging its widgets at an unusually low mark-up because of a commitment that it would provide training at a higher return than usual."*

67. Whilst the Tribunal was referring to an instance of the application of section 43(2) of the FOIA, in relation to a party's commercial interests, the Commissioner considers that the principle, regarding the need for public authorities to identify explicit instances of harm and link this to the disclosure of specific information, is transposable to the facts of this

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2169/Hartlepool%20Borough%20Council%20EA-2017-0057%20\(14-03-18\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2169/Hartlepool%20Borough%20Council%20EA-2017-0057%20(14-03-18).pdf)

case. Moreover, in order for regulation 12(5)(e) to be engaged, it must be shown that specific adverse effects would follow as a direct result of information being disclosed. There is, therefore, an enhanced need for public authorities to show a causal link between withheld information and claimed adverse effects.

68. In this case, Homes England's submissions suggest that disclosure of the information would improve parties' bargaining position, to the detriment of the Council's position. It has referred in general terms to "*potential bidders*", "*services*" and "*contracts*". However, it has not identified specific elements of the information nor explained the causal mechanism via which this would occur. It has not, for instance, provided the Council's views on its position regarding any negotiations which may still be ongoing.
69. Having considered the submissions, and being conscious of the age of the information, the Commissioner is left with the impression that the exception has been applied on a general basis, without a link being made between specific adverse effects and discrete elements of the withheld information.
70. On the basis of the arguments provided, the Commissioner is not persuaded that disclosure of the information would harm the legitimate economic interests of any person.
71. The Commissioner has therefore determined at paragraph 2 above that the exception at regulation 12(5)(e) is not engaged in respect of the withheld information. It has not been necessary to go on to consider the public interest test.

**Regulation 5 – duty to make environmental information available on request; Regulation 14 – refusal to disclose information**

72. Regulation 5(2) of the EIR states that information should be provided to the requester as soon as possible, and no later than 20 working days after the date of the request.
73. Regulation 14(2) states that, if a request for environmental information is refused by a public authority under regulation 12(1) (which includes the specific exception at regulation 12(5)(e)), the refusal shall be made as soon as possible and no later than 20 working days after the date of the request.
74. In this case, in view of the timing of the request, the response and the internal review procedure described in paragraphs 4 - 9 above, the Commissioner finds Homes England in breach of regulation 5(2), as it failed to make the information available to the complainant within 20 working days of the request.

75. She also finds Homes England in breach of regulation 14(2) of the EIR, as it failed to provide a refusal for the information it considered was exempt from disclosure within 20 working days.

## Right of appeal

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

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

77. 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.
78. 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 .....**

**Ben Tomes**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**