

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

Date: 7 July 2020

Public Authority: Cardiff Council

Address: foi@cardiff.gov.uk

Decision (including any steps ordered)

1. The complainant requested a report into the carbon footprint of Cardiff Council's ('the Council') pension fund. The Council initially refused the request but did not cite any specific exemptions. During the course of the Commissioner's investigation, the Council disclosed some information. The Council accepted that the request should have been considered under the EIR and confirmed that it was relying on regulations 12(4)(e), 12(5)(c), and 12(5)(e) to withhold the remainder of the report. The Commissioner's decision is that the Council failed to demonstrate that Regulations 12(5)(c) and 12(5)(e) are engaged. She finds that Regulation 12(4)(e) is engaged but that the public interest in disclosing the information overrides the public interest in maintaining the exception. In failing to consider the request under the EIR, the Commissioner also finds that the Council breached regulation 14.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information.
3. 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

4. On 17 January 2019, the complainant wrote to the Council and requested information in the following terms:

"I write to request a copy of the report into the carbon footprint of Cardiff Council's pension fund listed as Appendix 1 to the papers to the Cardiff Council Pensions Committee meeting on 14 January:

<http://cardiff.moderngov.co.uk/documents/b11361/Item%204%20-%20Climate%20Change%20Investment%20Policy%2014th-Jan-2019%2017.00%20Pensions%20Committee.pdf?T=9&LLL=0>

For the avoidance of doubt, I am requesting this information under the Environmental Information Regulations 2004 and the Freedom of Information Act 2000.

I would like to receive the information in electronic format".

5. The Council responded on 30 January 2019 and stated that the information requested was exempt from disclosure by virtue of paragraphs 14 and 21 of Parts 4 and 5 of Schedule 12A of the Local Government Act 1972.
6. On 30 January 2019 the complainant requested an internal review into the Council's handling of the request. He pointed out that paragraph 14 of Schedule 12A of the Local Government restricted the sharing of information, however it did not prohibit it. He also suggested that there was a significant public interest in disclosure of the information in question.
7. The Council provided the outcome of its internal review on 25 February 2019 and upheld that the information was exempt from disclosure by virtue of paragraph 14 of Part 4 Schedule 12A of the Local Government Act 1972.

Scope of the case

8. The complainant contacted the Commissioner on 4 June 2019 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation the Council disclosed a small amount of information contained within the report. The Council also acknowledged that the request should have been

considered under the EIR. The Council confirmed that it was withholding the remaining information within the report under regulations 12(5)(c), 12(5)(e) and 12(4)(e).

10. The scope of the Commissioner's investigation into this complaint is to consider whether the Council correctly applied regulations 12(5)(c), 12(5)(e) and 12(4)(e) to the remaining withheld information.

Reasons for decision

Is the information environmental?

11. The Commissioner has first considered whether the information requested is environmental in accordance with the definition given in regulation 2(1) of the EIR. Environmental information is defined within regulation 2(1) as:

"any information in written, visual, aural, electronic or any other material form on –

(c) measures (including administrative measures), such as policies, legislation, plans, programmes...and activities affecting or likely to affect the elements and factors referred to in (a) and (b)...".

12. In coming to her view that the requested information is environmental, the Commissioner is mindful of the Council Directive 2003/4/EC which is implemented into UK law through the EIR. A principal intention of the Directive is to allow the participation of the public in environmental matters. The Commissioner therefore considers that the term "any information...on" in the definition of environmental information contained in regulation 2 should be interpreted widely. It will usually include information concerning, about or relating to measures, activities and factors likely to affect the state of the elements of the environment. In other words information that would inform the public about the element, measure etc under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.
13. In reaching a view on this case, the Commissioner has considered the nature of the information held, rather than the reasons for holding it. The Commissioner does not consider it necessary for the information itself to have a direct effect on the elements of the environment, or to record or discuss such an effect. Rather, the information should be "*any information on*" something falling within regulation 2.

14. The request in this case is for a report on the carbon footprint of the Council's pension funds. The dictionary definition of a carbon footprint is "*the amount of carbon dioxide released into the atmosphere as a result of the activities of a particular individual, organisation or community.*" The Commissioner considers that the information requested in this case would fall under the definition of environmental information under regulation 2(1)(c), and the correct access regime is the EIR.

Exceptions

15. In its initial response to the Commissioner's enquiries, the Council confirmed that it was seeking to rely on regulations 12(5)(c), 12(5)(e) and 12(4)(e) and provided some representations in support of its application of these exceptions. However, the Commissioner wrote back to the Council asking it to confirm which exception(s) it considered applicable to each part(s) of the withheld information. The Commissioner also asked the Council for further information about its application of each exception claimed. In addition, as the Council had only provided details of one 'combined' public interest test in its initial response, the Commissioner asked the Council to provide separate representations in terms of its public interest considerations for *each* of the exceptions claimed.
16. The Council responded to the Commissioner on 25 October 2019 and advised that it was in discussion with the author of the report (MSCI ESG Research). The Council stated that "*MSCI's position on these matters are fundamental to taking forward the points you have raised in this case*". The Council advised that it was unable to provide a clear timeline to fully respond to the additional points raised by the Commissioner but assured that it was taking the matter seriously and wanted to reach a conclusion at the earliest opportunity.
17. On 12 December 2019 the Council advised the Commissioner that it was still in correspondence with the third party concerned and it was hoped that a response from the third party would be received by 20 December 2019.
18. On 11 February 2020 the Commissioner contacted the Council to ascertain whether it was in a position to respond to the additional points raised. The Council confirmed that it had not provided any further response to the Commissioner's enquiries. As a result, and in light of the delay in responding, the Commissioner wrote to the Council and confirmed that, in the absence of a response to her further enquiries, she had no option but to reach a decision based on the evidence the Council had provided to date.

Regulation 12(5)(c) – intellectual property rights

19. Regulation 12(5)(c) states:

“For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(c) intellectual property rights”

20. As stated in the Commissioner’s guidance on regulation 12(5)(c)¹, Intellectual property (IP) rights arise when owners are granted exclusive rights to certain intangible assets. To establish that there would be an adverse effect on IP rights a public authority must demonstrate that:

- the material is protected by IP rights;
- the IP rights holder would suffer harm. It is not sufficient to merely show that IP rights have been infringed;
- the identified harm is a consequence of the infringement or loss of control over the use of the information; and
- the potential harm or loss could not be prevented by enforcing the IP rights.

21. In determining whether this exception has been correctly applied the Commissioner considers that the onus is on the public authority to identify the specific IP right that would be adversely affected and its owner. The Commissioner considers that there are three main forms of IP rights: copyright, database rights and copyright in databases. In demonstrating that information falls within the scope of the exception, public authorities must, therefore, identify the form of IP right which information is protected by and explain why.

¹ https://ico.org.uk/media/for-organisations/documents/1632/eir_intellectual_property_rights.pdf

22. The Council advised the Commissioner that:

"The information in the report summarises information provided by MSCI under a research agreement with the Council...MSCI's research team collects data about the carbon impact of companies in which shares are traded in the global stock markets. The data is obtained by MSCI from a combination of sources....Where MSCI cannot obtain reliable information from elsewhere, they make assumptions about likely impact based on what they do know about the companies and their business activities. MSCI use this information to compile statistics about the various investment markets and also to produce 'low carbon' indices, which investment companies can purchase to create carbon-friendly investment strategies".

23. The Council advised the Commissioner that it considers MSCI's research and analysis methodology and the results of this analysis constitute its intellectual property, as outlined in the research agreement in place with MSCI, a copy of which was provided to the Commissioner. The Council is of the view that disclosure of MSCI's research methodology and analysis results would harm MSCI's ability *"to control and exploit its intellectual property rights, as this information may be appropriated and used by its competitors"*.

24. As the report in question was written by the Council's Pensions Manager (as opposed to MSCI itself), the Commissioner asked the Council to confirm exactly which parts of the information constituted information provided by MSCI to the Council under the research agreement. The Commissioner also asked the Council to clearly identify the specific intellectual property rights that existed in this case, what harm the IP rights holder would suffer through disclosure, exactly how disclosure would adversely affect the IP rights and how any potential harm or loss could not be prevented through MSCI enforcing its IP rights. The Commissioner also asked the Council to provide details of its public interest test considerations specifically in relation to the application of regulation 12(5)(c).

25. As the Council has failed to provide any further representations in respect of its application of regulation 12(5)(c) in this case, the Commissioner has no option other than to conclude that regulation 12(5)(c) is not engaged in this case.

Regulation 12(4)(e) – internal communications

26. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.

27. This is a class-based exception covering a relatively broad range of communications, including email correspondence, and there is no need for the public authority to consider the sensitivity of the information in order for the exception to be engaged. However, it is a qualified exception and, if it is engaged, the public authority is required to carry out a public interest test regarding whether or not the exception should be maintained.
28. The Council stated that the information within the report was produced to inform the Pensions Committee's consideration of progress towards developing a Climate Change Investment Policy. The Committee is responsible for determining the Pension Fund Investment Strategy and instructed officers to consider the feasibility of divesting from companies engaged in extraction of fossil fuels. The Council stated that the work was at an early stage, where a safe space was needed "*for policy development work to be undertaken responsibly and carefully, having regard to all relevant factors*".
29. The Council has failed to confirm whether it is applying regulation 12(4)(e) to all of the withheld information or only part(s) of it. However, the Commissioner notes that the withheld information comprises an internal report produced by the Council's Pension's Manager to inform the Pension's Committee of the pension funds carbon footprint. The Commissioner assumes that the report was intended as a briefing to Councillors who are members of the Pensions Committee and thus falls within the scope of the exception. Accordingly, the Commissioner is satisfied that the report engages the exception at regulation 12(4)(e).
30. The Commissioner will therefore go on to consider the balance of the public interest in the disclosure of the remaining withheld information contained within the report.

Public interest arguments in favour of disclosing the withheld information

31. The Council recognises the public interest in disclosure of environmental information generally, and specifically in matters relating to investments in fossil fuels. The Council also accepts that there is a public interest in transparency and openness in relating to public decision making.
32. The complainant stated that he had been informed by the Council that the report in question would "*inform a proposed Climate Change Investment Strategy*". He considers that there is a clear and strong public interest in disclosure of environmental information of this type.

Public interest arguments in favour of maintaining the exception

33. As referred to in paragraphs 15 to 18 of this notice, the Council failed to provide the Commissioner with separate public interest test arguments for each of the exceptions it has claimed, despite the Commissioner specifically asking it do so. Instead the Council provided 'combined' public interest test arguments for all three exceptions claimed. The Commissioner accepts that under the EIR, where more than one exception is engaged, a further step may be required in carrying out the public interest test. Her guidance² on how the exceptions and the public interest work in the EIR states that:

"If more than one exception is engaged in relation to the same piece of information, and the balance of the public interest test for each of them is in favour of disclosure, the authority may then weigh the public interest in disclosure against the aggregated weight of the public interest arguments for maintaining all the exceptions.

34. In its 'combined' public interest test representations, which omits completely the fundamental, initial consideration of the individual public interest tests that the Commissioner would normally expect to see, the Council provided the following public interest factors in favour of withholding the information:

- a) *"Disclosure would damage the legitimate commercial interests of the Council's Pension Fund Managers;*
- b) *Disclosure would damage the intellectual property rights and legitimate commercial interests of its consultants, MSCI;*
- c) *Disclosure would adversely affect the relationship between the Council and its investment managers and restrict the Pension Committee's future ability to invest Pension Fund assets with its preferred investment managers*
- d) *Disclosure would be likely to impede the ability of the Council and the Pensions Committee to obtain similar analyses and information in the future, and consequently hinder its ability to monitor the impact of its policies (in particular, the Pension Fund's Investment Strategy) and be detrimental to good public decision making".*

35. As the Council has not provided separate public interest test considerations for each exception claimed the Commissioner has had no option other than to extract what she considers to be the relevant

² https://ico.org.uk/media/for-organisations/documents/1629/eir_effect_of_exceptions_and_the_public_interest_test.pdf

argument(s) relevant to the exception at regulation 12(4)(e) from the Council's combined public interest test arguments referred to above.

36. The Commissioner considers this exception will encompass a wide range of internal communications. However, public interest arguments should be focussed on the protection of internal deliberation and decision making processes as well as on the content of the information itself. In light of this, it is the Commissioner's view that the only public interest argument which the Council has submitted in respect of regulation 12(4)(e) is set out at paragraph 34(d) above.

Balance of the public interest

37. The Commissioner notes that there is no automatic public interest in withholding information because it falls within a class-based exception. Neither should there be a blanket policy of non-disclosure for a particular type of internal document.
38. The Commissioner's guidance on Regulation 12(4)(e)³ provides that the central arguments surrounding the application of the exception relate to creating a 'safe space' in order to consider and discuss issues and formulate policy, and in ensuring that no 'chilling effect' occurs as a result of the disclosure of information.
39. The Commissioner accepts that often significant weight should be given to safe space arguments – i.e. the concept that a public authority needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction – particularly where an issue is live and the requested information relates to that issue.
40. The Commissioner notes that the Council has advised that work on developing a Climate Change Investment Strategy for its pension fund was at an early stage at the time of a request. During her investigation, the Commissioner asked the Council to provide further information as to what stage development of the strategy was at at the time of the request, including details of what further discussions/actions were required/outstanding and what 'live' issues were outstanding at the time of the request. However, the Council again failed to provide a response to these queries.

³ https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

41. The Council argues that disclosure would have a detrimental effect on its ability to obtain similar reports/analysis in the future and that this would affect its ability to monitor the pension fund Investment Strategy. However, the Council has not explained exactly how disclosure of the withheld information would have this effect.
42. The Commissioner is not satisfied that the Council has demonstrated an adequate consideration of the public interest in this case, despite it being afforded an opportunity to provide further representations for each of the exceptions claimed. The Commissioner finds that the public interest arguments are too generic and fail to have regard to the actual withheld information, or the specific exemption claimed at regulation 12(4)(e).
43. The Commissioner does not consider the Council's public interest arguments compelling enough or carry sufficient weight to warrant non-disclosure. There are stronger public interest arguments in favour of disclosure in this case. The public interest in openness and transparency, and in the issue of the carbon footprints associated with pension funds and addressing the climate risk of pension fund. The Commissioner has therefore decided in this particular case that the public interest in favour of maintaining the exemption is outweighed by the public interest in favour of disclosure.

Regulation 12(5)(e) – confidentiality of commercial information

44. This regulation states that a public authority may refuse to disclose information to the extent that its disclosure would affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
45. As referred to earlier in this notice, the Council failed to confirm to the Commissioner exactly what information within the report it considers to be exempt under each of the exceptions claimed. In light of this, the Commissioner has had no option other than to assume that the Council is seeking to withhold all of the remaining information within report under regulation 12(5)(e).
46. Regulation 12(9) states that 'to the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs 12(5)(d) to (g)'.

47. In order to consider whether Regulation 12(5)(e) of the EIR is applicable to the withheld information the Commissioner will initially consider whether the withheld information 'relates to information on emissions'.
48. During the course of her investigation, in light of the fact that the report relates to a carbon footprint review of the Council's pension fund, the Commissioner asked the Council to consider whether any of the information constituted information on emissions, and as such regulation 12(5)(e) could not apply.
49. The Council's view is that the report *"is not directly related to emissions, in that it is derived from various assumptions and inferences drawn by MSCI (different assumptions and inferences may lead to different results). For this reason, the Council does not consider the information should properly be regarded as information relating to emissions"*.
50. The Commissioner has referred to her guidance about 'Information on emissions (regulation 12(9))⁴ and adopts the approach taken by the Information Tribunal that the word 'emissions' should be given its plain and natural meaning. As a result, the definition of what constitutes an emission for the purposes of the EIR is broad. This interpretation is consistent with the European Directive 2003/4/EC⁵ and Aarhus Convention purpose of achieving greater awareness of environmental matters and more effective participation by the public in environmental decision making.
51. The first reference to 'emissions' in the EIR may be found in the definition of environmental information found in Regulation 2(1). In particular Regulation 2(1)(b) states that environmental information includes information on '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)'. Elements of the environment in Regulation 2(1)(a) include air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity'.
52. Neither the EIR, nor the European Directive 2003/4/EC, from which they were implemented, provide a definition of the term 'emissions'. However, the Commissioner accepts the view expressed by the

⁴ <https://ico.org.uk/media/1616/information-on-emissions-eir-guidance.pdf>

⁵ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

Information Tribunal in the case of Ofcom v Information Commissioner and T-Mobile (EA/2006/0078)⁶ that, the word emissions 'should be given its plain and natural meaning'.

53. The Commissioner has taken into account the definitions of the words "emit" and "emissions" in the Shorter Oxford English Dictionary and applied them to mean that emissions will generally be:
- the by-product of an activity or process;
 - which is added (or potentially added) to and affecting the elements of the environment;
 - over which any control is relinquished
54. In this case the withheld information is a report/analysis of the carbon footprint of the Council's pension fund. The report contains a significant amount of information relating to the carbon footprint measurements/predictions in respect of the fund's individual holdings for each of its equity managers.
55. As referred to earlier in this notice, the dictionary definition of a carbon footprint is "*the amount of carbon dioxide released into the atmosphere as a result of the activities of a particular individual, organisation or community*". Carbon footprints clearly relate to by-products which affect the elements of the environment, namely air and atmosphere over which any control is relinquished.
56. Regulation 2(1)(b) of the EIR refers to "any information **on** ...emissions" and Regulation 12(9) applied to information falling within this definition. In other words, where it details the level of existing or potential emissions or for example where it records that testing has revealed that no emissions have occurred. "Information on emissions" will also cover assumptions and formulas used to calculate the emissions in question. This interpretation is supported by Regulation 5(5) which requires public authorities to refer applicants who receive information falling within Regulation 2(1)(b) to the place where further details about measurement procedures, methods of analysis or sampling can be found or to a standardised procedure used if they request it.
57. For the reasons stated above the Commissioner has concluded that the withheld information within the report which refers to measurements/predictions on carbon footprints and the narrative about

⁶ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i104/Ofcom.pdf>

the measurements constitutes information on emissions under regulation 2(1)(b) affecting or likely to affect the elements of the environment in regulation 2(1)(a) namely, air and atmosphere. Accordingly, by virtue of Regulation 12(9) of the EIR, the Commissioner finds that the Council cannot rely on the exception under Regulation 12(5)(e) in respect of this information.

58. The report also contains information and narrative about companies' position in the industry in managing carbon risk. The Commissioner has concluded that this information does not constitute information on emissions, and she has therefore gone on to consider the application of regulation 12(5)(e) to this information.
59. The Commissioner's guidance on regulation 12(5)(e) explains that, in order for this exception to be applicable, there are four conditions that must be met. These are:
- (i) Is the information commercial or industrial in nature?
 - (ii) Is the information subject to confidentiality provided by law?
 - (iii) Is the confidentiality provided to protect a legitimate economic interest?
 - (iv) Would the confidentiality be adversely affected by disclosure?
60. The Commissioner's guidance goes on to clarify that, although condition (iv) is a necessary element of the exception, once the first three conditions are met, it is inevitable that condition (iv) will be satisfied.

(i) *Is the information commercial or industrial in nature?*

61. In her guidance on regulation 12(5)(e) the Commissioner considers 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 for profit.
62. The Council advised that investments in its Pension Fund are managed by external companies under commercial agreements. Lists of the companies in which the Pension Fund was invested was provided to MSCI for analysis on a commercially confidential basis. MSCI then *"extracted the relevant information for these companies from their database to produce statistics to compare with their market competitors"*. The Council argues that *"information about the investment strategies and decisions of these managers and indicators of the carbon footprint of their investments is commercially sensitive to the Fund Managers"*. The Council also considers that MSCI's research and analysis methodology and results are sold for profit and therefore commercially sensitive to MSCI.

63. Having reviewed the withheld information in conjunction with the Council's explanation, the Commissioner is satisfied that the information is commercial in nature, and that the first condition has been met.

(ii) *Is the information subject to confidentiality provided by law?*

64. In the Commissioner's view, ascertaining whether or not the information has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.

65. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.

66. The Commissioner considers that 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.

67. The Council provided the Commissioner with a copy of its agreement with MSCI. Although the Council did not refer specifically to the agreement in its representations relating to the application of regulation 12(5)(e), it did refer to it in its representations in relation to the application of 12(5)(c). The Council stated that MSCI had confirmed that:

"MSCI ESG Research derives actual economic value in its provision of the information and data contained within its services and regularly seeks to protect this from disclosure in its agreements, as it is generally proprietary and results from significant MSI RSG [sic] Research efforts to obtain to obtain and develop".

68. The Commissioner notes that the report was produced based on information which the Council provided to MSCI about its pension fund on a confidential basis. MSCI then produced the report using its research methodology and analysis. The Commissioner notes that the contract contains a confidentiality clause in respect of the information shared between the two parties. Based on the evidence available to her, the Commissioner agrees that the information is not trivial in nature and it was shared between the parties with an expectation that it would be handled in confidence, and that it has not been shared widely.

69. The Commissioner is therefore satisfied that the information is subject to confidentiality provided by law, and that the second condition has been met.

(ii) Is the confidentiality provided to protect a legitimate economic interest?

70. The First-tier Tribunal (Information Rights) ("the 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 the legitimate economic interest of the person the confidentiality is designed to protect.
71. It is 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.
72. The Commissioner has been assisted by the Tribunal in determining how 'would' needs to be interpreted. She accepts that 'would' means 'more probably 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. (Emphasis added)*

The Council's arguments

73. In its initial response to the Commissioner where it first stated it was relying on regulation 12(5)(e), the Council stated that it considered:

"disclosure of the commercially sensitive information within the report would be damaging to the commercial interests of its Fund Managers and MSCI because this information may be appropriated and used by their competitors".

74. In requesting further representations on its application of regulation 12(5)(e), the Commissioner advised the Council of the following:

With regard to point (iv) and taking account of my comments above about the threshold to justify non disclosure because of any adverse effect under any of the exceptions under 12(5) of the EIR, please clearly explain how disclosure of the withheld information would adversely affect the particular economic interest that has been identified. Please ensure that this explanation demonstrates a clear link between disclosure of the information that has actually been withheld and any adverse effect.

75. The Commissioner also asked the Council to clarify on what basis it established that disclosure would adversely affect any third party's interests (ie its Fund Managers and MCSI). The Commissioner also requested that the Council provide copies of any correspondence it had had with any third parties in relation to the request, and confirmation whether the third parties were provided with a copy of the actual withheld information at the time they were consulted. The Commissioner recommended that the Council's response was guided both by recent decision notices and her published guidance on regulation 12(5)(e). The Commissioner provided the Council with the relevant URLs to access these resources.
76. The Council responded and confirmed that it was in discussions with MSCI about disclosure of the withheld information. However, it failed to provide the Commissioner with the outcome of these discussions, or any further representations in relation to its application of regulation 12(5)(e).
77. The Commissioner emphasises that responsibility for demonstrating the correct application of an exception lies with the public authority. In the context of regulation 12(5)(e), it is not appropriate for the Commissioner to formulate arguments on behalf of the Council.
78. In this case, the Council has failed to explicitly demonstrate the causal link between the withheld information and the claimed adverse effects. It has also failed to provide any evidence that it has consulted with any of the third parties whose economic interests it contends would be adversely affected through disclosure. As referred to earlier in this notice, the Council also failed to provide separate public interest test considerations for each of the exceptions claimed.
79. In the absence of any clear explanation by the Council as to how disclosure of the withheld information would adversely affect the economic interests identified, the Commissioner cannot conclude that the third condition has been met. On this basis the Commissioner finds that regulation 12(5)(e) is not engaged.

Regulation 14 – Refusal to disclose information

80. Regulation 14 requires that where a public authority refuses to disclose information under an exception, this is stated in writing within 20 working days.
81. In this case, the Council applied the wrong legislation whilst handling the request, and it also did not cite any exemptions in its initial

responses. The Council did not consider the information under the terms of the EIR until invited to do so by the Commissioner.

82. In these circumstances the Commissioner believes that it is appropriate to find that the Council breached regulation 14(1) of EIR which requires that a public authority that refuses a request for information to specify, within 20 working days, the exceptions upon which it is relying.

Other matters

83. Although not forming part of the formal decision notice the Commissioner uses 'Others Matters' to address issues that have become apparent as a result of a complaint or her investigation of that complaint and which are causes for concern.
84. The Commissioner would like to highlight the importance of handling a request under the correct legislation. Determining the relevant legislation will inform the public authority of the how to proceed when handling a request; this is particularly so when the authority seeks to withhold information. In this case the complainant made it clear that he was requesting the information under the EIR and the FOIA. The Council initially treated the request under the FOIA, however, it failed to cite any of the exemptions contained within Part II of the FOIA as the basis to withhold the information requested.
85. The Commissioner would also like to highlight that the onus of demonstrating the valid application of an exemption (FOIA) or exception (EIR) lies with the public authority. In the circumstances of this case, the Commissioner notes that the Council provided limited arguments to support the engagement of the exceptions claimed during her investigation.
86. Despite the Commissioner asking the Council for further details in relation to the exceptions claimed and its public interest considerations the Council failed to provide a response to her enquiries, despite allowing sufficient time for the Council to respond. As a result, the Commissioner has had no option but to determine that, based on the evidence available to her, the Council has incorrectly withheld the information under the exceptions claimed.
87. The Commissioner has published comprehensive guidance for public authorities, dealing with requests under the FOIA and the EIR, including guidance on each exception/exemption and the public interest test. This guidance can be accessed at: <https://ico.org.uk/for->

[organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/](#)

88. The Commissioner trusts that the Council will be more thorough in its future responses to her investigation letters in the future.

Right of appeal

89. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

90. 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.

91. 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
Head of FOI Casework and Appeals
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF