

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

### **Decision notice**

**Date:** 26 March 2021

**Public Authority:** Hastings Borough Council  
**Address:** Queens Square  
Hastings  
TN34 1TL

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

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1. The complainant has requested copies of correspondence sent between Hastings Borough Council (the council) and East Sussex County Council (ESCC) about footpath closures, landslips and land stability within a local country park since 2011.
2. The council provided the complainant with some information in response to his request; however, it advised that certain information had been withheld under regulation 12(5)(b) and 12(5)(e) of the EIR. In addition, the council confirmed that redactions had been made to the copies of correspondence that had been released where the information did not fall within the scope of the request.
3. During the course of the Commissioner's investigation, the council released some additional information to the complainant. It advised that it still regarded some information to be exempt from disclosure on the basis that it was the personal data of third parties, or was subject to legal professional privilege.
4. The Commissioner's decision is that, on the balance of probabilities, the council has identified all the information that it holds which is relevant to the request. However, aside from one email which the Commissioner regards to fall outside the scope of the request, the council is not entitled to withhold any of that information which it claimed was exempt from disclosure. This includes the information which was redacted by the council in its original responses to the complainant on the basis that it did not fall within the scope of the request.

5. The Commissioner also finds that the council has breached regulation 14(2) of the EIR by failing to issue a refusal notice to the complainant within 20 working days of receipt of the request. As the council did not provide a response to the complainant's internal review request within 40 working days, it has also failed to comply with the requirements of regulation 11(4). Furthermore, whilst the council did provide some information in its original response to the complainant's request, its failure to do so within 20 working days is also a breach of regulation 5(2) of the EIR.
6. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - Release the information set out within the Confidential Annex attached to this decision notice.
7. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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8. On 1 June 2019, the complainant, acting on behalf of a local campaign group, Save Ecclesbourne Glen (SEG), wrote to the council and requested information in the following terms:

*'I request the following information under EIR regulations:*

*Copies of all correspondence between the ESCC rights of way team and HBC concerning footpath closures, the landslip and land stability issues in Ecclesbourne Glen since 2011. Correspondence to include all forms of communication between ESCC and HBC and HBC and ESCC.'*

9. On 8 November 2019, the council provided the complainant with some information that it believed to be relevant to his request. It confirmed that certain information had been redacted from the documents before their release as it was not viewed to be correspondence sent between the council and ESCC.
10. The council went on to advise the complainant that it had also withheld information under regulation 12(5)(b) of the EIR, stating that the course of justice has a wide meaning, and that it included 'material' which is covered by legal professional privilege (LPP). It also said that LPP exists to ensure complete fairness in legal proceedings and protects advice given by a lawyer to a client and confidential communications.

11. The council also referred the complainant to regulation 12(5)(e) of the EIR, stating *'Confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.'*
12. With regard to the public interest test, the council advised that it believed that this weighed in favour of withholding the information in this instance. It went on to provide the complainant with the reasoning for this decision.
13. On 17 November 2019, the complainant requested an internal review, setting out in some detail the reasons why he was unhappy with the council's response to his request.
14. On 28 February 2020, the council provided its internal review response. It maintained its view that certain information should be redacted from the documents which had previously been released to the complainant; it stated once again that this did not form correspondence sent between the council and ESCC, and therefore did not fall within the scope of the request.
15. The council then advised the complainant that the remaining information that had been withheld was 'clearly marked confidential' and was legal advice between both parties; it therefore also upheld its decision to withhold this information.
16. The council also confirmed to the complainant that it did not hold any additional information in relation to the land stability at Ecclesbourne Glen that would be relevant to the request, stating the following:  
  
*'Landslip and land stability issues – Hastings Borough Council holds no information between HBC and ESCC in relation [sic] these. Landslip and land stability is between HBC and Coffey not ESCC. Hastings Borough Council has provided you with all the information we are willing to disclose in relation to these matters.'*

## **Scope of the case**

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17. The complainant first contacted the Commissioner on 5 October 2019 after failing to get a response to his request from the council. Following receipt of the council's internal review response, he then contacted the Commissioner again on 7 May 2020.

18. The complainant set out a number of concerns about how the council has handled his request, which the Commissioner has summarised as follows:

- He states that it is not clear whether the information provided (which showed certain information had been 'blacked out') is all that which had been identified by the council as being relevant to the request.
- The complainant also disputes the council's assertion that it does not hold further information sent between itself and ESCC about the issue of landslip and land stability issues. In support of his arguments, he has provided details of a very similar information request which was made to ESCC<sup>1</sup> (the ESCC request). He states that in that case a large volume of information was released, and that this included some communications between ESCC and the council which were not included in the council's response to his request.
- He does not believe that the council has correctly applied regulation 12(5)(b) and regulation 12(5)(e) to information held that is relevant to the request.
- He has complained that the email headers and titles have been redacted, believing that these should have been released.
- He is concerned about the time taken by the council to provide a response to his request.

19. Following receipt of the Commissioner's initial letter of investigation, the council advised that, upon review, it had located some additional information which it then provided to the complainant. Whilst advising that it still regarded the information which it had previously redacted to fall outside the scope of the complainant's request, the council confirmed that it would disclose the headers and titles associated with such information, if advised by the Commissioner to do so.

20. The council also confirmed that it maintained its previous view that the information which it had withheld that was relevant to the request was subject to regulation 12(5)(b) and regulation 12(5)(e), although it did

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<sup>1</sup> [https://www.whatdotheyknow.com/request/escs\\_rights\\_of\\_way\\_correspondenc#incoming-1378352](https://www.whatdotheyknow.com/request/escs_rights_of_way_correspondenc#incoming-1378352)

not differentiate between each exemption in respect of any set of withheld information.

21. Following receipt of the additional information from the council, the complainant contacted the Commissioner again. He said he was concerned about the volume of redactions contained within the information which had now been provided. Once again, he referred to the ESCC request stating that approximately 140 items of correspondence had been released in that case.
22. After a further exchange of correspondence with the Commissioner, the council then advised that, having taken into account the passage of time, it was now in a position to release some of the information which had previously been withheld in response to the complainant's request.
23. However, the council confirmed that it believed that some information should still be withheld; it advised that this was because it was the personal data of third parties, or because it was legally privileged information. The council also maintained its view that it had been correct to redact certain information from the documents which it had provided to the complainant on the basis that it did not fall within the scope of the request.
24. The Commissioner regards the scope of her investigation to be as follows:
  - To establish whether, on the balance of probabilities, the council holds any additional information which is relevant to the complainant's request. This will include consideration of the redacted information which the council has claimed falls outside the scope of the request.
  - Whether the council is correct to withhold any information on the basis that it is personal data, or information that would be regarded to be subject to legal professional privilege.
  - Procedural matters as requested by the complainant.

## **Reasons for decision**

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### **Is the information environmental information?**

25. Information is 'environmental information', and must be considered for disclosure under the terms of the EIR, rather than the Freedom of Information Act 2000 (FOIA), if it meets the definition set out in regulations 2(1)(a) to 2(1)(f) of the EIR.

26. Regulation 2(1)(c) of the EIR says that any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in regulation 2(1)(a) and 2(1)(b) will be environmental information. One of the elements listed under 2(1)(a) is land.
27. The request is for correspondence which was sent between the council and ESCC about footpath closures, the landslips and land stability. The Commissioner is satisfied that such information can be considered to have an effect on the land and its use, and that it fits squarely into the definition of environmental information set out within regulation 2(1) of the EIR.

**Regulation 5(1) – Duty to make environmental information available on request**

28. Regulation 5(1) of the EIR states that '*a public authority that holds environmental information shall make it available on request.*' This is subject to any exceptions that may apply.
29. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to establish what information within the scope of the request it held, and any other reasons offered by the public authority to explain why further information is not held. She will also consider any reason why it is inherently likely or unlikely that further information is not held.
30. The Commissioner regards it to be necessary at this point to state that she is of the opinion that some of the information which the council has released to the complainant may not actually fall within the specific terms of his request. This is because she regards the primary focus of such correspondence to be about other information requests received by the council; such correspondence is not, in the Commissioner's view, about the footpaths, the landslips and the site, per se. The Commissioner has found it necessary to make comment on this particular point only because there is one particular set of withheld information which, in her view, is also about a request for information that had been made to the council. As the Commissioner does not regard this particular set of withheld information to fall within the scope of the request, she does not intend to consider it further within this decision notice.

31. The council had advised the complainant that certain information had been 'blacked out' within the documents provided to him because it was not relevant to his request. It explained that such information formed communications which were sent between third parties, and were not sent between the council and ESCC as he had requested.
32. Having considered the content of the redacted information, the Commissioner found that, as the council had stated, this consists of correspondence which was not originally sent between the council and ESCC. However, it is key to note that such communications were then subsequently included as attachments in correspondence that was sent between the council and ESCC. It is the Commissioner's view that the information contained within such attachments is relevant to the terms of the complainant's request.
33. Given the above, the Commissioner asked that the council reconsider its approach to such information, referring to her guidance '*The right to recorded information and requests for documents*'<sup>2</sup>. Paragraphs 43 and 44 of this guidance confirm that if a requester asks for a copy of an email, or letter, then all the additional information attached to, or enclosed with, such correspondence should also be regarded to fall within the scope of the request.
34. In the council's final response to the Commissioner, it appeared to maintain its previous view that it was correct to redact certain information from the copies of correspondence which it had sent to the complainant. However, it would seem that some of this information has now been disclosed to the complainant (as part of the bundle which the council confirmed, given the 'passage of time', could be released).
35. It is the Commissioner's view that the information which was redacted by the council in its original response to the complainant does fall within the scope of the request. She will therefore take this information into account when considering whether the council is entitled to rely on an exception contained within the EIR as its basis for refusing to release information in response to the request.

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1621/the-right-to-recorded-information-and-requests-for-documents.pdf>

36. However, before going on to consider the exceptions claimed by the council, the Commissioner must firstly consider whether, on the balance of probabilities, there is any other information held by the council that is relevant to the request.
37. The Commissioner, in her initial letter of investigation, had provided the council with a link to the ESCC request. As previously stated, the ESCC request was similar to the complainant's request, but it had resulted in the release of a substantially larger amount of information than that which has been disclosed by the council in this case. The Commissioner advised the council that she had taken a random sample of some of the documents that had been released in response to the ESCC request and had found a number of emails which, despite having contact names redacted, could be clearly identified as having been sent between the council and ESCC. Whilst the information contained within such emails would also fall within the scope of the complainant's request, they had not been disclosed to him, nor were they contained within the bundle of withheld information which the council provided for the Commissioner's consideration.
38. In the council's subsequent responses to the Commissioner, it confirmed that a search to identify any relevant emails had been carried out on the council's electronic systems. It stated that the searches had included all council servers and personal laptops.
39. The council also confirmed that emails predating 2016 have been deleted from its systems as there was no requirement to retain such records, and that it does not hold specific dates as to when this occurred (although it confirms this would have been prior to its receipt of the complainant's request). The council has explained that its officers receive thousands of emails per year, and that this could potentially amass to tens of thousands of emails for officers who have served many years at the council. It also states that prior to its recent move to a new system of storage, space was limited; given this, emails and folders containing emails had been periodically deleted to avoid unnecessary build up or clutter. The council goes on to say that it is therefore perfectly reasonable that ESCC officers may have retained emails over a longer period of time than council officers.
40. The council has confirmed that the Environment and Natural Resources Manager does hold some files where relevant historical email trails are kept; however, the searches carried out have not identified any email correspondence which were sent between himself and ESCC prior to 2016 that would be relevant to the request.



41. The Commissioner accepts the council's assertion that it is likely that some emails that were relevant to the request have been deleted in accordance with its retention policy. Furthermore, she is of the view that there is a possibility that emails which may have post-dated 2016, and which were released in response to the ESCC request, could also have been deleted by council officers, if they did not regard there to be a business need to retain such information. She also considers it to be the case that as the ESCC request was broader in its terms, it would have captured a significant amount of additional information to that which would be of relevance to the request under consideration.
42. The Commissioner is satisfied that the searches carried out by the council were appropriate and adequate in this case, and, as far as she can determine, there is no evidence to suggest that there is any additional information of any substance which is held by the council.
43. The Commissioner therefore accepts that, on the balance of probabilities, the council does not hold any information in addition to that which has already identified, that is relevant to the complainant's request.

#### Information in the public domain

44. The remaining withheld information consists of 17 separately dated sets of correspondence (after the exclusion of the one email already referred to in paragraph 31 of this decision notice). Some of this correspondence formed attachments to other emails which were sent between the council and ESCC (which the Commissioner has already determined earlier in this decision notice to be relevant to the request).
45. Firstly, the Commissioner has identified that one email recently marked by the council as having been withheld, is also marked within another set of information as having already been released. The Commissioner has assumed it to be the case that this correspondence has already been supplied to the complainant, although she has still included it within the list for disclosure set out in the Confidential Annex attached to this decision notice. This now leaves 16 remaining sets of withheld correspondence that still require further consideration.
46. After receiving the council's final representations, the Commissioner carried out a comprehensive check of the information that had been released in response to the ESCC request. She found that 8 of the remaining 16 sets of withheld correspondence still under consideration in this case, have actually already been released (with names and contact details redacted) by ESCC, and are therefore already in the public domain.

47. Furthermore, there are 3 additional emails that have been withheld by the council which contain information that is very closely linked to the content of that correspondence already released by ESCC, and they form part of the same email chains. The Commissioner regards the information which is contained within these 3 emails to be, in essence, the same as that which is already in the public domain. In addition, they do not contain legally privileged information, nor could the release of such information result in an inappropriate disclosure of personal data.
48. Given this, the Commissioner does not accept that there can be any reasonable grounds for withholding the 11 sets of correspondence referred to in paragraphs 47 and 48 of this decision notice; she therefore now requires the council to release this information to the complainant.
49. This now leaves 5 remaining sets of correspondence from the bundle of withheld information; the Commissioner is mindful that it may be the case that this information is also already in the public domain and/or that the requester has already had access to such information. However, without any evidence to confirm this, she has no alternative but to go on to consider whether, under the EIR, the council is entitled to withhold the information contained within the remaining 5 sets of correspondence on the basis that it is subject to LPP, or personal data, as claimed by the council.

### **Regulation 12(5)(b) – the course of justice**

50. Regulation 12(5)(b) provides an exception to the general duty to disclose environmental information where a disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.
51. The council has advised that certain information that has been withheld is subject to LPP. The Commissioner regards it to be likely that the council had applied regulation 12(5)(b) to some of the correspondence which she has now been found to have been released already by ESCC.
52. Of the 5 remaining sets of information that are still under consideration, only one very brief set of correspondence has been identified by the Commissioner as having some connection with a legal advisor. It is not clear whether this was withheld by the council on the basis that it was subject to LPP, or because it did not fall within the scope of the request. As the Commissioner is satisfied that it is relevant to the request, she will consider whether the council is entitled to withhold this information under regulation 12(5)(b).

53. The Commissioner accepts that LPP is a central component in the administration of justice, and that advice on the rights, obligations and liabilities of a public authority is a key feature of the issues that constitutes the phrase 'course of justice'. For this reason, the Commissioner has found in previous cases that regulation 12(5)(b) of the EIR will be relevant to information which attracts LPP.
54. Once a public authority has established that the requested information falls within the definition of LPP, the next question that often arises is whether privilege has been lost or waived because of earlier disclosures to the world at large; in most instances this would then mean that the information can no longer be regarded to be confidential.
55. In this instance, the Commissioner has found it difficult to establish how this particular piece of correspondence could be regarded to be confidential, and therefore subject to LPP. Its content is very similar to another email which the council has already released to the complainant; indeed, it provides a summary of that information.
56. Furthermore, whilst this particular correspondence may have been forwarded to a legal advisor, the Commissioner would question whether, in this instance, this is sufficient to determine that it falls under the definition of LPP. However, she does not intend to debate this point further given that, in any event, she is satisfied that any privilege which may have been attributed to such information would now have been lost by virtue of the fact that the information contained therein is already in the public domain.
57. The Commissioner therefore finds that the council is not entitled to rely on regulation 12(5)(b) in respect of the one remaining set of correspondence that has been withheld which she believes that the council may have claimed was subject to LPP. She therefore requires the council to release this information to the complainant.

### **Regulation 13-Personal data**

58. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester, and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
59. In this case, the relevant condition is contained in regulation 13(2A)(a)<sup>3</sup>. This applies where the disclosure of the information to any member of

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<sup>3</sup> As amended by Schedule 19 Paragraph 307(3) DPA 2018.

the public would contravene any of the principles relating to the processing of personal data (the DP principles), as set out in Article 5 of the General Data Protection Regulation (GDPR).

60. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ( the DPA). If it is not personal data, then regulation 13 of the EIR cannot apply.
61. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

*Is the information personal data?*

62. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual".*

63. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
64. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
65. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
66. In this case, there are a number of documents that have been withheld that consist of correspondence sent by third parties to the council, and the council's subsequent responses to those third parties. Again, it is unclear whether this information has been withheld on the basis that the council does not regard it to be relevant to the request, or because it is personal data of third parties. As the Commissioner has established that this information does fall within the scope of the request, she will consider whether the information is exempt from disclosure under regulation 13 of the EIR.
67. Firstly, with regards to the names and contact information of the third parties, the Commissioner notes that whilst the complainant had questioned the council's decision to redact certain titles and dates of emails before information was released to him, he did not raise any concerns that names and contact details of individuals were removed.

Furthermore, as far as the Commissioner can recall, the complainant has not contested the redaction of the names of any individuals acting in their professional capacity, or personal capacity, in any of the previous cases where he has felt it appropriate to submit a complaint to the ICO about the council's handling of a request.

68. Given the above, the Commissioner has taken it to be that the complainant does not expect to receive the names, or contact details of individuals, which may be contained within any of the remaining information that has been withheld, and that this does not form part of his complaint. She has therefore gone on to consider whether, if the names and contact information of third parties are removed, the remaining information would still be considered to be the personal data of the third parties.
69. It is apparent from the content of the correspondence sent by third parties that they were not acting in isolation; they are submitting representations/comments on behalf of local community groups about matters relating to the footpaths, the landslips and land stability. The correspondence sent by such third parties also includes specific references to the groups which they are acting on behalf of; indeed, one third party persistently refers to 'we' when setting out points within their correspondence.
70. However, whilst the third parties are not the focus of the information, the Commissioner does accept that, given the context in which their correspondence is written, there is a possibility that even if their names are removed from the correspondence before release, they will be identifiable by some members of the local community. Furthermore, whilst the correspondence is about matters such as the footpath closures, it does still reveal some information about the third parties; at the very least it confirms that they are part of a local community group, that they have been representing that group on certain matters, and have sent such correspondence to the council.
71. In the circumstances of this case, having considered the withheld information, the Commissioner is of the view that the information relates to the third parties and it is likely to identify them, even with their names and contact details removed. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
72. However, the fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is regarded to be principle (a).

Would disclosure contravene principle (a)?

73. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

74. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

75. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing – Article 6(1) of the GDPR

76. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

77. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>4</sup>.*

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<sup>4</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

78. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
79. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

80. In considering any legitimate interest in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
81. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
82. In this case, the request is for information about landslips, land stability and the footpath closures within a country park. These are matters that have therefore had an impact on the local community that live around that park.
83. Therefore, in this case, the Commissioner is satisfied that there is a legitimate interest in the disclosure of the information. She considers that the local community in particular will have an interest in how the detrimental impact that the landslips have had on the park is being managed, both short term and long term; this includes the consideration given by the council to communications sent by interested local groups on such matters.

Is disclosure necessary?

84. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make

disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.

85. With regards to the specific information which may have been withheld by the council under regulation 13, the Commissioner has received no evidence to indicate that this was accessible at the date of the request. Therefore, she concludes that disclosure under the EIR would be the least intrusive means of meeting the legitimate interests identified above.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

86. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
87. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
88. In the Commissioner's view, a key issue in this case is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
89. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
90. The Commissioner regards it to be of some importance that the third parties who wrote to the council were acting on behalf of local community groups, and it is clear that the intention was to provide the comments and views of those groups, rather than those of the individuals themselves. In such circumstances, where an individual is



making representations on behalf of their local community, it is unlikely that they would expect such communications to be deemed private and confidential.

91. It is also difficult to establish how the release of correspondence which sets out the views of a group, rather than the individual who wrote it, would cause harm or distress to any one individual. It is also the Commissioner's view that the content of the emails provide no insight or detail into the personal lives of the third parties; there are no details about how such issues have impacted them personally, and gives the reader no insight into any aspects of their private life.
92. Furthermore, the Commissioner is also aware that other representations which the third parties have made on behalf of local community groups on issues relating the footpaths, the landslips, etc are already in the public domain, and they are easily identifiable from such information (as names are included). Whilst this has not been a determining factor, the Commissioner does regard this have some relevance to her consideration of this case; this is because it provides some indication of the expectations which such parties have when they communicate with the council on matters that have had an impact on, or may be of interest to, the wider community.
93. Having taken account of all the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.
94. Even though it has been demonstrated that disclosure of the above information under the EIR would be lawful, it is still necessary to show that disclosure would be fair and transparent under principle (a).

#### Fairness and transparency

95. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
96. The requirement for transparency is met because, as a public authority, the council is subject to the EIR.
97. As a result, in this instance, the Commissioner has decided that the council has failed to demonstrate that the exception at regulation 13(1) is engaged. As a result, the council is required to release the 4 remaining sets of information that are set out within the Confidential Annex attached to this decision notice.

## **Procedural Matters**

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98. The complainant has requested that the Commissioner also consider the general handling of his request by the council.

### Regulation 5(2)

99. Regulation 5(2) provides that 'Information shall be made available under *paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.*

100. Whilst the council did provide some information to the complainant in response to his original request, as it failed to do so within the required 20 working days of receipt of the request, the Commissioner has found there to be a breach of regulation 5(2).

### Regulation 14(2) - refusal to disclose information

101. Regulation 14 (2) of the EIR states that a refusal shall be made as soon as possible and no later than 20 working days after the date of receipt of the request.

102. In this instance the complainant submitted his request on 1 June 2019, and the council provided its response on 8 November 2019, and therefore outside the 20 working days. As a result, the Commissioner must find that the council has breached regulation 14(2) of the EIR.

### Regulation 11 – representations and reconsideration (internal review)

103. Regulation 11(4) requires a public authority to inform the requester of the outcome of the internal review as soon as possible and not later than 40 working days after that date on which an internal review was requested.

104. The complainant submitted his internal review request on 17 November 2019, but the council did not provide its response until 28 February 2020. Given this, the Commissioner also finds that the council has breached regulation 11(4) of the EIR.

## **Other matters**

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105. It should be noted at this point that some of the information released by the council in its original responses to the request consists of correspondence which the complainant had sent himself. He has complained that, in the content of one set of correspondence that has been released, his name was disclosed. This would appear to have been done in error, as his name was redacted where it was included in any of the other documents which have been sent to him by the council.
106. A disclosure under FOIA is a disclosure to the world at large. However, as far as the Commissioner can see, this particular information was sent directly to the complainant, and it has not been published or made available by the council more widely. Given this, there has been no data protection breach as the disclosure has been made only to the data subject himself.
107. However, it is clear that the council did not intend for his name to remain in this one set of correspondence. The Commissioner would therefore ask that the council ensure that if it does make the information in question publicly available that it corrects this before doing so. She would also ask that in future it ensures that it maintains consistency in its approach to any redactions of personal data made before releasing information in response to a request.

## Right of appeal

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108. 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](mailto:grc@justice.gov.uk)

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

109. 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.

110. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**