

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 3 October 2022

Public Authority: Stratford-on-Avon District Council

Address: Elizabeth House
Church Street
Stratford-on-Avon
CV37 6HX

Decision (including any steps ordered)

1. The complainant requested communications between Stratford-on-Avon District Council (the 'Council') and a specified company in relation to a Memorandum of Understanding ('MoU') for an airfield. The Council handled the request under the EIR. It provided some of the requested information with redactions for personal information (Regulations 12(3) and 13 of the EIR) and withheld the remainder in its entirety under Regulation 12(5)(b), the exception for the course of justice.
2. During the course of the Commissioner's investigation, the Council revised its position several times and also made some further disclosures. Ultimately, the Council relied on Regulation 12(5)(b), Regulation 12(4)(d) – material in the course of completion, 12(5)(d) – confidentiality of proceedings, 12(5)(e) - confidentiality of commercial or industrial information and 12(5)(f) - interests of the person who provided that information. Further into the investigation, the Council again revised its stance. The complainant confirmed he did not wish the Commissioner to consider some of the information withheld under Regulations 12(3) and 13 – personal data – and has not challenged the Council's reliance on this for other parts of the disclosed information. The Commissioner has not considered this aspect further.
3. The Commissioner's decision is that the Council was correct to consider the request under the EIR for the reasons set out in this notice. For the reasons set out in this notice, he also finds that the Council correctly applied Regulations 12(4)(d), 12(5)(d), 12(5)(e) and 12(5)(f) to the withheld information as described in this notice. The Commissioner has not found it necessary to consider the Council's reliance on Regulation

12(5)(b) as the information withheld under this exception was considered instead under Regulation 12(5)(d).

4. The Commissioner does not require the Council to take any steps to ensure compliance with the legislation.

Background

5. The complainant has made more than one request to the Council on the subject of the MoU relating to Wellesbourne Airfield.
6. The complainant submitted correspondence in support of his complaint to the Commissioner which was very unclear, both in terms of which request he wished to complain about and the relevant chronology and correspondence.
7. Following various exchanges between the Commissioner and the complainant, the request of 16 February 2021 and applicable correspondence was subsequently identified (and agreed to by the complainant) as being that which the complaint related to.
8. However, when the Council provided its investigation response to the Commissioner, it helpfully set out the chronology of the identified request (ie that of 16 February 2021) and a broader (in terms of scope) follow-on request (of 20 April 2021). The Council responded to the Commissioner's investigation in relation to the latter request, advising that the later request would still include all the information requested in the earlier request.
9. The Commissioner contacted the complainant to outline the approach taken by the Council. He explained that the Council had advised more information would be caught by the wider remit of the request of 20 April 2021. In view of this, the complainant was asked to confirm which request he wished the Commissioner to consider.
10. On 23 June 2022, the complainant advised the Commissioner that he would like the broader request of 20 April 2021 to be investigated. All parties accept and understand that this request is not the request originally complained about.
11. This notice is necessarily very detailed. The Council has revised its stance at various points during the Commissioner's investigation and has also made some further disclosures. The Commissioner has endeavoured to relay the detail of what occurred in his investigation within the lengthier than usual 'Scope' section.

12. The request concerns the ongoing Compulsory Purchase Order proceedings in respect of Wellesbourne Airfield. On 30 August 2019 the Council and the owners of the Airfield signed an MoU¹ which ensures that aviation will continue at Wellesbourne Airfield whilst plans for the future enhancement of the facility are developed and discussed. York Aviation have been commissioned to provide a report on the compliance with the MoU².
13. Although it post-dates the request under consideration here, the Commissioner notes that a further MoU³ was signed on 25 August 2022, which sets out the next steps required to secure the long-term future of the Wellesbourne aviation offer.
14. The Commissioner understands that Council's Cabinet resolved on 12 December 2016 to enter into negotiations with the owners of the site to agree the purchase of the site. In the event this was not achieved, the Council also resolved to take steps to compulsorily purchase the airfield.
15. From his own online research, the Commissioner understands that the airfield owners, Littler Investments Ltd, had wanted to redevelop Wellesbourne Airfield as a housing site but came to an agreement with the Council for a mixed-use site, including retaining an operating airfield.
16. Although FOIA is applicant and purpose blind, the Commissioner considers it relevant to note that the complainant runs an aviation company which was formerly established at Wellesbourne Airfield for 15 years. This business is still in existence but no longer operates from Wellesbourne Airfield following Littler Investments Ltd becoming the owners of the airfield. The Commissioner understands that the complainant is currently engaged in litigation with the owners of the airfield.

1

<https://www.stratford.gov.uk/doc/208672/name/Memorandum%20of%20Understanding.pdf>

2

<https://www.stratford.gov.uk/doc/208980/name/York%20Aviation%20Review%20of%20Wellesbourne%20Airfield%20Exec%20Summary.pdf>

³ <https://www.stratford.gov.uk/doc>

Request and response

17. On 20 April 2021, the complainant wrote to the Council and requested information relation to Wellesbourne Airfield in the following terms:

“Please provide the communications between SDC [the Council] and LIL [Littler Investments Limited] with regard to the original MoU [Memorandum of Understanding] agreement. Can you please conduct a search of your Outlook for e-Mail communication which meets the remit of this request, in addition to providing us with any letters received or sent by SDC which meets the remit of the request. Although this is similar to a previous request, the remit is wider than previously asked and therefore there may be more information which meets the remit of this request. There is no time frame for this request, so the required response will include communication both before and after the implementation of the MoU - in essence, anything to do with the MoU and any of its aspects. Communication which meets the remit of the request may necessarily include Littler’s advisors, so there may be communication with [email address redacted], in addition to [email address redacted] (Littler solicitor). There may also have been contact with [name and email address redacted] who is the airfield manager.”

18. The Council responded on 17 May 2021. It provided some of the requested information (a small number of emails) with redactions for personal information under Regulations 12(3) and 13 of the EIR, but withheld the majority of the information in scope in its entirety, citing Regulation 12(5)(b) of the EIR, the exception for the course of justice.
19. The complainant requested an internal review on 17 May 2021. Following its internal review the Council wrote to the complainant on 14 June 2021. It maintained its original position.

Scope of the case

20. The complainant originally contacted the Commissioner on 16 June 2021 to complain about the way his request for information had been handled.
21. As set out in the ‘Background’ section above, the complainant has confirmed that he would like the Commissioner to consider a different request to that submitted originally, namely his follow-on broader request of 20 April 2021.

22. On 8 June 2022, during the course of the Commissioner's investigation, the Council explained that it had located and subsequently disregarded additional information as follows:

'In the Council's original handling of these requests [ie those of 16 February 2021 and 20 April 2021], 23 eMail files were identified and considered to be legally-privileged information. However, in reviewing the Council's response to this request following contact by yourselves, the Council recognised that the files which were originally pulled by the Council are not within the remit of this request, as they constitute communication between the Council and their own solicitors. As [the complainant] states himself on the file Final Response and New Request

"I have not requested the communication between SDC and their legal representatives that will be subject to legal privilege. My request was simply and remains to be, for the communications between SDC and LIL, with regard to the original MoU agreement."

23. The Council supplied the 23 files referenced above for the Commissioner to examine. Having reviewed the content, the Commissioner is satisfied that they constitute communications between the Council and its own solicitors which the complainant has specified he is not concerned with, so the Commissioner has excluded these 23 files from his investigation.
24. The Council now also told the Commissioner it had reconsidered its position. It said it no longer wished to rely on Regulation 12(5)(b) for the withheld information and instead wished to cite Regulations 12(4)(d) - material which is still in the course of completion, to unfinished documents and 12(5)(f) - interests of the person who provided that information to apply to the withheld information.
25. The Council informed the complainant of its revised position on 8 June 2022.
26. The complainant had already argued that the MoU agreement contravened planning policy and as a result had said, "it is essential that the information and correspondence around how the MoU was formed and written is published". The complainant now also highlighted that:

"It should be noted that the council have changed it [sic] position on hiding behind legal privilege to something else. This is no doubt as a result of a compliant [sic] to the councils [sic] firm of solicitors, who maintained a [sic] impossibly false position (about there being no breach of the MoU between SDC and LIL). It is clear from communications and representations from the parish council, DfT [Department for Transport] and others that the

position they gave was entirely false, and as a result of this they have deliberately intended to misled [sic] me and my company against SRA [Solicitors Regulation Authority] guidelines.”

27. In relation to the small number of the disclosed emails, the Commissioner noticed that two slightly different versions of some of the Regulation 13 redactions had been supplied to him by the Council. He queried this and was assured by the Council that both versions had been released to the complainant such that he has had sight of the name of the individual withheld in one version but not in the other, so the Commissioner has not considered this matter any further.
28. Furthermore, the complainant has not challenged the Council's personal information redactions (Regulations 12(3) and 13 of the EIR) within the disclosed material so the Commissioner has disregarded this aspect from his investigation.
29. The Commissioner made further enquiries to the Council in relation to its revised position and the withheld information. On 8 July 2022, the Council responded. The Commissioner considers the clearest way of explaining the Council's stance is to reproduce the key parts of its response as set out below:

“In relation to the redacted report and minutes which appear at pages 200 to 206 of the bundle, the entirety of these documents was not made public by virtue of being exempt information pursuant to s.100I and paragraphs 3 and 5 of Schedule 12A Local Government Act 1972 (on the basis that they comprise information relating to the financial business affairs of any particular person and information in respect of which a claim for legal professional privilege could be maintained in legal proceedings). The redacted versions in the bundle were the versions provided to the owners' solicitors only with a view to commencing proactive discussions. I attach the unredacted documents for your information but consider that relevant EIR exceptions justify the whole documents being withheld (12(5)(e) and 12(5)(b)).”

30. The Commissioner notes that the above contradicts the Council's earlier statement that it no longer wished to rely on Regulation 12(5)(b) for any part of the withheld information (see paragraph 24) ie the Council reverted to citing Regulation 12(5)(b) for part of the withheld information.
31. The Council also advised:

“I consider that Regulation 12(4)(d) applies to the draft versions of the MoU exchanged confidentially between lawyers, some of

which contain amendments and comments. However, there are also separate emails between lawyers which contain commentary on the evolving draft document. I consider, therefore, that 12(4)(d) should apply to the following pages of the bundle: 1, 2, 4, 5, 8, 9, 13, 14, 15, 16, 17, 22-29, 30-35, 40-41, 54-59, 62-70, 75-87, 88-91, 108, 125-126 (which concerns a draft press release), 149-160, 163, 176-179 (which concerns a draft press release).

In my view 12(4)(d) also applies to discussions around a draft clause in a third party legal document: pages 101-102, 130, 138, 141-144, 147, 180.

Pages 88-99; 115-119, 164-166 relate to a confidential meeting with third parties (Reg 12(5)(d) [but see paragraph 32 below] and 12(5)(f) applies) and 161-162 is a draft note of a confidential meeting (Reg 12(4)(d); 12(5)(d);12(5)(f) applies).

The following pages contain a breakdown of a third party's legal costs: 110-113; 123-124; 170-172, 184-187; 190 (Reg 12(5)(e) and 12(5)(f) applies).

I also consider that Reg 12(5)(f) applies to all correspondence from the owners' solicitors (Smith Partnership) to the Council or its solicitors since the material could adversely affect their client, particularly given [the complainant's] legal action against the owners which he informs us is ongoing, and the owners or their solicitor have not consented to the disclosure.

Page 188 is a confidential e-mail from a third party to the Council. I consider 12(5)(f) applies."

32. However, on 13 July 2022, the Council informed the Commissioner that it had again reconsidered its position and no longer wished to rely on Regulation 12(5)(d) for pages 88-99, 115-119, 161-162 and 164-166. For clarity, this means the Council was now relying only on Regulations 12(4)(d) and 12(5)(f) for those parts of the withheld bundle.
33. Accordingly, and again on 13 July 2022, the Council wrote to the complainant to inform him of the additional exceptions it was now relying on, namely:
 - Regulation 12(5)(b) – the course of justice.
 - Regulation 12(5)(d) – confidentiality of proceedings.
 - Regulation 12(5)(e) – confidentiality of commercial or industrial information.

34. Later that day the complainant raised some queries directly with the Council about the application of those exceptions to the withheld information, copying the Commissioner into his correspondence.
35. The Council replied to those queries on 21 July 2022. The complainant submitted further comments to which the Council replied on 25 July 2022 as follows:

“...“proceedings” means the meeting of Cabinet. I don’t have any further comment in relation to your other points”.

36. On reviewing the case correspondence in full in order to draft this notice, the Commissioner noted that not all the pages within the withheld bundle had been accounted for in the Council’s correspondence to him. On 9 August 2022, he asked the Council to revisit the withheld information and to update him accordingly
37. The Council did so, as follows:

“... I confirm that we wish to rely on the exception at Reg 13(1)(a) in relation to the personal information marked up by [name redacted].

In relation to the pages in the bundle I haven’t mentioned, I have checked and can confirm that unless mentioned below these are either blank pages or pages only containing email disclaimers or no substantive information.

Page 48 relates to discussions around a draft clause in a third party legal document (Reg 12(4)(d) applies).

Page 49 and 51 – this relates to negotiations around a draft press release (12(4)(d)).

Page 54 to 57 and 62 to 65 is an incomplete MOU (12(4)(d)).

Page 73 relates to a third party’s legal fees (Reg 12(5)(e) and 12(5)(f)).

Pages 127 to 130 (repeated at 135 to 138 and 176 to 180) are communications between the airfield owner’s solicitor and the Council’s solicitor about whether to disclose the MOU to [the complainant], which also mentions the draft press release. I consider 12(5)(f) applies to this. As you know the MOU was eventually published.

Page 192 to 199 and 207 to 214 – this correspondence between the Council’s solicitor and the airfield owner’s solicitor does not

appear to relate to the MOU. I query whether it is within the scope of the EIR request.

The correspondence at pages 215 to 220 between the Council's solicitor and the airfield owner's solicitor relates to negotiations over the emerging draft MOU (12(4)(d) and 12(5)(f) applies).

Letters at page 221 (repeated at 222) and 223 to 225 – I do not consider that a relevant exception applies to these letters [see paragraph 44 below]".

38. The Commissioner has examined the withheld bundle. There are a number of blank pages contained in the bundle, together with some which do not contain any "substantive information" as described by the Council above, for example, page 3 simply has the tail end of an email disclaimer which is carried over from page 2.
39. The Commissioner accepts that pages 192 to 199 and 207 to 214 do not relate to the MoU referenced in the complainant's request. He has therefore disregarded this information from further consideration.
40. The Commissioner is satisfied that all the pages within the bundle which are neither blank nor contain substantive information in scope of the request have been accounted for by the Council and withheld under the various exceptions listed above.
41. However, the Commissioner noted that the Council had marked some personal information within the bundle for redaction (such as the name part of some email addresses, phone numbers etcetera) and that Regulation 13 had not been cited by the Council in relation to this information. Following a further enquiry, the Council confirmed it would wish to withhold this information under Regulations 12(3) and 13.
42. Therefore, on 9 August 2022, the Commissioner wrote to the complainant to ask whether he was concerned with the Regulation 13 redactions within the withheld bundle, providing the link to the Commissioner's guidance on personal information⁴. The Commissioner explained that as the Council had not previously formally cited Regulation 13 in relation to the withheld bundle that, should the complainant want him to consider its reliance on Regulation 13, he would need to write to the Council again to investigate its reliance on that exception which would further delay the conclusion of his investigation.

⁴ s40 Personal_information_(section_40_and_regulation_13)_version2.3 (ico.org.uk)

43. The complainant responded on 10 August 2022; he confirmed he was more concerned with the content of the withheld information than the details of the individuals "at this stage". The Commissioner has therefore, not considered Regulation 13 as part of his investigation.
44. The Commissioner noted the Council's statement above, namely that it considered no exception could be applied to pages 221 (repeated at 222) and 223 to 225. He asked the Council to consider disclosing these unexcepted pages before he issued his decision notice.
45. On 22 August 2022, the Council confirmed it now intended to release these pages subject to redactions for personal information to the complainant.
46. Similarly, on 22 August 2022, the Council clarified that Regulation 12(5)(d) was being relied on for the Cabinet papers only (pages 200-206 of the withheld bundle), but that this is in conjunction with Regulations 12(5)(b) and 12(5)(e).
47. The Council disclosed the further pages listed at paragraph 44 to the complainant on 7 September 2022 with some Regulation 13 redactions. The Commissioner asked the complainant to confirm whether he wished to similarly disregard the personal information redactions from the Commissioner's investigation. In the absence of any reply from the complainant, and based on his previous stance, the Commissioner has not considered the Regulation 12(3) and 13 redactions within the information disclosed on 7 September 2022 any further.
48. On 11 September 2022 at the Commissioner's request, the Council confirmed definitively the pages of the withheld bundle it was relying on Regulation 12(5)(f) for. However, the Commissioner has amended this list under his analysis of the Council's application of Regulation 12(5)(f) because some of those pages had another exception applied and have were considered by the Commissioner under the other exception.
49. For clarity and for the reasons set out above, the Commissioner has disregarded the Council's reliance on Regulations 12(5)(b), 12(3) and 13 for the purposes of this notice.
50. For some parts of the withheld information, more than one exception has been applied. The Commissioner's approach has been to first consider the exception he considers most likely to potentially apply and, if that is not engaged on closer examination, only then will he consider any other exceptions applied by the Council to those parts of the withheld bundle. He considers that the information incorporated in both the 'Scope' and 'Reasons for decision' sections of this notice has endeavoured to set out where more than one exception has been cited –

however, some of this may not be explicit and requires a closer examination of the page numbers listed for each exception.

51. In this case, the Commissioner has considered whether the Council was entitled to rely on Regulations 12(4)(d), 12(5)(d), 12(5)(e) and 12(5)(f) to withhold the remaining requested information. He has also determined whether the requested information constitutes 'environmental information' for the purposes of the EIR.

Reasons for decision

Is the requested information environmental information?

52. The Commissioner has first considered whether the Council was correct to handle the request under the EIR.
53. 'Environmental information' is defined at EIR regulation 2(1). In accordance with the European Council Directive 2003/4/EC, from which the EIR derive, the Commissioner's view is that the definition should be interpreted widely. It is not necessary for the information itself to have a direct effect on the environment, or to record or reflect such an effect, in order for it to be environmental.
54. Regulation 2(1) of the EIR defines environmental information as being information in any 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 the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."

55. The Council told the Commissioner it considered that the request fell under the EIR for the following reasons:

'A previous ICO decision notice issued against Stratford-on-Avon District Council (IC-41498-R4V1 of 19th January 2021) relates also to matters around the sale of Wellesbourne Airfield, and The ICO held the information request here to fall under EIR:

"Having considered SDC's representations and the content of the information within the brief, the Commissioner decided that the airfield's physical infrastructure, its buildings, runways and taxiways are built structures within the meaning of EIR regulation 2(1)(f). Information 'on' any measures comprising additions to those, or adaptations of them, would therefore be environmental and need to be considered with reference to the EIR." [paragraph 27].

The Council consider the MoU to be a measure which intends to influence upon the use operations of the airfield and its use of buildings, runways and taxiways (e.g. by maintaining the established flying functions while pursuing the development), and therefore the MoU and communications around this matter are considered to meet the definition of Environmental Information for the same reasons given in the ICO Decision Notice given above.'

56. In considering this matter the Commissioner had regard for his own guidance.⁵ This says that it is often clear that a project itself constitutes a measure that will affect the environment, eg building a bridge. In this case, developing the physical infrastructure of an airfield is a measure that will affect the environment. He has, therefore, decided that the

⁵ https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf

requested information fell within the definition of information about environmental measures as set out in EIR regulation 2(1)(c).

57. The Commissioner's guidance for EIR regulation 2(1)(f) provides further detail and indicates that cultural sites, which include places that have an historical, literary, educational, or artistic value, and religious, ethnic, or social significance and which cover modern as well as historical and urban as well as rural locations, are environmental. Likewise, built structures including buildings and built infrastructure, such as roads, railway lines, pylons, aerials, bridges, canals and tunnels are caught by Regulation 2(1)(f).
58. Having considered the Council's representations, the content of the above referenced decision notice and the current request, the Commissioner is satisfied that the requested information in this case constitutes environmental information and that the Council was correct to handle the request under the EIR.
59. He will next consider the Council's refusal to provide the requested information on the basis of Regulations 12(4)(d), 12(5)(d), 12(5)(e) and 12(5)(f) of the EIR. He will first consider the Council's reliance on Regulation 12(4)(d).

Regulation 12(4)(d) - information in the course of completion

60. The Commissioner would first refer to his comments under the 'Other matters' section of this notice and state that the Council's failure to mark up the withheld bundle itself showing which exceptions apply and to instead submit a number of iterations (which sometimes vary) of which page numbers are applicable to which exception(s) may mean that the Commissioner has inadvertently not listed all the page numbers in this notice. This is further exacerbated by the bundle containing blank pages and repeated documents; however, the Commissioner is satisfied that he has reviewed the withheld bundle in its entirety and carefully considered whether any of the information is not excepted under the EIR.
61. For ease of reference, the Commissioner has reiterated below the parts of the withheld information for which the Council has cited Regulation 12(4)(d):
 - Draft versions of the MoU exchanged confidentially between lawyers, some of which contain amendments and comments.
 - Separate emails between lawyers which contain commentary on the evolving draft document.
 - Discussions around a draft clause in a third party legal document.

- In summary, the Council has advised that Regulation 12(4)(d) has been applied by the Council to the following pages of the withheld bundle:

1, 4-5, 8-9, 13-17, 22-35, 40-41, 54-59, 62-70, 75-91, 101-102, 108, 125-126 (which concerns a draft press release), 130, 138, 141-144, 147, 149-160, 163, 176-179 (which concerns a draft press release) and 180.
 - A draft note of a confidential meeting (pages 161-162).
62. From subsequent correspondence, the Commissioner notes that the Council has also advised the following:
- Page 48 relates to discussions around a draft clause in a third party legal document (Reg 12(4)(d) applies).
 - Pages 49 and 51 – relate to negotiations around a draft press release (12(4)(d)).
 - Pages 54 to 57 and 62 to 65 are an incomplete MoU (12(4)(d)).
63. For completeness, the Commissioner also notes that the Council has cited the following during the course of his investigation:
- “I consider that Regulation 12(4)(d) applies to the draft versions of the MoU exchanged confidentially between lawyers, some of which contain amendments and comments. However, there are also separate emails between lawyers which contain commentary on the evolving draft document. I consider, therefore, that 12(4)(d) should apply to the following pages of the bundle: 1, 2, 4, 5, 8, 9, 13, 14, 15, 16, 17, 22-29, 30-35, 40-41, 54-59, 62-70, 75-87, 88-91, 108, 125-126 (which concerns a draft press release), 149-160, 163, 176-179 (which concerns a draft press release).
- In my view 12(4)(d) also applies to discussions around a draft clause in a third party legal document: pages 101-102, 130, 138, 141-144, 147, 180.
- Pages 88-99; 115-119, 164-166 relate to a confidential meeting with third parties and 12(4)(d) applies.”
64. The Commissioner has reviewed all the above information identified by the Council as being excepted under Regulation 12(4)(d) in the course of his investigation.
65. Regulation 12(4)(d) states that:

"... a public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, unfinished documents, or to incomplete data".

66. The aims of the exception are to:

- Protect work a public authority may have in progress by delaying disclosure until a final or completed version can be made available. This allows it to finish ongoing work without interruption and interference from outside; and
- Provide some protection from having to spend time and resources explaining or justifying ideas that are not, or may never be, final.

67. For Regulation 12(4)(d) to be engaged, the requested information must fall within one of the categories specified in the exception. It is not necessary to show that disclosure would have a particular adverse effect but any adverse effects of disclosure may be relevant to the public interest test.

68. In its submissions to the Commissioner, the Council said:

'The scope of the request, and therefore the content of the files collated by the Council, necessarily relates specifically to discussions around the MoU presently in place between SDC and LIL. This includes draft MoU documentation, discussions relating specifically to the drafts and discussions around possible amendments and views upon aspects of the draft MoUs themselves. It should be noted that the finalised and agreed MoU is publicly available⁶. The ICO's guide on the application of this exception⁷ states that one of the intentions of applying this exception is to help avoid what The ICO terms a 'chilling effect':

"Public authorities may also argue that disclosing drafts would mean that those producing them will be less frank and candid in giving their views or presenting information in future, and so the quality of the advice and information in the drafts, and hence the quality of decision making, would suffer."

⁶

<https://www.stratford.gov.uk/doc/208672/name/Memorandum%20of%20Understanding.pdf>

⁷ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

69. The Council explained that the chilling effect in this case applies to the ongoing discussions between it and LIL, and their respective representatives. It said that matters and discussions involving the status of the named airfield are still ongoing (as they were at the time of the original request). The Council expressed its concerns that disclosure of the requested information into the public domain would be likely to impede the open and free discussions which are presently ongoing between the parties, potentially damaging the working relationship between those parties. Further, it argued that such a chilling effect would also likely impede the effectiveness of any present or future agreement between parties, as both parties will be less willing to speak honestly and frankly without concern that such discussions would later be disclosed into the public domain and potentially then used against them.
70. The Council considers this to be especially true as an MoU is a non-binding agreement which does not create any legal obligations on either party. Rather, it said, the creation of and adherence to the MoU is a legitimate effort by the Council to comply with Policy AS.9 of its Core Strategy⁸, part of which aims to:

“Retain and support the enhancement of the established flying functions and aviation related facilities at Wellesbourne Airfield.”
[page 181].

71. The Council argued that disclosure of this information would impede the ongoing relationship between it and LIL, potentially negatively influencing the effectiveness of future processes and therefore the likelihood that the Council will be able to successfully comply with Policy AS.9 of its Core Strategy through the use of an MoU or other similar discussions with LIL representatives. It also informed the Commissioner that negotiations between the parties in relation to the matter of the MoU are presently taking place, such that the Council considers the application of this exception to be especially pertinent at present.

The Commissioner's view

72. In his published guidance the Commissioner recognises that Regulation 12(4)(d) is engaged when the request relates to material that is still in the course of completion, unfinished documents or incomplete data.

⁸ <https://www.stratford.gov.uk/templates/server/document-relay.cfm?doc=173518&name=SDC%20CORE%20STRATEGY%202011%202031%20July%202016.pdf>

73. He defines those categories as follows:

- Material which is still in the course of completion can include information created as part of the process of formulating and developing policy, where the process is not complete.
- Draft documents are unfinished even if the final version has been produced.
- Data that is being used or relied on at the time of the request is not incomplete, even if it may be modified later.

74. The Commissioner acknowledges that the fact that the exception refers to both material in the course of completion and unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion. An example of this could be where a public authority is formulating and developing policy.

75. Having reviewed the evidence provided along with his own guidance, the Commissioner is satisfied that the information withheld by the Council under this exception relates to the status and development of Wellesbourne Airfield, and that this matter was under discussion both at the time of the request and at the present time.

76. In light of the above, the Commissioner has concluded that the information withheld under Regulation 12(4)(d) falls within the scope of the exception. It therefore follows that he finds that Regulation 12(4)(d) is engaged.

77. The Commissioner has next gone on to consider the associated public interest test.

Public interest test

78. Regulation 12(1)(b) of the EIR provides that where Regulation 12(4)(d) is engaged then a public interest test is carried out. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. Furthermore, under Regulation 12(2), a public authority must provide a presumption towards the disclosure of the information.

Public interest arguments in favour of disclosing the requested information

79. The complainant did not submit any specific public interest arguments, although he made some general comments as follows:

"Given the dubious provision of the MoU agreement that despite the councils representations (according to the parish council and others) [sic] contravened planning policy, with the council then ignoring representations for the parish council, DfT and MP, it is essential that the information and correspondence around how the MoU was formed and written is published.

Whilst the council claim that the landowners failure to negotiate lease terms with [complainant's business redacted] was position [sic] never accepted by the council, SDC have made deliberate attempts to mislead my company on stating that there was no breach of the MoU agreement between them and the landowners LIL (that they now appear to acknowledge has been breached). The statement in the email of yesterday regarding LIL stating "defending positions and suggestions which were never actioned as part of the agreed MoU" seems to acknowledge the breach."

80. The Commissioner is aware that the complainant previously had an aviation business established at Wellesbourne Airfield and thereby, has a personal interest in seeking disclosure of the remaining withheld information.
81. The Council recognised there is a public interest in LIL's transparency to ensure they are developing plans and strategies for the airfield which are in the public interest.
82. The Council also acknowledged the public interest in the Council's transparency to ensure it is following its own procedures and processes honestly and fairly, and that it has acted with appropriate effort to ensure adherence to Policy AS.9 of its Core Strategy.

Public interest arguments in favour of maintaining the exception

83. In favour of maintaining the exception, the Council said it did not consider the arguments in favour of disclosure to come at the expense of "the very ability for Council officers and their representatives - and by extension in this case LIL and their representatives - to maintain a strong working relationship and speak freely and openly in order to facilitate the creation of a complete and effective MoU, thereby enabling the Council to meet Policy AS.9 of its Core Strategy".

Balance of the public interest

84. The Commissioner is mindful that there is a general presumption in favour of disclosing environmental information and that there is an inbuilt public interest in enabling public participation in decision making in planning and development matters.

85. It is clear that the decision-making process in relation to the plans and strategies for Wellesbourne airfield raised in the was incomplete at the time of the request (and remains incomplete at this time). In previous decisions, the Commissioner has acknowledged that there is a strong likelihood that the integrity of and effectiveness of the decision-making process would be harmed by the disclosure of information before the process is complete.
86. Public interest considerations should always be relevant to the exception being relied upon, to the specific nature of withheld information and to the context at the time of the request. In this case, the Commissioner considers that the Council has demonstrated that the requested information relates to and informs a decision making process that is incomplete and that its disclosure would, by misinforming public debate, impede the decision making process that it supports.
87. As noted above, Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the Regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner (SGIA/44/2019)*:
- “If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...” and “the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations” (paragraph 19).
88. As covered above, in this case the Commissioner’s view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced. This means that the Commissioner’s decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(4)(d) was applied correctly.
89. As the Commissioner is satisfied that Regulation 12(4)(d) applies, he has not found it necessary to consider the Council’s application of Regulations 12(5)(f) to the same information.
90. The Commissioner has next considered the Council’s reliance on Regulation 12(5)(d) of the EIR.

Regulation 12(5)(d) – confidentiality of proceedings

91. Regulations 12(5)(b), 12(5)(d) and 12(5)(e) have ultimately been cited by the Council in relation to the withheld Cabinet papers (pages 200-206

of the withheld bundle). The Commissioner has first examined whether Regulation 12(5)(d) has been properly applied.

92. Regulation 12(5)(d) of the EIR says that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
93. There is no definition in the EIR as to what exactly is covered by regulation 12(5)(d), but the Commissioner has issued guidance⁹ to assist public authorities in determining when the exception might apply. For regulation 12(5)(d) to be engaged, a three stage test must be met, which is as follows:
- Are the proceedings presented by the authority legitimate?
 - Is the confidentiality of those proceedings provided by law?
 - Would disclosing the information adversely affect that confidentiality?
94. The Commissioner considers that 'proceedings' implies a level of formality and may include formal meetings that considers matters within the authority's jurisdiction, situations where an authority is exercising its statutory decision making powers, and official legal proceedings.
95. However, the Commissioner does not consider that all meetings or activities, just because they are deemed formal, would be covered by the Regulation. The fact the proceedings must be covered by a confidentiality of law not only supports the formality of those proceedings, but also requires that they are subject to either statute or common law that imposes a necessary confidence. It is important to note that the Regulation protects the confidentiality of the proceedings, not the confidentiality of the information.
96. The Council submitted:
- 'I consider 12(5)(d) applies to the confidential Cabinet report which was not in the public domain (pages 200-206). The Cabinet meeting is a 'proceeding' because it is a formal meeting of the Council's executive. These meetings are in public and are webcast, unless public access is excluded pursuant to one of the

⁹ https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf

statutory grounds (which is what happened in this case in relation to the agenda item relating to Wellesbourne Airfield). At Cabinet meetings the executive deliberate and exercise their statutory decision making powers. The Wellesbourne Airfield matter is a case in point, where the executive considered whether to exercise statutory compulsory purchase powers.

The confidentiality of this part of the meeting is protected by law. Section 100A(4) Local Government Act ['LGA'] 1972 states:

“(4) A principal council may by resolution exclude the public from a meeting during an item of business whenever it is likely, in the view of the nature of the business to be transacted or the nature of the proceedings, that if members of the public were present during that item there would be disclosure to them of exempt information as defined in section 100I below.”

Section 100I LGA 1972 defines exempt information as:

“(1) In relation to principal councils in England the descriptions of information which are, for this Part, exempt information are those for the time being specified in Part I of Schedule 12A to this Act, but subject to any qualifications contained in Part II of that Schedule; and Part III has effect for the [interpretation of Parts 1 to 3 of that Schedule].”

The Wellesbourne Airfield report was excluded from public access pursuant to paragraphs 3 and 5 of Part 1 of Schedule 12A of the 1972 Act.

Paragraph 3: Information relating to the financial or business affairs of any particular person (including the authority holding that information).

Paragraph 5: Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

The above paragraphs were relied on because the report contains legal advice from the Council's external legal advisors on the merits of compulsory purchase which is subject to legal professional privilege ...Paragraph 3 of Schedule 12A was relied on because of the confidential information in the report relating to land values.'

97. The Commissioner accepts that discussions about the compulsory purchase order process constitute legitimate formal proceedings, and therefore the first part of the test is met.

98. The next part of the test is to consider whether the confidentiality of the proceedings is provided by law. The Council has explained the specific statutory restrictions on disclosure above. The Commissioner therefore also considers that the second part of the test has been met.

99. The final consideration when applying the exception provided by Regulation 12(5)(d) is to assess whether the confidentiality of those proceedings would be adversely affected by disclosing the withheld information. The term 'would be' is taken to mean that it is more probable than not that disclosing the information would harm the confidentiality of the proceedings in question.

100. The Council said:

"If the material were disclosed, it would usurp the confidentiality provided for in the Local Government Act 1972. The rationale behind the ability to exclude the public from the consideration of certain business at local authority meetings in these circumstances is so that the Council can receive legal advice confidentially in order to make lawful decisions and so that commercially sensitive financial information can be viewed by councillors to help inform their decision making."

101. As the Commissioner accepts that disclosure would have an adverse effect by undermining consideration of the compulsory purchase order process, the final part of the test has been met and he is satisfied that the Council has correctly applied Regulation 12(5)(d) to the withheld information, namely the Cabinet papers.

102. He must next consider the associated public interest test.

Balance of the public interests: Regulation 12(5)(d)

103. There are general interests in transparency when it comes to the financial and decision making affairs of the Council. The Commissioner is also mindful of the requirements set out paragraphs 84 and 87 above.

104. In the case of the exception at Regulation 12(5)(d), it is necessary for the Commissioner to consider whether the adverse effect on the confidentiality of proceedings which has been identified, is outweighed by the public interest in the disclosure of the information.

105. Regarding the public interest arguments in favour of maintaining the exception, the Council has pointed out that there is an inherent public interest in protecting confidential information, and breaching an obligation of confidence would undermine the relationship of trust between the Council and those providing the information, which would not be in the public interest.

106. The Council argues that maintaining the confidentiality of the Cabinet meeting/proceedings is crucial so that legal advice can be received and sensitive financial information can be properly considered, in a confidential setting, to ensure robust and legally sound decision making.
107. The Commissioner recognises the importance of transparency and scrutiny of decision making. However, he considers that individuals and organisations should be able to communicate with a public body without fear that such communications will be shared with the wider public. If individuals thought that their private and confidential discussion with the Council would be routinely disclosed it is likely to lead to disengagement from the process, a lack of frankness in proposals and would undermine the whole process. The loss of trust in the process may result in individuals not willingly providing information and potentially may result in an increase in the time and expenditure needed to deal with such matters to the detriment of both developers and the Council.
108. The Commissioner therefore concludes that the public interest in maintaining the exception, in all the circumstances of the case, outweighs that in disclosure of the withheld information.
109. As the Commissioner has found the Council was correct to cite Regulation 12(5)(d) in relation to the withheld Cabinet papers, he has not gone on to consider the Council's reliance on Regulations 12(5)(b) and 12(5)(e) also applied to this information.
110. The Commissioner will next consider the information withheld under Regulation 12(5)(e) of the EIR.

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

111. The Council has cited Regulation 12(5)(e) of the EIR in relation to the following withheld information:
- A breakdown of a third party's legal costs (pages 73, 110-113, 170-172, 184-187 and 190).
112. The Commissioner has considered whether Regulation 12(5)(e) applies to all the information listed above although he notes that Regulation 12(5)(f) was also applied to this information.
113. Regulation 12(5)(e) of the EIR states that a public authority may refuse to disclose 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.

114. The Commissioner has published guidance¹⁰ on the application of this exception. As the guidance explains, the exception can be broken down into a four-stage test.

115. All four elements are required in order for the exception to be engaged. The Commissioner has considered how each of the following conditions apply to the facts of this case:

- The information is commercial or industrial in nature.
- It is subject to confidentiality is provided by law.
- The confidentiality is protecting a legitimate economic interest and
- The confidentiality would be adversely affected by disclosure.

116. The Council has explained that the material relates to the landowner's legal fees relating to aspects of the compulsory purchase process, which the Council agreed to pay in accordance with Government guidance. The material contains breakdowns of hourly rates for individual solicitors and the work undertaken, together with invoices from the law firm containing their bank details. The Council said it considers that information about hourly rates charged by solicitors in a private law firm and the work they are undertaking for a client relates to that firm's commercial activity.

117. The Commissioner has examined the documents listed at the above pages and cannot identify any invoices or bank details. The withheld information comprises emails which mention hours worked or an hourly rate, together with two separate breakdowns of tasks undertaken by the solicitors and the associated hours spent on those tasks with no costings (pages 110-113 which cover the period March 2019 to mid-July 2019 and pages 184-187 which spans late July 2019 to the end of August 2019).

118. The Commissioner is satisfied that the information is commercial in nature since it relates to a commercial activity, namely legal advice and input for a fee.

119. The Council has said that the information is not trivial and that it is not in the public domain. He accepts that the financial information about a

¹⁰ <https://ico.org.uk/for-organisations/commercial-or-industrial-information-regulation-12-5-e/>

law firm's hourly rates, how they have managed their time and on which specific tasks is information which was shared with the Council in circumstances creating an implied obligation of confidence.

120. The economic interest aspect is met because the third party law firm would not expect the sensitive hourly rate and breakdown of its commercial activity to be disclosed to the world at large.

121. The final requirement for the exception to be engaged is for it to be shown that an adverse effect to the confidentiality, provided to protect the legitimate economic interest, would occur from the disclosure of the information.

122. Although this is a necessary element of the exception, the Commissioner's approach is that, once the first three elements are established, it is inevitable that this element will be satisfied. Disclosure of confidential information into the public domain would inevitably harm the confidential nature of that information and would also harm the legitimate economic interests that have been identified.

123. As explained in the Commissioner's guidance (referenced previously), this was confirmed in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010), in which the Tribunal stated that, given its findings that the information was subject to confidentiality provided by law and that the confidentiality was provided to protect a legitimate economic interest:

"it must follow that disclosure... would adversely affect confidentiality provided by law to protect a legitimate economic interest" (para 14).

124. Disclosure would cause harm because this is information that a competitor law firm could use to gain a competitive advantage. The withheld information is commercially valuable and would provide competitors with insight into the costings for a particular piece of work, which could disadvantage the law firm in the marketplace.

125. The Commissioner is satisfied that the exception is engaged. He will now consider the public interest test.

Balance of the public interests: Regulation 12(5)(e)

126. As previously stated, there are general interests in transparency when it comes to the financial affairs of the Council, and the Commissioner would refer to his comments at paragraphs 84 and 87 above.

127. In the case of the exception at Regulation 12(5)(e), it is necessary for the Commissioner to consider whether the adverse effect on commercial

confidentiality which has been identified, is outweighed by the public interest in the disclosure of the information.

128. The Commissioner recognises the public interest in openness, transparency and accountability. Whilst he can see some public interest in the world at large knowing how much was spent in association with the Compulsory Purchase Order and the MoU, the Commissioner cannot see what would be achieved by releasing the breakdown of the third party legal costs, which the Council has agreed to pay.
129. Disclosure of the withheld information would enable competitor law firms to gain valuable commercial information which they could use in potential tenders to calculate the 'optimal costs' for aspects of the project. It would enable them to tailor their bid accordingly and hinder the prospect of them providing the most cost effective package for the taxpayer. This is not in the interests of the project, the public purse or the wider public.
130. Further, the Council must be able to negotiate freely with landowners as part of the Compulsory Purchase Order process.
131. Whilst it is understandable that the local and wider communities are interested in the way taxpayer's money is spent on a project like this, the Commissioner does not consider that the public interest in the withheld information itself is sufficient to outweigh the factors which favour the exception being maintained.
132. The Commissioner's decision is that the balance of the public interests in this case favours the exception at Regulation 12(5)(e) being maintained, and that the Council was therefore correct to withhold the information.
133. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the Regulation 12 exceptions as stated previously.
134. As covered above, in this case the Commissioner's view is that the balance of the public interests favours the maintenance of the exception, rather than being equally balanced.
135. This means that the Commissioner's decision, whilst informed by the presumption provided for in Regulation 12(2), is that the exception provided by Regulation 12(5)(e) was applied correctly.
136. As the Commissioner has found Regulation 12(5)(e) was correctly applied by the Council to the information listed above, he has not found it necessary to consider whether Regulation 12(5)(f) is engaged where it was simultaneously cited for some parts of this information.

137. The Commissioner has next considered the Council's application of Regulation 12(5)(f) to the remaining parts of the withheld information.

Regulation 12(5)(f) – interests of the person who provided the information

138. As has been stated, the Council applied more than one exception to some parts of the withheld information such that the Commissioner has already considered some of that information under Regulations 12(4)(d) and 12(5)(e). The remaining information withheld under Regulation 12(5)(f) consists of:

- All correspondence from the owners' solicitors (Smith Partnership) to the Council or its solicitors and the owners or their solicitor have not consented to the disclosure (pages 31, 33, 58-59, 68, 69-70, 94, 128-130, 135, 137-138, 153, and 217-218).
- Pages 127 to 130 (repeated at 135 to 138 and 176 to 180) which are communications between the airfield owner's solicitor and the Council's solicitor about the MoU.
- A confidential e-mail from a third party to the Council (page 188).

139. The Council has requested that the specific description of some of the information withheld under this exception is not reproduced in this notice and explained why; the Commissioner has respected the Council's position.

140. Regulation 12(5)(f) 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-

(f) the interests of the person who provided the information where that person—

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure...".

141. The Commissioner's published guidance¹¹ on this exception explains that its purpose is to protect the voluntary supply to public authorities of information that might not otherwise be made available to them. In such circumstances a public authority may refuse disclosure when it would adversely affect the interests of the information provider. The wording of the exception makes it clear that the adverse effect has to be to the person or organisation providing the information rather than to the public authority that holds it.

142. The guidance also explains that, with regard to engaging the exception, - and as recognised by the First-tier Tribunal (Information Rights) in the case of *John Kuschnir v Information Commissioner and Shropshire Council* (EA/2011/0273)¹² - a four stage test has to be considered, namely:

- Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
- Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
- Has the person supplying the information consented to its disclosure?
- Would disclosure adversely affect the interests of the person who provided the information to the public authority?

143. Where the four stages of the test are satisfied, the exception will be engaged. The public interest test will then determine whether or not the information should be disclosed.

The Council's position

144. When asked to justify its reliance on Regulation 12(5)(f), the Council explained that:

¹¹ https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

¹²

https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschnir%20decision.pdf

“The Council consider that LIL’s interests in this case are similar to those mentioned above for EIR 12(4)(d). In short, the Council consider there to be a reasonable interest in protecting the space for LIL’s representatives to speak openly and freely to SDC’s representatives about matters relating to the creation of the MoU without concern that such private discussions would later be disclosed into the public domain and potentially used against them (for instance, via using it to support a public campaign against the company’s reputation, compromising their position in their own contract negotiations with other organisations etc.). To disclose such information into the public domain would likely create a chilling effect on communications, which in turn would likely result in impeding the effectiveness of any present or future agreement between parties - as both parties will be less-willing to speak honestly and frankly without concern that such discussions would later be disclosed into the public domain and potentially then used against them.

Further, as many of the discussions collated relating to the MoU are not final, the Council consider that disclosure into the public domain could lead LIL into needlessly defending positions and suggestions which were never actioned as part of the agreed MoU.”

145. Additionally, the Council provided specific submissions which are set out below.

Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?

146. The Council advised that the information was provided freely in the context of legal discussions about proposals for Wellesbourne Airfield in the spirit of negotiation. It said that Smith Partnership, on behalf of the landowners, were adamant that the Council’s discussions with them would be conducted in confidence and the Council had given them this assurance. The Council signed a confidentiality agreement with LIL (the landowners) in Jul 2019 in relation to specified information which the Commissioner has been requested not to reproduce here.

Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?

147. The Council has confirmed that the information was not supplied in circumstances where it would be entitled to disclose it apart from under the EIR.

Has the person supplying the information consented to its disclosure?

148. The Council said it has not sought consent from the landowners' solicitors. However, it has stated that it considers consent unlikely to be forthcoming considering the owners' strained relationship with the complainant, the ongoing legal action and the fact that the owners solicitor expressly required the discussions should remain confidential leading to the signing of the confidentiality agreement.
149. The Commissioner is mindful of paragraph 28 of his Regulation 12(5)(f) guidance which states:

"Whilst consultation with the person who provided the information is encouraged in the majority of cases, the Commissioner recognises that there will be instances where, due to its knowledge of the particular circumstances of a case and its overall experience of the context in which the information was provided, the public authority will be able to explain the harm to the provider without such consultation."

Would disclosure adversely affect the interests of the person who provided the information to the public authority?

150. In considering whether there would be an adverse effect on the interests of the person who voluntarily provided the information, the Council needs to identify harm to the person's interests which is real, actual and of substance, and to explain why disclosure would, on the balance of probabilities, directly cause harm.
151. There is no requirement for the adverse effect to be significant – the extent of the adverse effect would be reflected in the strength of arguments when considering the public interest test (ie once the application of the exception has been established). However, a public authority must be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur. The need to point to specific harm and to explain why it is more probable than not that it would occur reflects the fact that this is a higher test than 'might adversely affect', which is why it requires a greater degree of certainty. It also means that it is not sufficient for a public authority to speculate on possible harm to a third party's interests.
152. In this case, the information comprises emails sent by a solicitor on behalf of his clients to the Council.
153. The Council considers that the adverse effect on the clients is relevant here. It said that disclosure of the information would adversely affect the interests of the landowners, whose solicitor provided this

information. It explained that the information was provided in the context of confidential, without prejudice legal discussions about the future of Wellesbourne Airfield and that there would have been no expectation that such communications between solicitors would be publicly available. Further, the communications reflect confidential instructions given by a client to their solicitor that they would not expect to be made public.

154. The Commissioner is mindful that the complainant has advised the Council that he is currently engaged in litigation with the owners of the airfield. Whilst he notes that the EIR are purpose and requester blind, he also accepts that the fact of the ongoing litigation increases the likelihood of the stated adverse effect occurring.

155. Having had regard to the context in which the Council holds the information, the Commissioner recognises that the information represents correspondence between solicitors in relation to the airfield.

156. In such a scenario, the Commissioner recognises the importance of the solicitor's right to correspond with the Council on behalf of their clients with the expectation of confidence. The disclosure of the information would have a significant adverse effect on their ability to exercise that right, not only through the public disclosure of correspondence that they clearly considered to be confidential, but also the chilling effect on their willingness to correspond with the Council in the future.

157. Having considered the above, the Commissioner is satisfied that the disclosure of the information would adversely affect the interests of the solicitor's clients. He has therefore concluded that the Council was correct to apply the exception provided by Regulation 12(5)(f).

158. He will next consider the public interest test for Regulation 12(5)(f).

Balance of the public interest: Regulation 12(5)(f)

159. Some weight must always be attached to the general principles of accountability and transparency. These in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.

160. In the circumstances of this case, the Commissioner recognises that disclosure of the information would provide public transparency about the correspondence that solicitors are submitting to the Council in their role of acting on behalf of their clients, particularly in the context of the future of Wellesbourne Airfield and the associated MoU. His consideration of the public interest test has been informed by the EIR requirements set out in paragraphs 84 and 87 of this notice.

161. However, the Commissioner considers there is very little public interest in the release of communications between solicitors which led to the formation of the MoU. He accepts the Council's view that what is more likely to be in the public interest is the MoU itself, which is publicly available. He also notes that the complainant is likely to have a personal interest in seeking disclosure of this information given the ongoing litigation; however, the disclosure of such documents in connection with such legal proceedings will be determined by rules of the courts.
162. The Commissioner recognises that the disclosure of the information would undermine the expectation of confidence held by the solicitor's clients about their correspondence with the Council.
163. There is a clear and compelling public interest that legal representatives are able to correspond with the Council in the expectation of confidence. Should this not be so, this would inhibit the solicitors and their clients from corresponding candidly with the Council about their concerns, and in turn, damage said representatives' ability to receive such correspondence, and further, to raise it with public authorities.
164. The Commissioner has concluded that the balance of the public interest lies in maintaining the exception at Regulation 12(5)(f) of the EIR.

Other matters

165. The Commissioner's analysis of the withheld information has been hampered by the Council's failure to provide a marked up copy of the exceptions applied despite being requested to do so (see also paragraph 60). Instead the Council has submitted various emails listing the relevant page numbers which in some instances, the Commissioner has found to be contradictory. In addition, this approach taken by the Council has resulted in a number of further enquiry emails from the Commissioner to ascertain the Council's intended position.
166. The Commissioner would remind the Council of the requirement to fully consider any withheld information and to mark it up accordingly when responding to EIR and FOIA requests.

Right of appeal

167. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

168. 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.

169. 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

Laura Tomkinson
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