

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

### **Decision notice**

**Date:** 7 February 2024

**Public Authority:** London Borough of Islington

**Address:** Islington Town Hall  
Upper Street  
London N1 2UD

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

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1. The requestor asked for information relating to the proposed women's building to be constructed as part of the redevelopment of Holloway Prison.
2. The London Borough of Islington ("the Council") disclosed some information to the requestor but relied on regulation 12(4)(e) (internal communications), 12(5)(e) (commercially confidential), regulation 12(5)(f) (impact on provider) and regulation 13 (personal information) to withhold other parts of the requested information.
3. The Commissioner's decision is that:
  - The Council incorrectly applied regulation 12(4)(e) to some of the withheld information.
  - The Council incorrectly applied regulation 12(5)(e) to some of the withheld information.
  - The Council incorrectly applied regulation 12(5)(f) to some of the withheld information.
  - The Council correctly applied regulation 13 to some of the withheld information.
  - On the balance of probabilities, the Council holds further information in scope of the request.

4. Further, the Commissioner finds that the Council breached regulation 11(4) of the EIR as it did not fully provide its internal review outcome within 40 working days; and breached regulation 5(2) in respect of an emails disclosed to the requestor late, during the Commissioner's investigation.
5. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
  - Disclose the emails dated 10 and 18 September 2020 listed under number 11 on the spreadsheet provided by the Council on 23 January 2024 (the "Council Spreadsheet")
  - Disclose the emails under number 2 on the Council Spreadsheet, except for the email dated 23 March 2023.
  - Disclose the email dated 20 March 2023 contained in the emails numbered 4 in the Council Spreadsheet.
  - Disclose the email dated 19 February 2023 contained in the emails numbered 6 in the Council Spreadsheet.
  - Carry out further searches for information in scope of the request.
6. 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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7. On 12 April 2023, the requestor wrote to the Council and requested information in the following terms:

"Please provide all information including but not limited to emails, communications, reports and correspondence, which concern:

1. A feasibility study for the proposed Women's Building or Women's Centre to be constructed on the site of Holloway Prison for Women (aka HMP Holloway), including any mention of a steering group or steering committee for the study, and any mention of a donation or funding for the study, since 1 August 2020.

2. The Women's Building Joint Steering Group or steering committee since 1 September 2022."

8. The Council responded on 12 May 2023, refusing the request as manifestly unreasonable (regulation 12(4)(b)).
9. On 12 May 2023, the requestor requested an internal review.
10. Following an internal review, the Council wrote to the requestor on 12 June 2023. It stated that:

"I have now reviewed the response and I uphold your complaint. Your request was misconstrued and is narrower than the parameters as stated in the response, and for what was used as the basis for applying the exception. In this case the threshold was not met in order for Regulation 12(4)b to be applied.

We have written to the service area involved and asked them to reissue you with a new response. This will be provided to you within two weeks of the date of this email."

11. 11 July 2023, the requestor wrote to the Commissioner as they had not received the promised response.
12. Following the Commissioner's intervention, on 29 August 2023, the Council provided the requestor with some information and an internal review response citing regulation 12(4)(e) (internal communications), 12(5)(e) (commercially confidential), regulation 12(5)(f) (impact on provider) and regulation 13 (personal information) to withhold other parts of the requested information.
13. On 23 November 2023 the Council provided the Commissioner with information which was being withheld pursuant to regulation 13.
14. Following the service of an Information Notice on 10 January 2024, on 23 January 2024 the Council provided the Commissioner with further withheld information and the Council Spreadsheet indicating which exception applied to each piece of information.

## Background

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15. The Council's adopted Supplementary Planning Documents ("SPD")<sup>1</sup> for the redevelopment of the Holloway Prison site included a requirement to provide a local women's centre.
16. Since summer 2020, a draft development brief in respect of the proposed women's centre has been consulted on with various groups associated with the criminal justice system and with experience of helping women with ties to that system. Local community and resident groups (including Community Plan for Holloway ("CP4H")) have also been consulted. The draft development brief was uploaded to the Council's website in June 2020.<sup>2</sup>
17. A women's building development brief production and consultation summary was published on the Council's website in July 2021.<sup>3</sup>
18. The requestor was a member of the CP4H Women's Building Working Group during 2022.
19. In April 2022, the Council approved the planning application made by Peabody Construction Limited ("Peabody") for the redevelopment of the site, subject to various conditions.<sup>4</sup>
20. A Women's Building Joint Steering Group was set up to allow the Council and Peabody to work together alongside suitably qualified experts to provide recommendations in respect of the women's building Feasibility and Commissioning Plan scope and programme. The Council has two nominated members in this group but is not responsible for taking minutes of the meetings, which is the responsibility of Peabody. CP4H was not included in the Women's Building Joint Steering Group.
21. As part of the Feasibility and Commissioning Plan, a feasibility study was commissioned in March 2023 to be carried out by Inner Circle. The

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<sup>1</sup> [A plan for the future of the Holloway Prison site \(islington.gov.uk\)](https://www.islington.gov.uk/development/development-planning/development-planning-reports/a-plan-for-the-future-of-the-holloway-prison-site)

<sup>2</sup> [Islington - Design Review Panel](#)

<sup>3</sup> [Islington - Design Review Panel](#)

<sup>4</sup> [P2021.3273.FUL Report Upload \(islington.gov.uk\)Executive Report Pre-tender \(islington.gov.uk\)](#)

Council has indicated that Peabody commissioned the feasibility study. At the date of the request, the feasibility study had not been completed.

## **Scope of the case**

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22. The requestor complained to the Commissioner on 11 July 2023 about the handling of their information request.
23. Following the intervention of the Commissioner, the Council agreed to speak to the requestor in an attempt to resolve the matter informally and disclosed further information to the requestor as a result.
24. However, the requestor was not satisfied with the documentation disclosed and requested a decision from the Commissioner on whether the exceptions cited had been correctly applied by the Council to the withheld information. As a result of their previous involvement with CP4H, the requestor also believes that the Council holds further information in scope of the request.
25. In responding to the requestor and the Commissioner, the Council provided copies of some information which post-dated the request for information dated 12 April 2023. The Commissioner does not consider that such information falls within the scope of the request, as it did not exist at the time the request for information was made. The Commissioner will therefore not be considering the application of the exceptions in respect of information which post-dates 12 April 2023.
26. The Commissioner considers that the scope of his investigation is to consider whether the Council is entitled to rely on regulation 12(4)(e) (internal communications), 12(5)(e) (commercially confidential), regulation 12(5)(f) (impact on provider) and regulation 13 (personal information) to withhold parts of the requested information.
27. The Commissioner will also decide whether the Council holds further correspondence in scope of the request and will consider any procedural matters he needs to address.

## **Reasons for decision**

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### **Regulation 12(4)(e) – Internal Communications**

28. Regulation 12(4)(e) of the EIR states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in

order to engage the exception. Rather, as long as the requested information constitutes an internal communication then the exception will be engaged.

29. The Commissioner has published guidance<sup>5</sup> on regulation 12(4)(e) which includes a description of the types of information that may be classified as 'internal communications'.
30. In this case, some of the withheld information, namely emails 6, 9, 11, 12, 13, 14, 16, 17 and 18 on the Council Spreadsheet ("Information A") consists of internal Council emails between Council officers who were considering a number of matters in relation to the planned women's building on the former Holloway Prison site.
31. In its submissions to the Commissioner, the Council stated that Information A consisted of internal Council emails only.
32. However, the Commissioner notes that the emails numbered 11 on the spreadsheet provided by the Council were sent externally and that therefore the Council has incorrectly applied regulation 12(4)(e) to those emails dated 10 and 18 September 2020.
33. Aside from this, the Commissioner is not aware of any evidence to suggest that the rest of Information A has been provided to any external recipients.
34. The Commissioner is therefore satisfied that the majority of Information A (except for the emails dated 10 and 18 September 2020 noted above) falls within the definition of internal communications and consequently he finds that the exception is engaged for the majority of Information A. The Commissioner will now go on to consider the public interest test for the majority of Information A.
35. In respect of the emails dated 10 and 18 September 2020 listed as item 11 on the Council's spreadsheet, the Commissioner requires the Council to disclose this information.

### **Public interest test**

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<sup>5</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/regulation-12-4-e-internal-communications/>

36. The Council acknowledged that there is a public interest in promoting the "understanding and participation in public debate of current issues" and "accountability and transparency in decision-making and functions" but argued that the public interest in favour of withholding the internal communications outweighed the public interest in favour of disclosure because internal communications within a local authority are considered to be "a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction" and that the impact of disclosure would be the "inhibition of frank and honest debate".
37. The Council recognised that there was a public interest in the development of the former Holloway Prison site, but argued that this had been met by the detailed consultation process and ongoing planning process, all of which is, or will be, published on the Council's website in due course.
38. The requestor is concerned that the Council did not carry out sufficient due diligence prior to the commissioning of the feasibility study and is not being open about the plans for the proposed women's building on the former Holloway Prison site. The requestor believes that disclosure of the withheld information is necessary for the public to be assured that the Council has not mismanaged the project.
39. The Commissioner accepts that there is a strong public interest in ensuring there is transparency about how public authorities make decisions. The Commissioner also recognises that, as a local resident, the requestor has a strong personal interest in the development of the former Holloway Prison site.
40. However, the Commissioner recognises that public authorities need "a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction". The need for a safe space is strongest when the issue is still live.
41. At the time of the request, the feasibility study had only just been commissioned and had not yet been carried out. The Commissioner therefore considers that the issue was live at the time of the request. He therefore accepts that, in the circumstances of this case, at the time of the request, the Council needed a safe space to discuss the feasibility study proposals.
42. In this case, it is clear that there are public concerns about the development of the women's building on the former Holloway Prison site and the feasibility study is an important part of addressing some of those concerns. The Commissioner notes that the findings of the feasibility study will be published once the study has been completed.

The question therefore is whether the disclosure of the discussions leading up to the commissioning of the report would add to the public's understanding of how the decision was reached. And, if so, whether this public interest outweighs the need for a safe space for public authorities to develop ideas and debate live issues.

43. In reaching a decision in this case the Commissioner has also taken into account the fact that the Council has disclosed a significant amount of information relating to the request. He considers that this goes some way to satisfying the public interest in disclosure.
44. Considering all the circumstance of this case, whilst he acknowledges that the subject matter associated with the request has been the subject of local and media interest, the Commissioner's decision is that the public interest in maintaining the exception at regulation 12(4)(e) outweighs that in disclosure and the Council is therefore entitled to withhold the majority of Information A under regulation 12(4)(e).
45. 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).

46. In this case, the Commissioner's view is that the balance of the public interest 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)(e) has been applied correctly to the majority of Information A except for the emails numbered 11 on the Council's Spreadsheet (as mentioned above).

### **Regulation 12(5)(e) – Commercial confidentiality of environmental information**

47. In this case, some of the requested information, namely emails 1, 2, 3, 4, 5, 7 and 8 on the Council's Spreadsheet ("Information B") is being withheld by the Council because of its commercial confidentiality.
48. This reasoning covers whether the council was correct to withhold Information B under Regulation 12(5)(e) of the EIR.



49. Information can be withheld under Regulation 12(5)(e) if disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
50. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of Regulation 12(5)(e) of the EIR, the authority must demonstrate that:
  - the information is commercial or industrial in nature;
  - the information is subject to confidentiality provided by law;
  - the confidentiality provided is required to protect a legitimate economic interest; and
  - that the confidentiality would be adversely affected by disclosure.
51. Regulation 12(5)(e) is also subject to a public interest test if the exception is engaged.
52. First, whilst the Commissioner accepts that some of Information B is commercial in nature (namely the email dated 6 April 2023 listed as email 1 on the Council Spreadsheet), the Commissioner finds that the Council has not explained why other parts of Information B are commercial in nature and, therefore, the Commissioner cannot accept all of Information B as such.
53. In particular, with the exception of the email dated 23 March 2023 (which is also included in the emails numbered 3 on the Council Spreadsheet), the majority of the emails numbered 2 discuss the requirements of the section 106 agreement and the progress being made with those requirements, one of which is the feasibility study. Looked at individually, the Council has not explained why all of these emails are commercial in nature and, therefore, the Commissioner's view is that he cannot accept the application of regulation 12(5)(e) to all of the emails numbered 2 on the Council Spreadsheet.
54. The emails numbered 3 on the Council Spreadsheet discuss the appointment of a fundraiser for the project and it is the Commissioner's view that the emails dated 23 March 2023 are commercial in nature.
55. The emails numbered 4 on the Council Spreadsheet contain some commercial information but the Council has not explained why the email dated 20 March 2023 would be classed as commercial information and therefore the Commissioner cannot accept it as such.

56. The emails numbered 5 are a repeat of some of the emails numbered 4 and appear to the Commissioner to be commercial in nature.
57. Having considered Information B, the Commissioner is satisfied that email numbered 1, email dated 23 March 2023 in emails numbered 2, emails numbered 3, emails numbered 4 (except emails dated 20 March 2023) and emails numbered 5 of Information B are commercial in nature. However the Council has not explained why the emails numbered 2 and 4 on the Council Spreadsheet are commercial in nature and therefore the Commissioner cannot accept them as such.
58. In its internal review, the Council stated that Information B is not trivial and is not otherwise accessible and therefore has the necessary quality of confidence.
59. The Council contended that Information B includes information "which could potentially be used by competitors to their own advantage, and to the disadvantage of the contractor/suppliers/bidders. Elements within the information would disclose a package of information brought together using the skills and experience of the contractor over time, which would be advantageous to other businesses in the area."
60. In its submissions to the Commissioner, the Council contended that disclosure of Information B "would be likely to cause actual prejudice to the commercial interests of the third party concerned in subsequent negotiations and competitive procurement exercises with other potential partners. The council does not have permission to share this from Peabody."
61. Having considered Information B, the Commissioner is satisfied that the email numbered 1, the email dated 23 March 2023 in emails numbered 2, emails numbered 3, emails numbered 4 (except emails dated 20 March 2023) and emails numbered 5 of Information B (the "Commercial Information") are subject to the common duty of confidentiality i.e., the information is of importance to the contractor, it is not in the public domain, it was provided in confidence and the contractor would not expect the information to be disclosed to the public.
62. Third, the Commissioner has considered whether the confidentiality is provided to protect a legitimate economic interest in respect of the Commercial Information.
63. As regards the protection of a legitimate economic interest in respect of the Commercial Information, in its internal review, the Council has explained that:  
  
"the contract/bid contains information provided by the contractor/bidder as to when and how it intends to carry out the

contract and provide the specified services. Some of this information is proprietary in nature and provides a detailed overview of the way the contractor approaches such contracts. The contractor states that disclosure could provide information on its methods of business which may be of advantage to its direct competitors, thereby negating its ability to develop a commercial advantage when tendering for other contracts. We accept that the legitimate economic interests of the contractor could be adversely affected by the disclosure of this information. There is an agreement that the confidential information agreed in the contract would be confidential to both parties (in that each party agreed to hold the information in confidence and could not therefore disclose it as each would owe the other a duty of confidence to protect their respective economic interests). Therefore, we are able to consider its own economic interests in addition to those of the contractor. The Council feels that confidentiality is required in order to protect its position as purchaser. Disclosing this information would be likely to affect the ability to negotiate best value and to effectively procure services in the future.”

“Detailed information on the methodology/equipment/systems used by the contractor/bidder could be studied and adopted by competitors of the suppliers of the equipment/service/system. Disclosure would be likely to disadvantage the contractor’s/bidder(s)’ ability to tender for other public or private commercial contracts if competitors to the methodology/system/manufacturers of the equipment use this information for their own benefits. Many elements of the information include details on commercially sensitive systems and processes developed by third parties – e.g. they may be the trade secrets of third parties.”

64. The Commissioner is satisfied that the confidentiality provided is required to protect a legitimate economic interest.
65. Finally, the Commissioner is satisfied that the confidentiality would inevitably be affected if the public authority disclosed the Commercial Information.
66. Since the four tests have been satisfied, the Commissioner finds that regulation 12(5)(e) of the EIR is engaged as disclosing the Commercial Information would adversely affect the Council’s and the contractor’s commercial interests. He has therefore gone on to consider the associated public interest test.

### **Public interest test**

#### **Public interest in disclosure**

67. The Council confirmed that it was very much in favour of openness and transparency, and felt that it had demonstrated by providing the requestor with a good deal of information to date, including information which was out of scope of the request.
68. The Council recognised that there was a public interest in the development of the former Holloway Prison site, but that this had been met by the detailed consultation process and ongoing planning process, all of which is, or will be, published on the Council's website in due course.
69. The complainant is concerned that the Council did not carry out sufficient due diligence prior to the commissioning of the feasibility study and that disclosure is necessary for the public to be assured that the Council has not mismanaged the project.
70. The Commissioner recognises that the public needs to be assured that the public authority manages public funds in a proper manner. Disclosure of the Commercial Information would enable the public to better scrutinise how the feasibility study was commissioned, but only in a limited way.

### **Public interest in maintaining the exception**

71. Regarding the public interest in withholding the Commercial Information, the public authority's argument is the position described at paragraph 63 of this notice. The Commissioner considers that this does not actually relate to the Commercial Information and appears to be a generic public interest argument.
72. However, the Commissioner is satisfied that there is a public interest in the public authority being able to achieve the best value for money that it can, and in there being a pool of well-performing organisations which can work on projects which involve the Council.
73. Furthermore, there is no evidence available to the Commissioner that the feasibility study has been handled incorrectly by the Council, or has not been subject to appropriate transparency.

### **Balance of public interest**

74. The Commissioner acknowledges there is always some public interest in disclosure, for example, to promote transparency, accountability and greater public awareness and understanding of decisions involving planning permission.

75. He acknowledges the requestor's concerns about the way in which the proposed women's building as part of the Holloway Prison development has been handled.
76. However, he considers that significant weight should be given to the public interest in protecting the commercial confidentiality of the public authority's negotiations.
77. This means that the Commissioner's decision, whilst informed by the "presumption in favour of disclosure" under the EIR (Regulation 12(2)), is that the exception provided by Regulation 12(5)(e) was applied correctly, but only to the Commercial Information in Information B.

**Regulation 12(5)(f) – detriment to the confider**

78. Some of the requested information is being withheld by the Council because of the detriment to the provider if disclosed, namely, emails 6, 8, 10 and 15 on the Council Spreadsheet ("Information C").
79. The Commissioner notes that the requestor was a recipient of email 10 on the Council's spreadsheet at the time it was sent on 3 September 2020 and therefore regulation 12(5)(f) cannot apply to email number 10 as the requestor has already received it.
80. The Commissioner also notes that email 15 is dated 14 July 2023 and is therefore out of scope of this request.
81. Therefore the only relevant emails are those numbered 6 and 8 on the Council Spreadsheet.
82. In respect of email numbered 6, the email to which regulation 12(5)(f) had been applied is an email between two third parties dated 19 February 2023.
83. In respect of email numbered 8, the emails dated 6, 8 and 13 March 2023 are between the Council and Peabody.
84. Regulation 12(5)(f) of the EIR states that: "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”

85. As with all the Regulation 12(5) exceptions, the Commissioner considers that, in order to demonstrate that disclosure “would adversely affect” a confider’s interests, a public authority must demonstrate that the adverse effect is more likely than not to occur.
86. The Council argued that “the person was not under, and could not be put under, any obligation to supply the information; supplied it expecting that it would not be disclosed to a third party and has not agreed to the information being supplied.”
87. In respect of the email dated 19 February 2023 between two third parties , the Council has provided no explanation as to how disclosure would “adversely affect” the third parties in question or whether the third parties have been asked for consent to disclosure. The Council therefore needs to disclose this email.
88. In respect of the emails dated 6, 8 and 13 March 2023 between the Council and Peabody, the Council has explained that “any information provided to the Local Authority is made available in good faith, for private discussion and may contain sensitive information. There is no obligation on Peabody to provide the information.”
89. The Council further argued that “it is considered in the public’s interest to allow the council to continue to engage in private discussions with third parties and residents to steer them towards outcomes that provide the greatest benefit to the borough’s residents. This outweighs the public benefit of making personal information publicly available. Thereby losing the trust and confidence of residents, preventing publicly beneficial future discussions.”
90. For broadly the same reasons as in relation to Regulation 12(5)(e), the Commissioner considers that disclosure of emails dated 6, 8 and 13 March 2023 between the Council and Peabody would adversely affect the provider of the information – therefore Regulation 12(5)(f) applies to those emails.

## **Public interest test**

### **Public interest in disclosure**

91. The Council confirmed that it was very much in favour of openness and transparency, and felt that it had demonstrated by providing the

complainant with a good deal of information to date, including information which was out of scope of the request.

92. The Council recognised that there was a public interest in the development of the former Holloway Prison site, but that this had been met by the detailed consultation process and ongoing planning process, all of which is, or will be, published on the Council's website in due course.
93. The Commissioner recognises that the public needs to be assured that the public authority manages public funds in a proper manner.

### **Public interest in maintaining the exception**

94. Regarding the public interest in withholding the Commercial Information, the Council's argument is the position described at paragraph 89 of this notice.
95. The Commissioner is satisfied that there is a public interest in the public authority being engaged in private discussions to achieve the best value and outcomes for its residents.

### **Balance of public interest**

96. The Commissioner acknowledges there is always some public interest in disclosure, for example, to promote transparency, accountability and greater public awareness and understanding of decisions involving planning permission.
97. He acknowledges the requestor's concerns about the way in which the proposed women's building as part of the Holloway Prison development has been handled.
98. However, he considers that significant weight should be given to the public interest in protecting the ability of the Council to engage in private discussions.
99. This means that the Commissioner's decision whilst informed by the "presumption in favour of disclosure" under the EIR (Regulation 12(2)), is that the exception provided by Regulation 12(5)(f) was applied correctly but only the emails dated 6, 8 and 13 March 2023 between the Council and Peabody.

### **Regulation 13 - personal data**

100. Some of the requested information is being withheld by the Council because it is personal data, this includes emails numbered 1, 5, 8, 11 and 15 on the Council Spreadsheet and also a number of other emails

not noted on the Council's spreadsheet, redacted copies of which have been provided to the requestor ("Information D").

101. The Commissioner notes that email number 15 is dated 14 July 2023 and is therefore out of scope.
102. The Commissioner notes the requestor's remarks that some of Information D has been disclosed by one of the Council's representatives on the joint steering group for the women's building and that therefore the Council's use of Regulation 13 is inconsistent with that disclosure. However, it is not clear whether that disclosure was made pursuant to an EIR request or on a business as usual basis and, if made on the latter basis, the EIR exceptions would not apply.
103. 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.
104. In this case the relevant condition is contained in regulation 13(2A)(a)<sup>6</sup>. This applies where the disclosure of the information to any member of 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 UK General Data Protection Regulation ('UK GDPR').
105. The first step for the Commissioner is to determine whether Information D constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
106. Secondly, and only if the Commissioner is satisfied that Information D is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

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

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

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<sup>6</sup> As amended by Schedule 19 Paragraph 307(3) DPA 2018.



108. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
109. 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.
110. 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.
111. The Commissioner is satisfied, in the circumstances of this case, that Information D relates to third parties, specifically, the Council has redacted the names of individuals from various emails which have been disclosed to the complainant.
112. The Commissioner is satisfied that this information both relates to and identifies the individuals concerned. Information D therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
113. 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.
114. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

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

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

116. 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.
117. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the UK GDPR**

118. Article 6(1) of the UK 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.

119. 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>7</sup>.*

120. In considering the application of Article 6(1)(f) of the UK 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.

121. 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**

122. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that a wide range of interests may be legitimate interests. The interests may

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<sup>7</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 and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".*

be public or personal, broad, or narrow, compelling, or trivial. However, the narrower and less compelling the interest, the less likely it is that such an interest will outweigh the rights of the data subjects.

123. The Commissioner accepts that there is a legitimate interest in the transparency of the activities of public authorities and public understanding of an environmental issue and has therefore gone on to consider the necessity test.

### **Is disclosure necessary?**

124. '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 EIR must therefore be the least intrusive means of achieving the legitimate aim in question.

125. It is the Council's view that the redacted information already provided to the complainant addresses the legitimate interest identified.

126. The Commissioner has decided in this case that disclosure of the withheld information to the world at large is not necessary to meet the legitimate interest in disclosure. The Commissioner understands the requestor has concerns about the redevelopment of Holloway Prison. However, the Council's decisions have been scrutinised, and will be subject to additional scrutiny via the planning process and further public comment.

127. Therefore, the Commissioner has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing, and it is unlawful. It therefore does not meet the requirements of principle (a).

128. The Commissioner has therefore decided that the Council was entitled to withhold Information D under regulation 13(1), by way of regulation 13(2A)(a).

### **Is any further information held?**

129. The requestor has raised a number of points during the Commissioner's investigation and believes that the Council should hold further information in scope of the request.

130. The requestor said: "... the material provided by the Council...features several glaring gaps in time, including the entire year of 2022. Material related to the feasibility study is provided from 30 July 2020 to August 2021 followed by a 19-month gap ending on 1 February 2023. I can

confirm from my own experience that the material is incomplete. While a member of the CP4H Womens Building Working Group during 2022, I was cc'd or forwarded several emails between the Council and CP4H that mention the feasibility study."

131. The requestor further said: "The same is true regarding requested material about the Steering Group. A redacted email on 20 March from Peabody Housing contains a meeting agenda in which the consultancy Inner Circle is scheduled to present how it will carry out the feasibility study. No information is included about what must have occurred previously such as setting up the Steering Group and the tender (if any) under which Inner Circle was hired."
132. During the Commissioner's investigation a number of key questions were raised about the searches carried out by the Council in order to locate all of the information in scope of the request. The Council confirmed that all relevant information was held electronically and that all officers who had been involved with the Holloway Prison project carried out a search of their mailboxes and folders. The searches that were carried out were on council equipment and various terms were used for searching, including "Women's Building"/"Holloway Prison Site"/"Women's Building Feasibility Study". All information was then provided to the information governance team for review.
133. The Council explained that a former employee's emails were not initially checked as that member of staff had left the Council before the request was received but that access was subsequently obtained to their email account and emails relating to the former Holloway Prison site were extracted for consideration by the information governance team.
134. As noted above, the Council confirmed that appropriate searches and search terms were used in order to locate relevant information in scope of the request.
135. There is no requirement for the Council to create information in order to answer the requester's questions, their obligation is to supply information they held at the time of the request. The Commissioner notes that the Council contacted Peabody to obtain copies of documents for the requestor, which is not required under the EIR. Furthermore, the Council provided the requestor with documents which post-dated the date of the request, again, not required under the EIR.
136. However, the Commissioner notes that the withheld information refers to a Council approval process being required for the commissioning of the feasibility study in March 2023. No documentation relating to this approval has been located by the Council but there is email evidence that it should exist.

137. From the information provided by the Council to the requestor and the Commissioner, the Commissioner is not satisfied that, on the balance of probabilities, the Council holds no further information in scope of the request.

### **Procedural matters**

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138. Regulation 11(4) of the EIR (representations and reconsideration) provides that a public authority shall notify a requester of the outcome of its internal review as soon as possible and no later than 40 working days after receiving an internal review request.

139. In this case, the complainant requested an internal review on 12 May 2023 and on 12 June 2023 the Council stated that:

"I have now reviewed the response and I uphold your complaint. Your request was misconstrued and is narrower than the parameters as stated in the response, and for what was used as the basis for applying the exception. In this case the threshold was not met in order for Regulation 12(4)b to be applied.

We have written to the service area involved and asked them to reissue you with a new response. This will be provided to you within two weeks of the date of this email."

140. However, it was not until 29 August 2023, and only following the Commissioner's intervention, that the Council provided the requestor with some information and a full internal review response citing regulation 12(4)(e) (internal communications).

141. The Commissioner therefore finds a breach of regulation 11(4) of the EIR.

142. He also finds a breach of regulation 5(2) in respect of the additional information disclosed by the Council on 29 August 2023 as this was disclosed more than 20 working days after receiving the request.

### **Other matters**

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143. The Council has mishandled this request from the outset. The Council's arguments in respect of the EIR exceptions are poor and the Commissioner is disappointed at the time it has taken to respond to the Commissioner's investigation and the inadequate submissions provided.

## Right of appeal

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

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

145. 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.

146. 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 .....**

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