

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

Date: 14 September 2017

Public Authority: Welwyn Hatfield Borough Council
Address: The Campus
Welwyn Garden City
Hertfordshire
AL8 6AE

Decision (including any steps ordered)

1. The complainant has requested information held by Welwyn Hatfield Borough Council (the council) on the future of the Estate Management Scheme (EMS). The council provided some information but withheld the remainder relying on regulations 12(4)(d), 12(4)(e), 12(5)(b), 13 and 5(3).
2. The Commissioner's decision is that the council has correctly identified all the information held within the scope of the request, and has therefore complied with regulation 5(1). She has also decided that the council has correctly applied the exceptions at regulations 12(4)(d), 12(5)(b), 13 and 5(3). However, with regard to the application of regulation 12(4)(e), the Commissioner's decision is that for the most part, the council has applied the exception correctly, but there are a small number of documents to which regulation 12(4)(e) has been claimed and to which it does not apply, and the council has therefore breached the EIR in respect of these.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information as listed in the annex.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 6 October 2016 the complainant made the following request for information:

"I would be grateful if you would supply a list of all meetings since 1 September 2015, whether private or public, minuted or not, where the future of the Estate Management Scheme was discussed. This request is to include dates, locations and who attended.

Please also supply all minutes, notes (formal and informal), presentations, emails, letters, and any other documentation, that relate to the future of the Estates Management Scheme, again since 1 September 2015."

6. The council acknowledged the request on 11 October 2016, and on 27 October 2016 it advised that it was relying on regulation 7 to extend the time for a response.
7. On 1 December 2016 the council responded. It provided the complainant with information in response to the first part of the request; the dates, locations and attendees of meetings. However, in respect to the second part of the request it provided some information, but withheld the remainder under regulation 12(4)(e) (internal communications), 12(4)(d) (unfinished documents) and 12(5)(b) (course of justice).
8. The complainant requested an internal review on 5 December 2016. The council provided the outcome of this on 23 December 2016. It disclosed some further information but continued to withhold the remainder under regulations 12(4)(e), 12(4)(d) and 12(5)(b).

Scope of the case

9. The complainant contacted the Commissioner on 8 January 2017 to complain about the way his request for information had been handled. He was concerned that he had not been provided with all the information he had requested, and outlined the nature of information he had expected to be provided with. This was mainly the names of council officers and councillors he expected to have exchanged correspondence regarding the EMS. He also asked the Commissioner to examine whether the council had correctly applied the exceptions cited.

10. During the course of the investigation, the council confirmed that some of the withheld information was personal data of either third parties, or the complainant himself. It therefore maintained that regulation 13 or regulation 5(3) applied to a small part of the withheld information.
11. The Commissioner considers the scope of this investigation to be to determine whether the council has identified all the information within the scope of the request, and whether it has correctly applied the exceptions to the withheld information.

Reasons for decision

Regulation 5(1) – Information held

12. Regulation 5(1) of the EIR provides a general right of access to recorded environmental information held by public authorities. Public authorities should make environmental information available within 20 working days unless a valid exception applies.
13. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to check that the information was not held and she will consider if the authority is able to explain why the information was not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held. She is only required to make a judgement on whether the information was held "on the balance of probabilities".
14. In the first instance the Commissioner has considered the complainant's concerns about whether all the information within the scope of the request has been identified by the council. In particular he expected the following information to be held:
 - (a) Emails from Councillors and elected members of the cabinet
 - (b) Emails from Bob Baldock – Director for Planning.
 - (c) Some of the emails refer to attachments and these have not been provided.
 - (d) No information from the CEO – Michel Saminaden
 - (e) Emails to or from the planning officer who wrote the report to cabinet on the EMS
 - (f) Informal notes

15. The Commissioner has had sight of the withheld information, and can confirm that this includes the majority of the information the complainant is concerned that he has not received. The Commissioner recognises that the complainant's concerns regarding whether all the requested information has been identified stem from the fact that the council has withheld a large proportion of the requested information, and this falls within the description of information the complainant expected to be held.
16. The Commissioner is satisfied that all the information held within the scope of the request has been identified by the council, and either provided to the complainant, or withheld under an exception.
17. The Commissioner will therefore go on to consider the council's application of exceptions to the withheld information. She will first consider the council's application of regulation 12(4)(e), as the majority of documents have been withheld under this exception.

Regulation 12(4)(e) – Internal Communications

18. Regulation 12(4)(e) 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 it will be exempt from disclosure, subject to the public interest test.
19. The information falling within the scope of this exception in this case consists of emails between officers involving research, internal discussion, drafting and amending documents, reviews by senior officers, and discussions with senior members. The Commissioner therefore accepts that the majority of the information withheld under 12(4)(e) clearly falls within the scope of the exception.
20. However, there are a number of documents which the council has applied 12(4)(e) to, but which the Commissioner has found do not fall within the scope of the exception. These fall into the following categories:
 - (a) Emails between council officers and an officer at Welwyn Hatfield Community Housing Trust.
 - (b) Handwritten notes/aide memoires by a council officer.
 - (c) Correspondence between the council and Grant Shapps MP, including some correspondence from the complainant.

- (d) Correspondence between the council and Welwyn Garden City Society and Welwyn Garden City Heritage Trust.
 - (e) Correspondence between the council and third party private individuals.
 - (f) Amenities and values assessment.
21. With regard to the emails between the council and the officer at Welwyn Hatfield Community Housing Trust, the Commissioner notes that the housing trust is an Arm's Length Management Organisation (ALMO), and is therefore a public authority in its own right. An ALMO is usually set up as a company limited by guarantee, with the local authority as the sole member or guarantor. In this way the definition of section 6(2)(b)(i) is met and the ALMO is a publicly-owned company, and therefore a public authority for the purposes of FOIA. Section 6(2)(b)(i) of the FOIA states that:
- "(b) a company is wholly owned by the wider public sector if, and only if, every member is a person falling within sub-paragraph (i) or (ii)—*
- (i) a relevant public authority or a company wholly owned by the wider public sector"*
- The Commissioner has had regard to the particulars of Welwyn Hatfield Community Housing Trust and is satisfied that it was, at the time of the request, a public authority in its own right. Therefore correspondence between council officers and officers at the housing trust cannot be considered to be internal communications, and regulation 12(4)(e) does not apply. The documents concerned are listed in the annex.
22. In considering the handwritten notes by a council officer in the planning department, the Commissioner has seen no evidence to suggest that these documents were communicated to any other individuals. The Commissioner therefore does not accept that these documents are internal communications, and regulation 12(4)(e) cannot apply. The relevant documents are listed in the annex.
23. Turning to correspondence between the council and Grant Shapps MP and his office, the Commissioner is satisfied that this is not internal communications as Grant Shapps MP and his officer are not officers of the council and are therefore external third parties. As such regulation 12(4)(e) does not apply. The documents containing this correspondence also contain forwarded correspondence from the complainant to Grant Shapps MP, and this will be considered further in this notice under regulation 5(3) as it is likely to be the personal data of the requester. In addition one letter from Grant Shapps MP contains the email address of a third party individual, and so the Commissioner will consider the

application of regulation 13 to this information further in this notice. The documents concerned are listed in the annex.

24. The correspondence between the council and Welwyn Garden City Society and Welwyn Garden City Heritage Trust is clearly communications between the council and two separate third party organisations, and is therefore not internal communications. Therefore regulation 12(4)(e) does not apply to the documents in this category. These documents are detailed in the annex. However, the council has advised that it considers that some of the information within this category is the personal data of third parties and to disclose it would breach the Data Protection Act 1998 (the DPA). The Commissioner will therefore consider the application of regulation 13 to this information later in this notice.
25. The communications between the council and third party individuals are clearly not internal communications, and regulation 12(4)(e) does not apply. The council has stated that it considers some of this information to be the personal data of these individuals, and therefore that regulation 13 applies. The Commissioner will consider this further below.
26. The final category of information is a document entitled Amenities and Values Assessment. There is no evidence that this has been communicated internally or otherwise. The Commissioner therefore does not accept that regulation 12(4)(e) applies to this information. The document is listed in the annex.
27. With the exception of these six categories of information, the Commissioner is satisfied that information withheld under regulation 12(4)(e) is internal communications, and that the regulation has therefore been applied correctly to this information. She has therefore gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the requested information. In doing so, she recognises that regulation 12(2) of the EIR specifically provides that public authorities should apply a presumption in favour of disclosure.

Public interest in disclosure

28. The council stated that *"There is an inherent public interest in the openness and transparency of public authorities, in enabling members of the public to be more aware of the process of policy-making and the considerations involved in it."*
29. However, it argued that in this case, the public interest in disclosure had limited weight because of the information that is publicly available and the processes in place for public engagement in the EMS. In particular it highlighted the following:

- (a) *"The detailed considerations in the review process have been published in two public reports to the Councils Cabinet on 7th July 2015 and 2nd August 2016.*
 - (b) *Following both reports, there have been a number of processes under which the potential new policy has been tested including discussions with relevant local organisations, a town-wide review of permitted development rights and scope for representations to be made to appropriate committees.*
 - (c) *There has been a household consultation since the second Cabinet report.*
 - (d) *All key documents in connection with the review of the Estate Management Scheme were publicly available [at the time of the request]. The review is still ongoing and the public are kept informed of progress on the review at all stages.*
30. The complainant considers that the publication of the Cabinet Report of 2 August 2016 represented the completion of that phase of work, and therefore stands alone. He argues therefore that the recommendations and decision of that paper could not be influenced from that point on, and therefore the exceptions applied by the council to withhold information do not apply. The Commissioner therefore understands that the complainant considers that the work on the future of the EMS up to August 2016 was concluded by the report to cabinet and that there is therefore no requirement for a safe space in which to continue deliberations on the future of the scheme.

Public interest in maintaining the exception

31. With regard to the public interest in maintaining the exception, the council concluded that it required time and space to deliberate, consider options, and reach decisions before these were made public. The Commissioner recognises these as safe space arguments. In its internal review, the council gave the following reasons as to why the public interest in this case favoured maintaining a safe space:
- (a) *"Not disclosing these options, or the factors discussed in relation to them, would protect the council from having to use public resources explaining options that may never be final, or become formal proposals. It would also complicate the policy process, as the council would have to clarify that certain options or approaches had been rejected.*
 - (b) *The documents or information in issue all contributed to the developing policy in the period of the request. The policy proposal remained live during that period (and this remains the*

case). As the Commissioner's guidance makes clear, the disclosure of draft or unfinished documents (which includes those that contribute to the policy process, even if complete in themselves) can be expected to impede the process of reaching a decision.

- (c) The disclosure of information relating to the continued formulation and assessment of a live proposal is unlikely to assist good policy-making, since officers and members involved would be liable to inhibition in the exchange of views and advice; particularly from the knowledge that those views were likely to be published during - and risked becoming a factor in - public discussion of the proposals. There would be a significant risk of a chilling effect on officers advice, as well as harm to the council's policy-making through the loss of the safe space.*
- (d) The publication of earlier proposals, drafting or discussion, or of the names of those involved in meetings on the matter, and the dates of those meetings, could be expected to form a distraction from the main issues under consideration in the council and within the community: i.e. the future of the EMS scheme."*

32. In its response to the Commissioner, it further added that it considered that the public interest in maintaining the exception was of significant weight where the policy proposal is still under consideration. It has explained that the council consulted on the future of the EMS between 26 October 2016 and 16 December 2016. This means that the consultation stage was not yet underway at the time of the request, but that it had been completed at the time of the review. The council considers that the matter is live as the responses to the consultation are being analysed, with a view to a further report being submitted later in 2017, which has not yet been completed. The council argues that if the information is disclosed, there is a risk of distraction from the debate on the future of the scheme if earlier proposals which have already been considered become part of a public debate.
33. The council suggests that the information adds little to that which is already available, and would only serve to diminish the safe space both for the continuing development of current policies, and also for future proposals on what is a matter of considerable importance for the residents of Welwyn Garden City, and the public in general in the borough.
34. In addition to safe space arguments, the council also considers that disclosure of the information could reasonably be expected to result in a chilling effect on officials in the course of the consultation and subsequent action in relation to the future of the EMS. It has argued

that if officers and members were aware that their initial discussions and proposals would become public knowledge and therefore become part of the debate, then there is a realistic prospect of them becoming more cautious in their discussions, which in turn could lead to less sound policy advice and decisions as all the options may not be available for consideration. The council also added that disclosure of individual documents to which the exception applies would undermine the principle of the exception.

35. For these reasons, the council maintained that the public interest in maintaining the exception outweighed the public interest in disclosure.

Balance of the public interest

36. The Commissioner notes that the EIR carries a presumption in favour of disclosure when considering the public interest in maintaining an exception. She also recognises that in this case, there is a significant local interest in the future of the EMS as it has a direct impact on a number of homes within the borough. In addition, there is also an inherent public interest in the transparency of decision making.

37. The Commissioner considers that the underlying rationale behind this exception is that public authorities should have the necessary space to think in private. The original European Commission proposal for the Directive (COM(2000)0402) explained the rationale as follows:

*"It should also be acknowledged that public authorities should have the necessary space to think in private. To this end, public authorities will be entitled to refuse access if the request concerns [...] internal communications."*¹

38. Although a wide range of internal information might be caught by the exception, the Commissioner is of the opinion that, following the above European Commission proposal (which the EIR are intended to implement), public interest arguments should be focussed on the protection of internal deliberation and decision making processes. She therefore accepts that there is a requirement for public officials to maintain a safe space in which to develop policy unhindered by outside influence and unnecessary additional explanations.

¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0402:FIN:EN:PDF>

39. The Commissioner understands that the complainant considers that the publication of the 2 August 2016 report to Cabinet represents the end to that part of the process of deciding the future of the EMS. However, it is clear that although there was a report to Cabinet at that point, the process as a whole remains incomplete as no final decision has been made on the future of the EMS. In addition to this, it is clear that at the time the request and internal review were being considered, the public consultation was ongoing. The Commissioner recognises that the consultation has ended in terms of gathering all the responses, however, the council has confirmed that even now, it is still in the process of analysing those responses, and so the decision making process is ongoing.
40. The Commissioner accepts the council's position that the consideration of the future of the EMS is still a live project. The council's website has a page dedicated to the EMS and this confirms that "*A significant number of responses have been received and are being considered. A report will be presented to The Cabinet in due course with a suggested way forwards.*".²
41. The Commissioner finds that at the time of the request and internal review, and also now, there was and is a requirement to maintain a safe space for council officers to discuss the future of the EMS unhindered by unwarranted interference. The Commissioner recognises that there is a degree of controversy over the EMS, and as the council has acknowledged, there have been problems with the scheme's administration and enforcement. The Commissioner also recognises that there are different opinions among the residents of the town as to the worth of the EMS. Some societies and individuals support the EMS and want to maintain controls to ensure that the uniqueness of the Garden City is not lost, whilst some home owners within the scheme area consider it to be a burden.
42. In view of the fact that the future of the EMS has not yet been determined, and the council is still in the process of considering the options in conjunction with the responses received from the consultation, the Commissioner is satisfied that there remains a requirement for a safe space for discussion and development of policy. In addition, whilst she acknowledges that there is a general public interest in the future of the EMS, she does not find that there is a

² <http://www.welhat.gov.uk/EMS>

compelling public interest reason in this case which warrants disclosing information outside of the council's decision making processes and is satisfied that disclosure would result in harm to the council's ability to discuss and carry out decision making in a safe space.

43. For the reasons set out above the Commissioner considers that, in all the circumstances of the case, the public interest in maintaining the exception set out in regulation 12(4)(e) outweighs the public interest in disclosure and she therefore accepts that the internal communications in question should be withheld.
44. The Commissioner will therefore go on to consider the council's application of regulation 12(4)(d) to the documents it considers to be in the course of completion.

Regulation 12(4)(d) – Information in the course of completion

45. Regulation 12(4) states that for the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that – (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data.

46. The Commissioner's guidance states 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.

(a) 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.

(b) Draft documents are unfinished even if the final version has been produced.

(c) Data that is being used or relied on at the time of the request is not incomplete, even if it may be modified later."³

47. The aims of the exception are:

³ https://ico.org.uk/media/for-organisations/documents/1637/eir_material_in_the_course_of_completion.pdf

- (a) 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
 - (b) To provide some protection from having to spend time and resources explaining or justifying ideas that are not, and may never be final.
48. The council has identified a number of documents within the scope of the request which are drafts and were in the course of completion. The majority of these were various iterations of documents which were eventually published as part of the consultation on the EMS other documents include draft reports and draft letters. It is clear to the Commissioner that these are draft documents, in some cases they are specifically marked as such, and in the remainder the accompanying emails seek comments or approval. Whilst final versions have been completed and published, following the lead of a number of Tribunal cases⁴, the Commissioner is clear that the draft versions still fall within the scope of regulation 12(4)(d). Having seen the information, the Commissioner is satisfied that the council has correctly applied the exception to the information.
49. As regulation 12(4)(d) EIR is subject to the public interest test, the Commissioner has next gone on to consider the public interest factors in this case.

Public interest in disclosure

50. The council has advised that the public interest considerations relevant to this exception and to regulation 12(4)(e) were considered together. Therefore it considers that the same public interest arguments apply to the disclosure of the information within the scope of this exception.
51. The complainant has also made no differentiation between the exceptions cited in his position regarding the public interest. The Commissioner accepts that the same public interest in disclosure arguments apply to this exception.

Public interest in withholding the information

⁴ Secretary of State for Transport v the Information Commissioner ([EA/2008/0052](#), 5 May 2009) and Mersey Tunnel Users Association v the Information Commissioner and Halton Borough Council ([EA/2009/0001](#) Stage 2, 11 January 2010)

52. As before, the council has advised that the same public interest considerations apply to the information withheld under regulation 12(4)(d) as outlined above in respect of 12(4)(e).

Balance of the public interest arguments

53. The Commissioner has had further regard to her guidance on regulation 12(4)(d) which states that safe space and chilling effect arguments are relevant to the public interest considerations of regulation 12(4)(d). The Commissioner therefore accepts that the public interest arguments outlined above in respect of 12(4)(e) apply equally to 12(4)(d).
54. In terms of balancing the public interest, the Commissioner has had regard to the specific nature of the information withheld. She notes that in this case, the unfinished information is for the most part the draft versions of the consultation documents from their earliest iterations to the final draft copies. In some cases the documents are sent with amendments in the form of tracked changes, in others draft documents are accompanied by emails containing suggested changes. Whilst the final versions of these documents have since been published, the Commissioner does not accept that this diminishes the need for a safe space in terms of the policy or matter to which those documents relate. In this case, as has already been established, the future of the EMS has yet to be determined and a way forward has not yet been agreed.
55. The Commissioner therefore accepts that there is a strong public interest in maintaining a safe space for council officers to consider all relevant options for the future of the scheme without the hindrance of being called upon to explain the reasons for previous decisions and actions. This is particularly relevant in this case as the Commissioner has already found that at the time of the request and internal review, and also now, the future of the EMS has not been finalised and as such, there was and is a requirement to maintain a safe space for council officers to discuss the future of the EMS unhindered by unwarranted interference.
56. As above, the Commissioner has recognised that there is some controversy concerning the EMS and its future, and as the council has acknowledged, there have been problems with the scheme's administration and enforcement. The Commissioner also recognises that there are different and contrasting opinions among the residents of the town as to the worth of the EMS.
57. In view of the fact that future of the EMS has not yet been determined, and the council is still in the process of considering the options in conjunction with the responses received from the consultation, the Commissioner is satisfied that there remains a requirement for a safe space for discussion and development of policy and the associated

documents. Whilst she agrees that there is a general public interest in the future of the EMS, she does not agree that this outweighs the public interest in maintaining the safe space for continuing to discuss the future of the EMS and to create and amend associated documents.

58. The Commissioner therefore finds that the council was correct to withhold the documents under regulation 12(4)(d). She has therefore gone on to consider the council's application of regulation 12(5)(b) for information which if disclosed would have an adverse effect on the course of justice.

Regulation 12(5)(b) – Course of Justice

59. Regulation 12(5)(b) provides an exception to the general duty to disclose environmental information where disclosure would adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature.
60. The council has highlighted a small number of documents within the scope of the request which it has argued are subject to a claim of legal professional privilege, and therefore that regulation 12(5)(b) applies. The Commissioner has had sight of these documents and can confirm that they are emails seeking or outlining questions for legal advice, and also the legal advice contained in draft reports. Some of the information for which the council has claimed regulation 12(5)(b) applies has also been correctly withheld under the exceptions considered above as they are either internal communications on the matter of seeking legal advice or are draft documents containing legal advice. In relation to the documents in which the advice was provided, the council has solely claimed reliance on regulation 12(5)(b), and it is these documents not covered by any other exceptions which the Commissioner will consider here.
61. There is no specific exception within the regulations referring to information that is subject to legal professional privilege. However, both the Commissioner and the Tribunal have previously decided that regulation 12(5)(b) encompasses such information.
62. In the case of *Kirkaldie v the Information Commissioner and Thanet District Council*⁵, The Tribunal expressed the view that the purpose of section 12(5)(b) was reasonably clear. It said that it "*exists in part to*

⁵ EA/2006/001

ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the rights of individuals or organisations to a fair trial.” It therefore accepted that this regulation “covers legal professional privilege, particularly where a public authority is or is likely to be involved in litigation”.

63. The principle of legal professional privilege is based on the need to protect a client’s confidence that any communication with his or her legal advisor will be treated in confidence. There are two limbs of legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). There must be a real prospect or likelihood of litigation rather than just a fear or possibility.
64. The council has stated that it considers the information is covered by legal advice privilege as the documents are clearly communications between the council and its legal adviser for the purpose of obtaining legal advice and communicated in their professional capacity as legal advisers.
65. The Commissioner is satisfied that the information is covered by the exception at regulation 12(5)(b), and must therefore go on to consider the public interest test.

Public interest in withholding the information

66. The council refers to *DCLG v ICO and WR* [2012] UKUT⁶ in which the Upper Tribunal reached the following conclusions:
 - (a) That the risk of the disclosure of legally privileged information, leading to a weakening of confidence in the general principle of LPP, was a public interest factor of “very considerable weight” in favour of maintaining the exception. It added that there would have to be “special or unusual factors” in a particular case to justify not giving it this weight and in this case there were none.
 - (b) That disclosure would be unfair as legal proceedings were a possibility in this particular case. It was important to maintain a level playing field and disclosure of the public authority’s legal advice to the requester would be unfair unless the authority had “the corresponding benefit”.

⁶ GIA/2545/2011

67. The council has also argued that disclosure of legal matters under consideration would tend to undermine both the general expectation of confidentiality in respect of legal advice. It would also serve to prejudice the development of sound and legally watertight proposals for submission to a court, at a formative stage.

Public interest in disclosure

68. The council accepts that there is a public interest in transparency and in enabling the public to better understand or express views on the legal considerations involved in deciding the future of the EMS.
69. The council has stated that it does not consider that there are any special factors in this case, in the terms referred to in DCLG v ICO and WR which would justify giving a greater weight to the disclosure of external legal advice.

Balance of the public interest arguments

70. As before in the public interest test for the other exceptions cited, the Commissioner finds that the process of determining the future of the EMS is not yet complete. She acknowledges that there are stages to the process, and that reports have been published on the matter on two occasions. However, she overwhelmingly finds that the overall process has not yet been completed and the future of the EMS has not been decided. She therefore finds that there is a strong public interest in allowing the council to maintain a safe space to seek and act on legal advice in relation to the ongoing considerations on the future of the EMS.
71. The Commissioner also agrees that there are no special or unusual factors, as set out in DCLG v ICO and WR, that would warrant the disclosure of legally privileged information.
72. Furthermore, the Commissioner considers that maintaining the integrity of the legal process is one of the core intentions behind the course of justice exception and previous decisions issued by the Commissioner and the Information Tribunal have recognised that, where the process is ongoing, disclosure would likely prejudice this integrity.
73. The Commissioner therefore finds that regulation 12(5)(b) applies and the public interest favours withholding the information.
74. The Commissioner has therefore gone on to consider regulation 13 which the council has applied in respect of third party personal data.

Regulation 13 – Personal data

75. Following the analysis of the previous exceptions, there are a small number of documents to which they do not apply. The council has stated that it considers that some of the information within these documents is third party personal data and therefore it is withholding this information under regulation 13. These are as follows:
- Names and email addresses of third party individuals belonging to Welwyn Hatfield Hatfield Conservative association or Welwyn Garden City Society.
 - Emails between the council and third party individuals concerning personal EMS related matters.
76. Regulation 13 provides that personal data of someone other than the person making the request shall not be disclosed where either one of two conditions are satisfied. The first condition, which is relevant here, is that disclosure would contravene one of the data protection principles in the Data Protection Act 1998 (DPA) or would contravene section 10 of the DPA.
77. The Commissioner has had regard to the information withheld under regulation 13 and agrees with the council that the parts of the information it has described are the personal data of third parties. The individuals in question can clearly be identified from the information.
78. In determining whether disclosure of the information would contravene one of the data protection principles, the Commissioner has had regard to the first data protection principle which states that personal data shall be processed fairly and lawfully, and must not be processed unless one of the schedule 2 (or schedule 3 in the case of sensitive personal data) can be met.
79. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
- the data subject(s) reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual(s) concerned); and
 - the balance between the rights and freedoms of the data subject(s) and the legitimate interests of the public.

Reasonable expectations

80. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individual concerned has a reasonable expectation that

their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, the purpose for which they provided their personal data and any assurances they were given.

81. The Commissioner has found that there were a small number of documents to which regulation 12(4)(e) does not apply. Within these, there is a small portion of information which the council considers is the personal data of individuals in the form of their email addresses and contact details. These individuals are members of either Welwyn Hatfield Conservative Association or Welwyn Garden City Society. The council has confirmed that it is this personal data to which it considers regulation 13 applies. The council is concerned that as these are private email address, the individuals concerned would not have a reasonable expectation that they would be made publicly available to anyone else but the initial recipient. The Commissioner accepts that it would not be within the reasonable expectations of the individuals concerned for their personal data in the context of which it was supplied to the council, to be disclosed to the wider world. Not least because it can be seen from the surrounding email chains that the individuals concerned had not contacted the council themselves in relation to the EMS, but were either contacted by the council, or had their personal data forwarded to the council by other individuals such as councillors and the local MP.
82. With regard to the private third party individuals who have contacted the council in respect of their personal concerns relating to the EMS, the Commissioner is satisfied that they would have had no reasonable expectation that their correspondence, and the personal data therein would be disclosed to the world at large. The emails were sent by the individuals to their respective councillors to express personal concerns about their property or the EMS generally. These were then forwarded internally to the council officers dealing with the future of the EMS for their information. It is clear that the third party individuals had no expectation as to how their information would be used, and were certainly not provided with any fair processing notices advising that information may be subject to disclosure through the provisions of the EIR or FOIA.
83. The Commissioner is satisfied that these individuals would have had a reasonable expectation that the withheld information, which constitutes their personal data, would not be disclosed.

Consequences of disclosure

84. As to the consequences of disclosure upon the third party individuals, the Commissioner has considered whether disclosure would be likely to result in unwarranted damage or distress to that individual.

85. The council has argued that disclosure of the emails from the third party individuals, and their email addresses, could subject them to unwanted and unwarranted email attention. Particularly in where views have been expressed regarding the future of the EMS. The Commissioner also considers that in cases where there is no reasonable expectation of disclosure of personal data, unwarranted distress can be caused by the action of disclosing that personal data to the world at large.
86. In this case, the Commissioner is satisfied that there are negative consequences of disclosure, and that these would be both unwarranted and unexpected.

Balance between the rights and freedoms of the individuals and the legitimate interests of the public

87. In this case as has already been established there is a general public interest in transparency of council decision making, and in respect of this case, there is also a more local public interest in the future of the EMS and the processes the council is going through to make a decision on the matter.
88. It could therefore be argued that there is a public interest in disclosing the personal data of the individuals concerned as it would increase the transparency of the decision making process and would allow the public to see who has contributed.
89. However, the Commissioner has had regard to the nature of the withheld information, particularly the names and contact details of third parties and is not satisfied that this would substantially add to the public understanding of the council's EMS decision making.
90. The Commissioner has decided that the interests of the public in this case are very limited, and when balanced against the rights of the individuals to have their personal data protected, do not outweigh them.
91. She has therefore found that the council has correctly applied regulation 13 to the personal data contained in the documents described above and listed at the annex.

Regulation 5(3) – personal data of the requester

92. The final part of the withheld information to consider is regulation 5(3) as there is a very small portion that is the personal data of the requester. This information consists of correspondence from the complainant to Grant Shapps MP, which had been forwarded to the council, and is clearly the personal data of the requester.
93. Regulation 5(3) states:

"To the extent that the information requested includes the personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data."

94. The Commissioner has considered this information and is satisfied that it constitutes the complainant's own personal data. She therefore finds that it is exempt from disclosure under the EIR by virtue of regulation 5(3).

Right of appeal

95. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

96. 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.
97. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

1. The following is the information to which the Commissioner has found the exceptions cited do not apply, and that therefore must be disclosed. The numbering refers to the numbering used by the council.
 - (a) Information to be disclosed as referred to in paragraph 21 as correspondence between council officers and an officer at the separate public authority Welwyn Hatfield Community Housing Trust: documents 118, 119, 131, 132.
 - (b) Information to be disclosed as referred to in paragraph 22 as handwritten notes by a council planning officer: documents 62, 68, 69, 70.
 - (c) Information to be disclosed as referred to in paragraph 23 as correspondence between the council and Grant Shapps MP and his office, with the exception of the information to which the Commissioner has found regulation 13 and regulation 5(3) of the EIR applies (see 2(b) below): documents 139 and 179.
 - (d) Information to be disclosed as referred to in paragraph 25 as correspondence with third party interest groups with the exception of the information to which the Commissioner has found regulation 13 of the EIR applies (see 2(c) below): documents 122 and 177.
 - (e) Information to be disclosed as referred to in paragraph 26 as Amenities and Values Assessment: document 54.
2. The following documents are those referred to in paragraph 91 as containing information to which regulation 13 applies.
 - (a) The personal data contained in documents 46 (of which document 153 is a duplicate) and 164 is third party personal data in the form of emails from members of the public to their councillor. This is the information to which regulation 13 applies and which is excepted from disclosure.
 - (b) The personal data referred to in the correspondence to the council from Grant Shapps MP is an email address within document 139. The remainder of the information in this document is to be disclosed (see 1(c) above).
 - (c) The email addresses of third parties to which the Commissioner has agreed regulation 13 applies can be found within the

following documents: 122 and 177. The remainder of the information is to be disclosed (see 2(d) above).

3. The following documents contain information to which the Commissioner has found regulation 5(3) applies.
 - (a) Document 51 to the extent that the information is emails to and from the complainant.
 - (b) Document 179 to the extent that the information is an email from the complainant.