

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

Decision notice

Date: 8 June 2020

Public Authority: Lancashire County Council

Address: PO Box 78
County Hall
Fishergate
Preston
Lancashire
PR1 8XJ

Decision (including any steps ordered)

1. The complainant has requested information regarding resurfacing works and road markings. The Lancashire County Council initially stated it had disclosed all of the information in scope of the request, except one element which was withheld on the basis of FOIA section 42, for which it subsequently agreed that the EIR is the appropriate legislation and therefore changed its response to cite regulations 12(4)(e) and 12(5)(d). The council also changed its position to state that it could only locate records from 2017 onwards to part of the request, and cited regulation 12(4)(b) in this respect.
2. The Commissioner's decision is that Lancashire County Council is entitled to rely upon 12(4)(b) for records held prior to 2017 and that the public interest rests in maintaining this exception. She also finds that, on the balance of probabilities, it has located all information in scope of the request from 2017 onwards.
3. The Commissioner found that regulation 12(4)(e) is engaged, however, the public interest favours disclosure and that that regulation 12(5)(d) is not engaged. The Commissioner also finds that the council breached regulation 5(2) and 14(2) of the EIR in its handling of the requests.

4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Release the withheld information identified for request item [4].
5. 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

6. On 20 January 2019 the complainant requested information from Lancashire County Council ('the council') in the following terms [numbering added for reference]:

[1] "Details relating to resurfacing work on Market Street, Edenfield, including specifications / requirements and if applicable acceptance arrangements between LCC [the council] / The Highways Authority and its Contractor between 2003 and the present day.

[2] Details of the background information and consultations relating to The Road Traffic Regulation Act 1984 and the Road Traffic Act 1991 The Lancashire County Council (Rossendale Borough Area) (On Street Parking Places, Prohibition and Restriction of Waiting) Consolidation Order 2009, Schedule 10.01, Item No.83.

[3] Details of all specifications / requirements and if applicable acceptance arrangements between LCC / The Highways Authority and its Contractor relating to the aforementioned Item, e.g. the provision of the relevant road markings."

7. The council responded on 14 February 2019 stating that the cost of responding was prohibitive and suggesting that the complainant reduced the scope.
8. The complainant re-submitted the request on 14 February 2019 with a reduced scope, advising:

"I am content to refine the dates, I originally submitted, to April 2009 to present date."
9. The council responded on 27 March 2019 and provided some information within the scope of the request, that being:

- a copy of the Traffic Regulation (No 365) order 1999 - Market St and Heycrofts View. The council stated: *"This order was sealed in July 1999 and would have been included on the Consolidation Order of 2009."*
 - This statement: *"The work on site – lining after resurfacing carried out by LCC or their contractors should result in the existing and current TROs [Traffic Regulation Order's] marking being replaced after any such works. The lining replaced after the latest resurfacing placed sections of DYL [Double Yellow Line] around this junction which, it is claimed, do not represent the 1999 (and Con 2009) order. Investigations using google maps have revealed that there had been a section of single yellow line to the south of the private road, south of Heycrofts View on the east side of Market Street. There is no order for this and we have no record of this lining work being requested. Therefore there is an anomaly in that, though the current markings do not exactly reflect the detail in the order, the date when the incorrect lining was placed is not known therefore we do not know how long incorrect markings have existed here. The advice of our legal team is that we cannot replace lining which may have been incorrect for a length of time up to approximately 10 years, ie since 2009. We need to consult again and have asked the traffic order team to include this in a future parking TRO – this is in progress."*
10. The complainant requested an internal review on 28 March 2019 outlining that the response given was inadequate because:
- [3] No specifications were provided for the work undertaken or any of the acceptance arrangements.
- The complainant also made a new request:
- [4] For disclosure of the legal advice referred to in the council's response.
11. The complainant chased the council for a response a number of times.
12. On 8 May 2019 the council sent the internal review outcome to the complainant in which it upheld its position stating: *"...we feel we have adequately answered your revised request..."* The council also provided some further information regarding the anomaly in road lining and its plans for a reassessment and public consultation.
13. The complainant responded on 8 May 2019 re-iterating the information missing from the council's responses for [3] and [4] and requesting a further review.

14. The council issued a second review on 13 June 2019. In response to [3] it stated that the council had provided all the information held. Regarding [4] it cited the exemption at FOIA section 42 – legal professional privilege.
15. The complainant raised further points with the council regarding the review on the 14 June 2019 to which the council responded on 15 July 2019 having located some further information, being:
 - A map referring to failed / remedial dressing.
 - Attachments showing plans of highways, and associated screenshots from the "*Highways database*" with regard to resurfacing.
 - A document detailing resurfacing works.
 - Advised that "*All of the schemes are approved by Cabinet or Cabinet Member and the documents can be found in the minutes of the meetings that are published as below, which is in the public domain.*" It provided links to schemes for repairs.
16. Following the submission of the complaint to the Information Commissioner, the council provided a further response to the complainant on the 24 July 2019 which included:
 - a letter to residents advising of the resurfacing dated July 2017;
 - a letter to residents advising of the resurfacing commencing 5 August 2018;
 - a letter to residents advising of resurfacing dated 24 July 2017;
 - a document dated 22.07.19 giving three references to "*Street Works records*" identified as "*Ironworks and patching*", "*Surface dressing*", and "*Remedials*";
 - screenshots of the asset management system ('HAMS') record associated with the work.
17. On 13 April 2020, the council advised the complainant that it was unable to search for records prior to 2014 for request item [3], citing regulation 12(4)(b). It provided a revised response to the complainant in these terms. The council then contacted the complainant again on 21 April 2020 and advised that the revised response should have stated that it was unable to search for records prior to 2017.

Scope of the case

18. The complainant contacted the Commissioner on the 1 July 2019 to complain about the way his request for information had been handled. Specifically that further information must be held in scope of [3], stating: *"What I am after, and I cannot reasonably accept that the council does not have it, is a full detailed specification of what the council required of its contractor, and how the council accepted the work, this has not been provided. This may be part of an enabling contract or a bespoke contract for this specific job, but somewhere there should be a contract with these details."* The complainant also disputes the council's reliance on section 42 to withhold request item [4].
19. During the course of the investigation the complainant raised that the council should hold a contract that addresses request item [3]. In response to the Commissioner's questions on this point, the council advised that it has a contract with a single service provider for all carriageway surface treatments in Lancashire but that this it is a generic contract and not specific to the works. It also advised that all surface treatments sites are designed and laid in accordance with Road Note 39 which is a guide for the design of surface dressing used on roads throughout the UK. It stated that it does not have acceptance criteria because work is accepted on the grounds of a minimum guarantee period of 12 months.
20. The complainant advised that the supplementary information, provided on 15 July 2019 and 24 July 2019, did not change their view that further information must be held. However, the complainant stated that the information subsequently provided to the Commissioner regarding 'Road Note 39' and the works minimum guarantee period partly answers [3] and should have been provided as part of the council's response. The complainant remains concerned that the council may hold further information than it has identified and disclosed.
21. For reasons set out in this decision notice, the Commissioner considers that the EIR is the appropriate legislation under which to consider this request. During the course of the investigation, therefore, the council changed its reliance on the exemption at FOIA section 42, for EIR 12(4)(e) *"or possibly"* 12(5)(d). The Commissioner notes that the council has not advised the Complainant of the change in respect of an updated refusal notice.
22. The Commissioner considers that the scope of this case is to establish whether the council breached regulation 5(1) in responding to this request and whether it holds any further information in scope of [3]. She will also consider the council's reliance on regulation 12(4)(b) for

records held before 2017, and whether it provided the complainant with reasonable advice and assistance as required by regulation 9. Furthermore, despite the council's ambiguous response regarding item [4] she will consider whether the council has engaged either the exception at regulation 12(4)(e) or 12(5)(d) in refusing to provide information in respect of [4]. If it has, then she will consider where the balance of public interest lies. The Commissioner will also consider any whether the council has made any procedural breaches in handling the requests.

Reasons for decision

Regulation 2(1) - Environmental Information

23. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition in regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.
24. Regulation 2(1) of the EIR defines environmental information as information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste...emissions...and other releases into the environment, likely to affect the elements referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;..."
25. Information about a plan or a measure or an activity that affects or is likely to affect the elements of the environment is environmental information. The information in this case relates to plans and activities to alter the road surface, and the road markings, which could affect the use of the road, and other factors such as noise or emissions (for example through changes to parking or waiting restrictions).

26. The Commissioner therefore finds that the information is environmental information and should be considered under the EIR.
27. In view of this, the Commissioner has concluded that the council wrongly (initially) handled the request under the FOIA and breached regulation 5(1) of the EIR. As the council subsequently corrected this during the Commissioner's investigation the Commissioner does not require the council to take any steps in this regard.

Regulation 5 – duty to make environmental information available on request

28. Regulation 5(1) of the EIR states that: "a public authority that holds environmental information shall make it available on request." This is subject to any exceptions that may apply.
29. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. She will also consider the actions taken by the authority to check that the information is not held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held.
30. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) in which it was stated that "*there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records*". It clarified that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities. This is therefore the test the Commissioner applies in this case.
31. In discussing the application of the balance of probabilities test, the Tribunal stated that, "*We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.*" The Commissioner has therefore taken the above factors

into account in determining whether or not further information is held, on the balance of probabilities.

The Complainants view

32. The complainant considers that there should be further information in scope of [3], in terms of a full detailed specification of the council's requirements of its contractor, and how the council accepted the work. In the complainant's opinion, *"this may be part of an enabling contract or a bespoke contract for this specific job, but somewhere there should be a contract with these details."*
33. The complainant explained the request was made out of concern that the road surface became worse in a few weeks after the works. Additionally, that a double yellow line, which was specified in a Traffic Regulation Order, had not been replaced during the works and that as a result *"it is now incredibly dangerous exiting my road on to [redacted]. I want to know what happened..."*
34. The complainant states that information provided by the council on 15 and 24 July 2019 does not represent evidence of the council's specification or requirements, nor show how the council accepted the work from its contractor:
 - Response of 15 July 2019: provides a number of documents such as purchase to payment type statements for *"surface dressing"* without giving further detail; three maps which the complainant considers are not relevant to the request being for different streets; and two maps which may be partially relevant (although no context given), but just indicate either a small part of the requirement, being a red line on a map, or some very brief *"scribbled notes"* stating *"a lot of patching this end."*
 - Response of 24 July 2019 : provides letters to residents advising of resurfacing works commencements; an unnamed document which gives three references noting ironworks and patching, surface dressing and remedials; and some system screenshots which appear to relate to purchase to pay requisitions, although no detailed requirements are listed.
35. During the course of the investigation, the council advised the Commissioner that that all surface treatments sites are designed and laid in accordance 'Road Note 39' which is a guide for the design of surface dressing used on roads throughout the UK. It stated that it does not have acceptance criteria because work is accepted on the grounds of a minimum guarantee period of 12 months.

36. The complainants view is that the explanation given to the Commissioner regarding the road surface design guide, and the guarantee period should have been provided in response to the request. Furthermore, the complainant remains unconvinced that the council located and released all of the information held in the scope of the request.

The Council's response

37. During the course of the investigation the council advised that it was only able to identify records regarding works on the carriageway from 2017 onwards. It stated that the "Highways Service" has undergone significant restructures and staff reductions with a resulting loss of local knowledge and of local records that may have been held on separate team systems or individual employee drives.
38. The council stated that it had searched for information on the current asset management system which is held on the corporate drive. This is HAMS (Highways Asset Management System) which was introduced in 2017. It explained that previously information was held in other places, such as network drives and spreadsheets but that this information had subsequently been migrated to HAMS. The council stated that introduction of the new system resulted in very limited access to records held before 2017. Although the council has searched some pre-2017 records it advised that it cannot be certain that it has located all records in scope of the request prior to 2017.
39. The council also advised that some of the information, provided to the complainant, had been obtained after a search of a spreadsheet that was in use during 2018/19. This spreadsheet provides details of works on given streets. From 2019 onwards this information has been stored on HAMS.
40. The council stated that it was not aware of any information relevant to the scope of the request being destroyed or deleted.
41. The council advised that it had been unable to locate a formal policy regarding the retention of records relevant to this request and added " *it should be noted that, given the vast network of highways across Lancashire (which is, geographically a large area) it would be impractical to retain records for all minor issues on all areas of the network.*"
42. The council advised that the business purpose for holding information in scope of the request would be to record work carried out so that it may monitor failures and inform future programmes. The council advises that it has provided all such information held for this purpose.

Conclusion

43. The Commissioner accepts that the two pieces of information provided during the course of the investigation are not strictly in the scope of the request. These being "Road Note 39"¹, which is documented as a design guide and states that it should not be used as a specification, and the council's explanation of requiring a guarantee period for works rather than holding any acceptance criteria. She cannot therefore find a breach of regulation 5(1), however she considers that early provision of this information, during the review and in response to questions from the complainant would have answered, to some degree, the enquiry central to the outstanding elements from [3].
44. The Commissioner notes the council's changing position regarding the date from which it is able to carry out searches for records without incurring an unreasonable burden of effort. It initially accepted the request to search for records from 2009, in its final position though the council revised the date to be 2017. However, prior to the Commissioner's intervention, it was the council's position that it had identified all information within the scope of the request, being from 2009.
45. The council's responses were ambiguous as they did not specify the latterly identified limitations on the search period. Furthermore, as discussed above they also omitted to identify information that would have been helpful in, to some degree, satisfying the requestors central issue of concern. The Commissioner considers that this is indicative of poor records management and request handling processes.
46. The Commissioner has considered the responses provided by the council, and although she considers that the request was poorly handled, she has no evidence that the council is withholding any further information for the period of 2017 onwards.
47. The Commissioner has therefore determined that, on the balance of probabilities the council does not hold any further information which falls within the scope of the request for the period from 2017 to the date of the request.

Regulation 12(4)(b)

¹ <https://trl.co.uk/reports/RN039>

48. Regulation of the EIR 12(4)(b) provides that

"(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –

(b) the request for information is manifestly unreasonable;"

49. The council maintains that it is unlikely that it holds any further information in scope of the request from 2009 to 2016. It is confident that it has located all information held since 2017, which is when the comprehensive system (HAMS) was introduced. However the council states that to carry out a full search of the council for information possibly held in other records and systems, between 2009 and 2016 would be manifestly unreasonable because it would impose a significant burden on the council in terms of officer time and cost.

50. Regulation 12(4)(b) of the EIR is designed to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation in handling information requests. In effect, it works in similar regards to two exemptions within the Freedom of Information Act 2000 ('FOIA'): section 12, where the cost of complying with a request exceeds the appropriate limit and section 14, where a request is vexatious.

51. The EIR differ from the FOIA in that there is no specific limit set for the amount of work required by an authority to respond to a request, as that is provided by section 12 of the FOIA.

52. Specifically, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 20041 ('the Fees Regulations') which apply in relation to section 12 of the FOIA are not directly relevant to the EIR because the cost limit and hourly rate set by the Fees Regulations do not apply in relation to environmental information. However, the Commissioner accepts that the Fees Regulations provide a useful starting point where the reason for citing regulation 12(4)(b) is the time and cost of a request, but they are not a determining factor in assessing whether the exception applies.

53. The Fees Regulations confirm that the costs associated with these activities should be worked out at a standard rate of £25 per hour per person. For local authorities, the appropriate limit is set at £450, which is the equivalent of 18 hours work.

54. The Commissioner is satisfied that regulation 12(4)(b) sets a fairly robust test for an authority to pass before it is no longer under a duty to respond. The test set by the EIR is that the request is 'manifestly'

unreasonable, rather than simply being 'unreasonable' per se. The Commissioner considers that the term 'manifestly' means that there must be an obvious or clear quality to the identified unreasonableness.

55. It should also be noted that public authorities may be required to accept a greater burden in providing environmental information than other information.

56. Therefore, in assessing whether the cost or burden of dealing with a request is clearly or obviously unreasonable, the Commissioner will take the following factors into account:

- proportionality of the burden on the public authority's workload, taking into consideration the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services;
- the nature of the request and any wider value in the requested information being made publicly available;
- the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue;
- the context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester;
- the presumption in favour of disclosure under Regulation 12(2);
- the requirement to interpret the exceptions restrictively.

57. The council provided the Commissioner with the following explanation for applying regulation 12(4)(b) to records prior to 2017:

- HAMS was introduced in 2017 and stores all records for the Highways Service, there is very limited access to records held prior to 2017 that are not on HAMS.
- Attempts were made to locate any outstanding information not held on HAMS within an 18 hour timeframe;
- The council believes that it is most likely the case that no further information is held;
- Since 2009 the Highways Service has undergone significant change in the way the service is delivered with two major restructures, and a significant reduction of staff within the service. This has resulted in a loss of local knowledge and personal records.
- However due to the loss of local knowledge it cannot state categorically that nothing further is held in the council.

- Any further efforts to find information would place a manifestly unreasonable burden on the council and are unlikely to identify further information in scope of the request.

Is the exception engaged?

58. The Commissioner has no basis upon which to dispute that the council has attempted, within an 18 hour time period, to locate any further information held. She accepts that migration to a new system and loss of local knowledge would make it problematic for the council to be certain that no further information is held. However, she believes, as discussed earlier in this decision notice, that the issue is indicative of poor records management in the council.
59. The Commissioner accepts that any further searches for information in scope of the request would put a burden on the council. She must therefore appraise whether, in the context of the request, this represents a manifestly unreasonable burden.
60. The Commissioner has considered the nature of the request, taking account the presumption in favour of disclosure and the requirement to interpret exceptions restrictively. The Commissioner accepts that the issue is of importance to the complainant, and perhaps in the local area.
61. The Commissioner recognises that the county council is large and therefore will have significant resource available. However, she is mindful of the council's arguments that further searches are unlikely to locate any other information in scope of the request. Furthermore, the explanation provided during the course of the investigation regarding 'Road Note 39', and the minimum guarantee period for works, go some way in addressing the central outstanding concern. This leads her to consider that carrying out further searches would be disproportionately burdensome to the council.
62. The Commissioner has also been guided by what is considered to be a reasonable time period under FOIA, being equivalent to 18 hours of work. She considers that the council has carried out sufficient searches for further records in adhering to this time period.
63. Although this figure is a guideline basis for EIR requests, she can take into account the value of the information requested when deciding whether the request is manifestly unreasonable for the purposes of Regulation 12(4)(b).
64. Having considered likelihood of further information potentially caught within scope of the request and the value of the information concern, and despite the resources available, the Commissioner finds that it

would be manifestly unreasonable to require the council it to respond to the request in relation to records held prior to the introduction of HAMS in 2017. As such, the Commissioner considers that the subsequent diversion of resources from other public duties is significant enough to engage the exception at 12(4)(b).

The public interest test

65. Regulation 12(4)(b) is a qualified exception and is therefore subject to the public interest test at regulation 12(1)(b) which states that information can only be withheld if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

66. The complainant has expressed safety concerns in relation to the road works undertaken by contractors on behalf of the council. The requested information would provide insight into the council's specification and acceptance arrangements for road works in the complainant's local area.
67. There is a general public interest in promoting transparency, accountability, public understanding and involvement in the activities of public authorities.
68. Furthermore, there is always a general public interest in the disclosure of environmental information because it supports the right of everyone to live in an adequate environment and ultimately contributes to a better environment.

Public interest in maintaining the exception

69. The council's case is that there is no public in interest in hampering council functions because employees are diverting a disproportionate amount of time searching for further information that is most probably not held.
70. It states that there is a strong public interest in ensuring that council resources are not diverted from core duties and functions.

Balance of the public interest

71. With regard to the public interest in disclosure the Commissioner has taken into account the general public interest in transparency and accountability. She recognises the complainant's reasons for making the request as being legitimate and is mindful of the presumption in favour of disclosure.

72. However, balanced against this is the burden that would be imposed on the council. In this instance, considering the preceding arguments for engaging the exception, it seems unlikely that further extensive searches are likely uncover any significant information relating to the request.
73. The fact that some information may exist within the subject matter of the request is not reason in and of itself to put public authorities to a large effort in compliance where to do so would require significant public resources to be applied in order to fully comply with the request.
74. In this case the Commissioner agrees with the council that the public interest favours the maintenance of the exception. She considers the burden that compliance would cause outweighs any public interest factors in favour of disclosure. Disclosure would divert the council away from its other functions and this is not in the wider interests of the public.

Regulation 9 - advice and assistance

75. The application of regulation 12(4)(b) of the EIR triggers the duty to provide advice and assistance in accordance with regulation 9. This means that a public authority should assist the applicant in making a fresh, refined request which could be considered without being a burden in terms of cost so far as it is reasonable to do so. For example, a public authority could suggest narrowing the scope of the request to a particular topic or by timeframe. In some cases it will not be possible for a public authority to provide any advice and assistance of this nature. In these cases, public authorities are still expected to inform the applicant of this and why.
76. The council applied regulation 12(4)(b) during the course of the investigation. At that time, in terms of regulation 9, it advised that it could provide records from 2017 onwards.
77. As the council have already responded regarding records from 2017 onwards the Commissioner does not require any further action to be taken in respect of regulation 9.

Regulation 12(4)(e)

78. Regulation 12(4)(e) states:

'12.-(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(e) the request involves the disclosure of internal communications."

79. The council advised that the withheld email chain is an internal communication between colleagues in the highways department raising a query with the legal services department and their response, being the legal advice that was provided.
80. The information is handled solely within the council and was not shared externally.
81. Regulation 12(4)(e) 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 engaged..
82. The Commissioner has reviewed the document and is satisfied that it clearly falls within the description of an internal communication and therefore engages regulation 12(4)(e).

The public interest test

83. Regulation 12(1)(b) requires that, where the exception under regulation 12(4)(e) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. The Commissioner is mindful of the provisions of regulation 12(2) which state that a public authority shall apply a presumption in favour of disclosure.

Public interest arguments in favour of disclosure

84. The complainant provided that release of the withheld email is in the public interest because:
 - there is a Traffic Regulation Order (TRO) in force for the road markings. The public should know why the council thinks it does not have to maintain the TRO;
 - the council has powers to issue fines for contravention of a TRO therefore it is reasonable to understand the policy for the maintenance of a TRO;
 - A TRO is made for a reason, which in this case is likely to be safety, therefore it is in the public interest for road users to understand the council's rationale for not maintaining the TRO.
85. Furthermore, it is the complainant's opinion that the council may claim that if a road marking is not maintained for a period of 10 years then

the TRO is no longer valid. The complainant disputes this point stating *"This potentially affects all the road markings in the country and every council that has responsibility for highways, I was unable to find any precedent for this."* The complainant is therefore of the opinion that it is in the public interest to release the withheld information.

Public interest in maintaining the exception

86. The council provided that the exception should be maintained for the following reasons:

- The email exchanges are a legal query between the highways department and a legal services advisor regarding the reinstatement of markings, and the required associated legal processes.
- The council states *"it is clearly a communication between a client and legal advisor on matters of law."*
- Whilst the council acknowledges a general public interest in being open and transparent it stated that there is a stronger principle of ensuring that communications between a client and their legal advisor remains confidential. The council believes this should only be outweighed in extreme circumstances.
- The council states that the incorrect road markings at a particular location on the highway has seemingly caused no historical issues. Therefore, there is not sufficient public interest to outweigh the principle of confidential communications between client and legal advisor on matters of law.

Balance of the public interest

87. The Commissioners guidance² on regulation 12(4)(e) outlines that internal communications may include legal advice from in-house lawyers, which will attract legal professional privilege. However, public interest arguments under this exception must be focussed on harm to internal deliberation and decision-making processes. Broader arguments about the principle of legal professional privilege will not carry any inherent weight under this exception.

² https://ico.org.uk/media/for-organisations/documents/1634/eir_internal_communications.pdf

88. If a public authority does use this exception, there will be some public interest in preserving a safe space to seek and consider legal advice without external interference. As with other safe space arguments, this is only likely to carry weight while the issue is still live.
89. With this in mind, the Commissioner considers that the public interest arguments offered by the council are quite broad and imply a focus on the principle of confidentiality in terms of legal professional privilege.
90. The Commissioner considers that the council could have potentially argued in terms of preserving a safe space, however no such arguments have been offered.
91. The Commissioner is therefore persuaded by the complainant's case that there is a greater public interest in support of disclosure of the withheld information.
92. The Commissioner has concluded that although the exception at regulation 12(4)(e) is engaged, the balance of the public interest favours disclosure. She has therefore gone on to consider whether regulation 12(5)(d), which was also cited by the council, is engaged in relation to [4].

Regulation 12(5)(d)

93. During the course of the investigation, and after discussions with the Commissioner regarding the requests being for environmental information, the council changed its reliance on the exemption at FOIA section 42, in favour of EIR 12(4)(e) "*or possibly*" 12(5)(d).
94. Regulation 12(5)(d) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that public authority, or any other public authority, where such confidentiality is provided by law.
95. It is important to recognise that the test for applying the exception is whether a disclosure to the world at large would undermine the confidentiality of the proceedings in question. Therefore, although some information may have been revealed to one of the parties involved in the proceedings, the Commissioner will consider the impact of disclosing the withheld information to the general public.
96. The term 'proceedings' is not defined in the EIR, but the Commissioner interprets it to include situations where an authority is exercising its statutory decision making powers.
97. The engagement of the exception involves a three stage test:

- What are the proceedings in question?
- Is the confidentiality of those proceedings provided by law?
- Would disclosing the information adversely affect that confidentiality?

98. The council advised that the exception is engaged because:

- it comprises of legal advice provided by the legal services department to the highways department;
- it is clearly a communication between a client and legal advisor on matters of law;
- such communications between a client and their legal advisor should remain confidential.

99. In her guidance³ the Commissioner states that 'proceedings' imply some kind of formality, and does not cover an authority's every action, decision or meeting. It will include but is not limited to:

- formal meetings to consider matters that are within the authority's jurisdiction;
- situations where an authority is exercising its statutory decision making powers; and
- legal proceedings

100. The Commissioner considers that 'proceedings' in regulation 12(5)(d) as possessing a certain level of formality. For example, legal proceedings, formal meetings at which deliberations take place on matters within a public authority's jurisdiction or where a public authority exercises its statutory decision making powers. In the Commissioner's view proceedings are unlikely to encompass every meeting or procedure carried out by a public authority.

101. In this case the council has failed to outline what proceedings the information requested would relate to and how they are formal in their nature.

³ https://ico.org.uk/media/for-organisations/documents/1626/eir_confidentiality_of_proceedings.pdf

102. Furthermore, regulation 12(5)(d) can only apply to proceedings where that confidentiality is provided for by law, this can either be by virtue of common law or by virtue of a specific statutory provision. The council has not explained on what basis it believes that the proceedings are covered by confidence provided for by law.
103. In order to engage the exception it is also necessary to understand how disclosure of the withheld information would adversely affect the confidentiality of these proceedings. A clear link between disclosure of the information that has actually been withheld and any adverse affect is required. The council has not provided any supporting arguments in this regard.
104. Looking at the withheld information, and the context in which it was exchanged, the Commissioner agrees that legal advice is exchanged. However, she is unable to satisfy any of the criteria outlined above in order to agree that the exception is engaged. The council have not defined the process under which they consider the information to have been exchanged or given any details about the statutory powers that would be exercised in the outcome. As such, the Commissioner cannot apply anything other than speculation to the criteria and is left with no choice but to conclude the exception is not engaged.
105. The Commissioner therefore finds regulation 12(5)(d) is not engaged for the withheld information in scope of [4].
106. As the Commissioner is not persuaded that regulation 12(5)(d), or regulation 12(4)(e) can be applied to the withheld information in scope of [4], it is her decision that this information should now be released to the complainant.

Procedural matters.

107. Regulation 5(1) of the EIR states that, subject to any exceptions, environmental information must be made available on request. Regulation 5(2) requires that the information be made available promptly, and in any event no later than 20 working days after the date of receipt of the request. Where no information is held, Regulation 14(2) requires a refusal notice to be issued within that time.
108. The request for items [1-3] was made on 30 January 2019. The council responded on 27 March 2019. The complainant asked for a review and stated that the council had not answered all of the questions. The council provided internal reviews on 8 May 2019 and 13 June 2019 in which it maintained its position that it had provided all the information requested. During this time the complainant remained in correspondence with the council, subsequently further information was

provided on 15 July 2019 and 24 July 2019, none of which the complainant accepted was in scope of the request. On 13 April 2020 the council revised its response to cite regulation 12(4)(b) for records prior to 2014. It amended the refusal to records prior to 2017 on 21 April 2020 stating that the former date had been given in error.

109. During this period, whilst providing the complainant with information, the council failed to identify how it considered that the information related back to the specific questions raised in the request, and where specifically it did not consider it held any further information.

110. In regard to request item [4], the information request was made on 8 May 2019, the internal review of 13 June 2019 cited FOI section 42. During the course of the Commissioner's investigation, the council agreed that the EIR are applicable to the information requested. The council subsequently changed its position to rely upon regulations 12(4)(e) and possibly 12(5)(d). The council was not definitive regarding the regulation cited and did not communicate the change to the complainant in an updated refusal notice.

111. The Commissioner therefore concludes that the council has breached regulation 5(2) in providing information outside of the 20 working day period; furthermore it breached 14(2) of the EIR in respect of all of the requests as it failed to provide the complainant with an adequate refusal notice within the prescribed 20 working day period.

Other matters

112. The Commissioner regards it as appropriate to make reference to the council's poor handling of the information requests and her subsequent concerns about its records management and request handling procedures.

113. In summary the Commissioner considers that the council:

- failed to be transparent regarding its difficulties in searching for records prior to 2017;
- demonstrated a lack of clarity regarding the records held;
- provided information to the complainant, but didn't link it to the specific questions of the request;
- extended the duration of the request unnecessarily due to all of the above.

114. The EIR regulation 16 Code of Practice provides guidance on how to deal with requests for environmental information. Public authorities should use the Code as a handbook to help with their day-to-day handling of requests.
115. Recommendations for EIR public authorities on record keeping, record management and destruction are set out in the FOIA section 46 Code of Practice.
116. The Commissioner therefore refers the council to the aforementioned Codes of Practice issued under sections 45 and 46 of the Freedom of Information Act (2000) and the associated guidance that the Commissioner has made available on her website.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

118. 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.

119. 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