

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

**Date:** 1 August 2022

**Public Authority:** London Borough of Croydon  
**Address:** Bernard Weatherill House  
8 Mint Walk  
Croydon  
CR10 1EA

**Decision (including any steps ordered)**

---

1. The complainant requested information relating to a particular planning application. The London Borough of Croydon (the 'Council') handled the request under the EIR. It provided some information in response to the request with redactions under Regulation 12(5)(b) – the course of justice and Regulation 13 - personal information. During the course of the Commissioner's investigation, the Council reissued the previously disclosed emails and removed some Regulation 13 redactions. It located additional information which it disclosed, with redactions under Regulation 13. The complainant disputed the redactions and argued that more information must be held. Having examined the information in detail in order to issue this notice, the Commissioner identified that Regulation 12(5)(b) had only been applied to information which post-dates the request, such that it is out of scope.
2. The Commissioner's decision is that the Council was correct to handle the request under the EIR. He finds that, where cited, the Council has properly relied on Regulation 13. He has also decided that, on the balance of probabilities, the Council has now provided all the information it holds (with the exception of one letter it has been unable to locate and, therefore, has been unable to determine definitively whether it would fall in scope). As the Council failed to issue its internal review within the statutory 40 working days' time limit, it breached Regulation 11(4) of the EIR.

3. The Commissioner does not require the Council to take any steps as a result of this notice but has commented on the handling of the request in the 'Other matters' section of this notice.

## Background

---

4. The request concerns a planning application<sup>1</sup> submitted in September 2019 for the proposed demolition of an existing building and the erection of a four-storey building comprising seven to eight apartments with a single parking space and other external alterations.
5. The planning application decision was made in February 2022, which post-dates the request. Planning permission has been refused. The complainant did not submit the planning application – his property is in the nearby vicinity.
6. The Commissioner understands that the final date to appeal the Council's decision is 22 August 2022.
7. To aid understanding of the chronology of the various searches and disclosures in this case the Commissioner has summarised them here:

4 June 2021	Disclosure of emails to the complainant with redactions for Regulations 12(5)(b) and 13 (see paragraphs 35 and 36 of the 'Scope' section below).
25 April 2022	The Council conducted a further search and located additional information. Having reviewed the content, it informed the Commissioner on 23 May 2022 that the information either relates to "external" communications and/or post-dates the request and is therefore, not in scope, a position the Commissioner agrees with.
27 May 2022	Reissue of the emails originally disclosed on 4 June 2021, with some of the Regulation 13 redactions removed (ie more senior names disclosed).
13 June 2022	The Council conducted a search of its Uniform system (its Planning Service documents management system) and located further emails and documents (such as the Lift Statement) in scope.

---

<sup>1</sup> Planning Explorer | Planning Application 19/04661/FUL (Croydon Council)

17 June 2022      The Council disclosed the additional information located on Uniform to the complainant, with redactions under Regulation 13.

## **Request and response**

---

8. On 8 March 2021, the complainant wrote to the Council via the WhatDoTheyKnow.com website, and requested information in the following terms:

“Please provide copies of all internal emails between any employees of Croydon Council, documents, reports and notes relating to Planning Application 19/04661/FUL which incorporates my land.”

9. The Council responded on 31 March 2021. It refused to provide the requested information, citing section 14(2) of FOIA (the exemption for a repeat request).
10. The complainant requested an internal review on 31 March 2021, explaining that his previous request related to emails between Silverleaf and the Council and that his request of 8 March 2021 was for internal emails, etcetera, relating to the application on his land.
11. On 9 April 2021, the Council confirmed it would carry out an internal review and would aim to do so by 30 April 2021.
12. On 3 May 2021, having received no response, the complainant informed the Council that he had referred the matter to the Information Commissioner’s Office.

## **Scope of the case**

---

13. The complainant contacted the Commissioner on 3 May 2021 to complain about the way his request for information had been handled.
14. On 4 May 2021, the Council acknowledged that the complainant’s two requests were different such that section 14(2) of FOIA no longer applied. It said it would now respond under the EIR as opposed to FOIA.
15. The Commissioner received the complainant’s complaint form on 4 May 2021; he said he had not had a response or internal review.
16. On 3 June 2021, the Commissioner wrote to the Council asking it to respond to the request within ten working days.

17. The Council issued its substantive response on 4 June 2021. It provided some of the requested information with Regulation 13 redactions for personal information (names, addresses and contact details of individuals). Other parts of the disclosed emails were redacted in accordance with Regulation 12(5)(b) of the EIR – course of justice.
18. On 5 June 2021, the complainant requested an internal review in relation to the Council's revised response, saying he believed further information was held that had not been released.
19. On 5 June 2021, the complainant advised the Commissioner that he remained dissatisfied and wanted the matter to be investigated.
20. The Council provided its internal review, late, on 12 August 2021. It upheld its original position in relation to the Regulation 12(5)(b) and Regulation 13 redactions. It also said that, following further checks, all information in scope of the request had been provided.
21. The subsequent investigation, which commenced on 22 February 2022, has been protracted, with a number of exchanges between the Council and the Commissioner seeking to establish the Council's final position, facilitating further disclosures and obtaining the complainant's view.
22. Following its investigation response of 25 April 2022, the Council told the Commissioner it had located additional information potentially in scope which it had not previously identified or disclosed to the complainant. It required some additional time to review this.
23. On 23 May 2022, the Council advised the Commissioner of its intended way forward. It provided copies of the additional information it had found which it had now reviewed, and said that it did not consider it to be in scope as it either related to "external" communications and/or post-dated the request.
24. The Commissioner reviewed this additional information located by the Council in the further searches undertaken during his investigation and accepts that they do not constitute "internal" communications and/or post-date the request. He has, therefore, not considered them any further.
25. The Commissioner has summarised the remaining key points of the investigation below:
  - On 27 May 2022, the Council reissued the previously disclosed emails to the complainant disclosing the names of its officers below 'Head of Service' in public facing roles. It continued to withhold the names of those officers below Head of Service level and/or those third parties who would not reasonably expect to have their identity enter the public domain.

- The complainant confirmed he wanted the Commissioner to consider the remaining personal information and Regulation 12(5)(b) redactions within the disclosed emails and submitted other queries, which the Commissioner subsequently raised with the Council.
- The complainant highlighted that one of the disclosed emails makes reference to a letter from a [named individual] which the Council has been unable to locate and does not definitively consider to be in scope (see the first bullet point under paragraph 28 below).
- On 13 June 2022, having conducted a further search which now included its Uniform system, the Council advised the Commissioner that it had located further emails and information in scope which it intended to provide to the complainant with redactions under Regulation 13. The Council said it intended to proceed as follows:
  - Provide the internal emails located on Uniform in scope of the request to the complainant;
  - Provide the Case Officer emails;
  - Provide the Lift Statement, the Pre-Application information and a revised version of the Council's original response to include disclosure of the name of the Council's solicitor (previously withheld under Regulation 13).
  - Confirm the Council's position as to what information is held in relation to the Rear Doors, Balcony and Privacy issues (ie no further information held than had previously been released or are part of the public record or addressed in response to the complainant's previous related requests).
  - Confirm that the Council had been unable to locate the [name redacted] letter referred to above.
  - Confirm that the issues raised by the complainant regarding parking are deemed to be out of scope because the information held post-dates the request.
  - Provide a copy of the list of consultees involved in assessing how the increase in traffic on the complainant's land in response to the complainant's statement that information on this subject was missing from the disclosure.
  - Confirm that information about how noise was assessed is included in the publicly available officers' report.

- Set out the Council's position regarding the previous requests and the searches that have been undertaken (ie that all relevant documents are captured on the Council's online register). Some documents, for example a consultee's comments, may not be specifically available to the public however would be summarised in the Case Officers report, which was considered by the Council's Planning Committee.
  - Respond to the complainant's newly raised issue of "...documents showing a substantive consideration of the application are missing - including those where mandatory policies under the London Plan were waived" (ie by informing the complainant that these issues are considered within 7.0 Relevant Planning Policies and Guidance and 8.0 Material Planning Considerations of the report considered by the Planning Committee).
26. On 17 June 2022, the Council updated the complainant as set out above. It apologised for the delay in providing the additional information omitted from the initial response to the request.
27. Having sought the complainant's view following the Council's update, he raised a number of points/concerns which the Commissioner relayed to the Council for consideration.
28. This resulted in a further email of 29 June 2022 from the Council to the complainant, in which the following was explained:
- The Council confirmed that the [name redacted] letter could not be located. It said that the letter may be out of scope because it would not seem to be an "internal" document but accepted that without sight of the actual letter, it could not confirm this definitively.
  - Some of the information the complainant said he had expected to see is not contained within the published planning reports. The Council believes that some relevant comments are contained in a draft version of a Committee report, but has excepted the report on the basis of Regulation 12(4)(d) – material in the course of completion, unfinished documents or incomplete data.
  - The final version of this Committee report is in the public domain and sets out the final position of the Council in respect of its considerations of this particular planning application. Furthermore, there is still the possibility of an appeal up to 22 August 2022, and the Council considers that

to release the draft now could undermine its position in defending such an appeal.

29. The Commissioner notes that the draft Committee report excepted under Regulation 12(4)(d) is dated 13 January 2022. It post-dates the request, so the Commissioner has excluded it from his investigation.
30. The Commissioner again sought the complainant's view. On 4 July 2022, he responded as follows:

".. The fact remains that the developed failed [sic] mandatory planning policy and the planning team made no mention [sic] of this in either planning report (December 2020 and January 2022) and misled [sic] the planning committee. They have avoided every attempt to understand why they misled [sic] the public and the planning committee. In addition unlawfully withheld visualisations which were requested under the FOI act which proved the development breached my privacy and failed to respond to even basic questions such as the height of the development (and FOI request on the height of the development took 14 months for a response and they still won't confirm the actual height). As I've stated in my response to them there is a broader context: they won't respond or won't respond [sic] fully to FOI requests about this development; they direct me and other residents to the planning report which does not contain the requested information; they withheld visualisations which proved the development failed privacy requirements; they made statements in the planning committee that were not true and they refuse to provide any explanation as to why they did not make the committee aware that this development failed mandatory policy".

31. On 5 July 2022 the complainant said that information regarding his planning application had been removed from the Council's website.
32. The Commissioner relayed both these points to the Council for consideration.
33. At the time of drafting this notice, the Council has chosen not to comment further on the complainant's view set out at paragraph 30 above. It provided the Commissioner with a screenshot and confirmation that its website has not been amended since 2 February 2022 and that the planning related information is still available to view. The Commissioner updated the complainant accordingly.
34. The Commissioner can only consider those matters within his remit. He is not able to assess whether or not the Council has complied with the planning regulations or associated processes. He can only scrutinise the



Council's handling of the complainant's information request in accordance with the relevant legislation, in this case the EIR.

35. It became evident to the Commissioner in reviewing the withheld information that Regulation 12(5)(b) has been applied to information which post-dates the request. He has consulted with the relevant officer at the Council to check his understanding is correct and this has been confirmed. The Council said it had provided redacted versions of emails held in a bid to show the complainant what information is held, even where this post-dates the request. The Commissioner appreciates that the Council was endeavouring to assist the complainant, however, it is not obliged to consider information beyond the date of the request. For this reason, the Commissioner has not considered the Council's reliance on Regulation 12(5)(b).
36. Similarly, some of the Regulation 13 redactions have been applied to parts of emails which post-date the request. Again, the Commissioner is not obliged by law to consider information which is out of scope. He has, therefore, disregarded these redactions from his investigation.
37. In this case the Commissioner has considered whether the Council was correct to handle the request under the EIR. He has also determined whether the Council has properly applied Regulation 13 – personal data to the remaining redactions in scope of the request within the disclosed emails. The Commissioner has also examined whether, on the balance of probabilities, the Council has now provided all the information it holds in scope of the request.

## **Reasons for decision**

---

38. The Commissioner has first considered whether the Council was correct to handle the request under the EIR.

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

39. Regulation 2(1) of the EIR defines environmental information as any information in any material form on:
  - “(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
  - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges



and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)."

40. The Commissioner considers that the phrase "any information...on" should be interpreted broadly. In this case the requested information concerns information associated with a specific planning application.

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

"The Council considers that the request is one that falls within the Environmental Information Regulations. This is on the basis that the information requested relates to a planning application, as such The Council's [sic] considers this complies with the definition set out in Regulation 2(1)."

42. The requested information in this case relates to planning matters. Planning and development of land is a measure which is likely to affect the elements of the environment, namely land and landscape. The Commissioner is therefore satisfied that the requested information constitutes environmental information and that the Council was correct to handle the request under the EIR.

43. He will next consider the Council's reliance on Regulation 13 for the remaining redactions within the disclosed emails.

## **Regulation 13 – personal data**

44. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
45. In this case the relevant condition is contained in regulation 13(2A)(a)<sup>2</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
46. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
47. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

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

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

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

49. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
50. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
51. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

---

<sup>2</sup> As amended by Schedule 19 Paragraph 307(3) DPA 2018.

52. In this case, the remaining withheld information in scope relates to names, email addresses and contact details for staff members below the Council's Head of Service level. The Council told the complainant:

"We have removed names, e-mail addresses and contact details of individuals as this would be disclosing personal data to you. The General Data Protection Regulation 2018, renders such data exempt from disclosure by virtue of Regulation 12(3) of the Environmental Information Regulations 2004 ("EIR") read with the provisions of Regulation 13.

It is important to remember that when information is released under the Environmental Information Regulations 2004, it is considered released to the wider public. Any such disclosure of personal information would not be compliant with the provisions of the General Data Protection Regulations 2018.

We have also removed the names of officers of the council from this information as it has been the custom and practice for the Council to generally only release the names of staff down to 'Head of Service' level, which the Council considers meets the Transparency Code issued by the Secretary of State for Communities and Local Government. Furthermore the council considers that this position is consistent with guidance issued by the Information Commissioner, including a Decision Notice issued in respect of a similar request FS50276863<sup>3</sup>."

53. Although previously issued decision notices are not binding, and despite the age of the cited notice, the Commissioner has taken the principles and rationale from that notice into consideration as he considers them to still be relevant here.
54. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to named, living individuals. He is satisfied that this information both relates to and identifies those individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
55. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under

---

<sup>3</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2010/564116/fs\\_50276863.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2010/564116/fs_50276863.pdf)

the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

56. The most relevant DP principle in this case is principle (a).

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

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

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

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

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

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

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

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

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

---

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

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

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA and Schedule 3, Part 2, paragraphs 53 to 54 of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph

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

### **Legitimate interests**

64. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
65. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
66. The complainant has not submitted any specific legitimate interests per se; he has simply asked the Commissioner to consider whether more of the withheld names, etcetera, should be released.
67. Despite being requested to do so twice, (both in the initial investigation letter of 22 February 2022 and an email sent on 19 July 2022 prior to drafting this notice) the Council did not respond to the Commissioner's Regulation 13 questions.

---

(dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

68. Given the importance of personal data, and his regulatory role in such matters, the Commissioner has considered whether there are any legitimate interests in disclosure of the remaining withheld names and contact details. He can identify an argument for transparency and openness and for the complainant to be able to see who dealt with the issues raised in the emails.

### **Is disclosure necessary?**

69. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.

70. Again, no arguments have been advanced by either the complainant or the Council.

71. With regard to the Council's approach to handling personal data in relation to its officers, and noting that the content of the emails has been largely disclosed, the Commissioner does not consider it necessary for any further personal information details to be provided. The planning process itself provides applicants, and those objecting to planning proposals, recourse to challenge decisions made. Further, the complainant is able to contact the relevant Head of Service directly in connection with this matter should he wish to do so. Disclosure of the names and specific contact details of the less senior officers involved is not necessary to assist either the complainant or any other interested party.

72. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

### **Conclusion**

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

74. The Commissioner will next consider whether, on the balance of probabilities, any further information in scope of the request is held by the Council.

**Regulation 12(4)(a) – information not held at the time of the request**

75. Regulation 12(4)(a) provides an exception from the duty to make information available if the authority does not hold the requested information at the time of the request.
76. In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, ie the balance of probabilities. Accordingly his investigation will consider the public authority's reasons for stating that it does not hold the information in question, as well as the extent and reasonableness of any search conducted. The Commissioner will also consider any arguments put forward by the complainant as to why the information is held (as opposed to why it ought to be held).
77. The complainant has expressed concern that not all the information held in scope of his request has been provided by the Council. He is also vexed by the Council's failure to locate a letter which may be in in scope (see paragraph 24 of this notice).
78. It is important to note that the "cut-off" point for determining whether the requested information is held by a public authority is based on the date the request was received.
79. It is also relevant to remember that additional information was located by the Council and disclosed to the complainant during the course of the Commissioner's investigation.

80. In its submissions to the Commissioner, the Council explained that:

"At the time of the request planning officers involved in handling the application was [sic] asked to perform a search of their inbox for anything relating to this application.

All relevant documents are captured on the Council's online register. Some documents for example a consultee comments may not be specifically available to the public however would be summarised in the officers report which was considered by the Council's Planning the [sic] Committee.

At the time of the request Planning Officers searched their internal systems, emails [sic] accounts and also relied upon what was detailed online (as above)."

81. The Council said it believed that adequate searches were undertaken at the time of the request. However, as a result of other requests for information made by another requester, it undertook further searches which it explained were wide ranging and which covered the location in question.



82. The Council advised that these searches had produced information which either post-dated the complainant's request and/or related to "external" communications, such that they were out of scope of the wording of this request.
83. The Council affirmed that records relevant to the request would be held electronically and said that relevant 'formal' documentation is held within the Planning Register and on its Uniform system. It commented that, at the time of the request, the planning application was 'live' so all formal records would have been retained.
84. In addition, the Council explained:
- "The Planning Service have commented that much of the correspondence from [the complainant's] requests may have been considered to be informal correspondence so that it may not have been retained, records in respect of the formal planning application would have been retained."
85. In relation to whether there is a business purpose for the Council to retain the requested information, it said:
- "Formal information is held on the system for transparency if later requested by the public/developer and often used as reference by officers. There is no case to hold informal information however there is no instruction to destroy."
86. In terms of any statutory requirements for the Council to retain the information, it advised:
- "The Planning Service have commented that there is no statutory requirement to retain internal emails. It is a statutory requirement to make certain information available online and we comply with this."
87. Subsequently, (and as set out earlier in this notice) the Council also undertook a search of its Uniform system during the Commissioner's investigation. It located some emails and documents (such as the Lift Statement) in scope which it disclosed to the complainant on 17 June 2022, with redactions under Regulation 13, which have been considered above.
88. The Commissioner acknowledges that the Council's failure to carry out adequate and thorough searches from the outset, together with its failure to locate the letter referenced in the disclosed emails is not helpful, and, understandably, could cast doubt on whether more information is held. However, the Commissioner has taken account of the Council's more wide ranging searches undertaken in the course of his investigation, the further disclosures made and also considered the

complainant's position that more information must be held. The Commissioner has reflected on the specific wording of the request, the Council's explanations as to where and how information is retained and his own review of the information located during the Council's additional searches.

89. He is mindful that the Council has failed to locate the letter and has commented further in the 'Other matters' section of this notice. However, he has also considered that this letter may not actually fall within the scope of the complainant's request.

### **Conclusion**

90. Overall, on the balance of probabilities, which is the test he must use, the Commissioner is satisfied that no further information falling within the scope of the request is held.

### **Regulation 11(4) – representations and reconsideration**

91. Regulation 11(1) of the EIR provides the right for requesters to request a review of the handling of their request. Specifically, Regulation 11(1) states that:

“...an applicant may make representations to a public authority in relation to the applicant's request for environmental information if it appears to the applicant that the authority has failed to comply with a requirement of these Regulations in relation to the request”.

92. Regulation 11(4) of the EIR requires that where an applicant requests that an authority reviews its response to a request for information under Regulation 11(1) that the authority notifies the applicant of its decision as soon as possible and no later than 40 working days after the date of receipt of the representations.
93. In this case, there have been two internal review requests and outcomes during the Council's handling of this request. However, it is the second of those which is definitively outside the statutory deadline.
94. Having initially refused the complainant's request on the basis that it was a repeat request, the Council ultimately reviewed its position and provided its substantive response under the EIR on 4 June 2021. The complainant then requested an internal review on 5 June 2021.
95. The Council provided its internal review outcome on 12 August 2021, 48 working days after receipt.

96. The Commissioner notes that the Council apologised to the requester but did not offer any specific reason(s) for the delay. However, in correspondence with the Commissioner, it explained:

“Any delays associated with responding to [the complainant’s] request, were as a result of competing demands and a number of requests that [the complainant] had made, resulting in a single point of contact being established to co-ordinate contact with him.”

97. In this case, the Council breached Regulation 11(4) of the EIR by failing to provide its internal review within 40 working days.

### **Other matters**

---

98. The Council has been unable to locate a letter referred to in the emails disclosed to the complainant. It is evident that this letter did exist, although, despite extensive searches, the Council has not been able to ascertain its whereabouts. Without sight of this letter, no determination can be made as to whether or not it falls within scope of the complainant’s request.
99. The Commissioner is concerned and disappointed that the Council has not located the letter, particularly given that it is from recent times.
100. The Council should refer to the section 46 code of practice<sup>5</sup> and ensure that improvements are made to its records management.
101. In this case, the Council chose to provide the complainant with some information which post-dates the request, some of it with redactions. Whilst appreciating the Council’s rationale for taking this approach, the Commissioner considers that it has added a layer of complexity, confusion and additional time to his investigation. The Council should ensure when responding to future requests that it only considers information up to the date of the request as required.

---

<sup>5</sup> <https://ico.org.uk/media/for-organisations/documents/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf>

**Right of appeal**

---

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

103. 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.

104. 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 .....**

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**