

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

**Decision notice**

**Date:** 10 December 2013

**Public Authority:** Cheshire East Borough Council  
**Address:** Westfields  
Middlewich Road  
Sandbach  
Cheshire  
CW11 1HZ

**Decision (including any steps ordered)**

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1. The complainant has requested a report prepared by the Designated Independent Person appointed by the Council to investigate allegations of misconduct against senior officers within the Council in relation to the development of a waste transfer station. The Council withheld the information under regulations 13 – personal data, 12(5)(d) – confidentiality of proceedings, 12(4)(e) – internal communications, and regulation 12(5)(b) – course of justice and inquiries of a disciplinary nature.
2. The Commissioner's decision is that Cheshire East Borough Council has not complied with the request in accordance with the Act. In respect of regulation 13, not all the information identified by the Council as personal data, is personal data. Of the information which is personal data, some of it could be disclosed without breaching the data protection principles, however other information can be withheld under regulation 13. Regulation 12(5)(d) is only engaged in respect of some of the information to which it has been applied, however where it is engaged the public interest favours maintaining the exception in respect of the majority of that information. The report does not constitute an internal communication and therefore regulation 12(4)(e) is not engaged. Regulation 12(5)(b) is not engaged on the grounds that the report attracts legal professional privilege, however the Commissioner is satisfied that the disclosure of some of the information would have an adverse effect on an inquiry of a disciplinary nature. Where regulation

12(5)(b) is engaged the public interest favours maintaining the exception in respect of the majority of that information.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - to disclose a redacted version of the report as described in the confidential annexe to this notice.
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**

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5. On 24 January 2013, the complainant wrote to Cheshire East Council and requested information in the following terms:

" Title of request - A copy of the independent report into the Lyme Green Waste disposal fiasco.

The request - Under the freedom of information act I am requesting a copy of the report into the Lyme Green waste plant disaster which has cost the ratepayers a minimum of £800,000."

6. Cheshire East Council responded on 20 February 2013. It stated that the information was exempt under:
  - section 40(2) – the disclosure of personal data would breach the Data Protection Act,
  - section 41 – information provided in confidence,
  - section 36 – the disclosure would prejudice the free and frank exchange of views for the purpose of deliberation or would otherwise prejudice the conduct of public affairs,
  - section 31(1)(g) – in particular that the disclosure would prejudice an investigation into whether any person is responsible for conduct which is improper,
  - section 42 – legal professional privilege
7. The complainant requested an internal review on 21 February 2013. Due to the nature of the information requested, the original decision to

withhold the Designated Independent Person's (DIP) report had been taken at a very senior level and the report itself had only been circulated to a very limited number of people within the Council. Therefore the Council considered there was no member of staff of sufficient seniority to conduct an internal review. It therefore advised the complainant to complain directly to the Information Commissioner.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 6 March 2013 to complain about the way his request for information had been handled.
9. The Commissioner was aware that the report concerned matters regarding a proposal to build a waste transfer station and that potentially it contained environmental information. It followed that there was a possibility that the information request should have been considered under the EIR. The Commissioner informed the Council of this possibility.
10. Although the Council did not accept that the request should have been considered under the EIR it did provide arguments why the information could be withheld under the exceptions provided by the EIR as well as arguments why it considered the report was exempt under FOIA. Therefore the Council provided submissions in respect of the FOI exemptions cited at paragraph 6 above and the following EIR exceptions:
  - regulation 13 – personal data,
  - regulation 12(5)(d) – confidentiality of proceedings.
  - regulation 12(4)(e) – internal communication
  - regulation 12(5)(b) – course of justice and inquiries of a disciplinary nature,
11. Ultimately the Commissioner concluded that the DIP's report should have been considered under the EIR. Therefore the Commissioner considers that the scope of case is whether Cheshire East Council is entitled to rely on the EIR exceptions cited above to withhold the DIP's report. However the first thing to address in this notice is why the Commissioner considers the report is environmental information.

## Background

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12. In autumn 2011 contractors for Cheshire East Council started work to develop a waste transfer station at a site in Lyme Green near Macclesfield in Cheshire. The intention was to store material collected from kerb side collections at the site before it could be transferred to other sites where the material would be recycled. Initially concerns were raised by local residents over whether planning permission had been granted for the development. The works were halted in November 2011 and the project was finally abandoned in February 2012. Following an investigation by the Council's Internal Audit which produced a report in June 2012, it became apparent that there were a number of irregularities in how the project had been carried out. This resulted in the Council appointing the DIP to investigate allegations of misconduct against several senior officers. By law a DIP has to be appointed where it appears to a local authority that allegations against certain senior officials warrant investigation. The DIP provided the Council with his report in December 2012. The implications of that report were still being considered at the time the request was received.
13. The report is split into four chapters and thirteen appendices. Chapter one explains the process followed by the DIP and provides some general observations on the operation of the Council. Chapter two considers the evidence gathered by the investigation. In Chapter three the DIP gives his opinion on whether the allegations are well founded and in Chapter four he recommends what actions, if any, should be taken.

## Why the Designated Independent Person's report is environmental information.

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14. The Council has argued that the request should be considered under FOIA. It accepts that the events considered by the DIP's report arose out of the project to build a waste transfer station, but the Council has argued that the purpose of the DIP's investigation was to establish whether certain officers had acted inappropriately. As such, the Council has argued, the report does not examine issues about the site itself or measures affecting that site.
15. The Commissioner accepts that the purpose of the report is, by definition, to examine allegations of misconduct. However having read the DIP's report the Commissioner finds that the report sets out and examines the events surrounding the proposal to develop the Lyme

Green site as a waste transfer plant. The history of the proposal and the attempts to implement that proposal are an important and integral part of the report's narrative. The allegations being investigated are inextricably linked to the way in which decisions about the use of the land and the proposed development were taken.

16. Therefore the Commissioner is satisfied that the content of the report is environmental information on a number of grounds. Firstly it relates to the state of the land itself and so falls within the definition of environmental information provided by regulation 2(1)(a) which states that environmental information is information on the elements of the environment such as land. Secondly, the report explores and unravels the history of the plan to develop the waste transfer site at Lyme Green and the decisions taken when attempting to implement that plan. The proposal to develop the waste transfer site and the planning procedures that were followed are measures likely to affect the environment. This brings the information within the definition of environmental information provided by regulation 2(1)(c) – ie information on measures, plans and activities affecting or likely to affect the land and landscape.
17. Finally the actual proposed development of the waste transfer station formed part of the Council's wider strategy on collecting and recycling household waste. Waste is one of the factors likely to affect the environment listed in the definition of environmental information provided by regulation 2(1)(b). It follows that a report into what went wrong with the proposal is information on a measure relating to a factor affecting the environment. This again brings the content of the report within the definition of environmental information set out in regulation 2(1)(c)
18. The fact that the primary use of the report is to determine whether allegations of misconduct are well founded does not change the fact that the information itself relates to an element of the environment ie land, and measures affecting both that element of the environment and factors effecting the elements of the environment ie waste. The Commissioner is therefore satisfied that the information is environmental information and that the request should have been considered under the EIR.

## **Reasons for decision**

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

19. Regulation 13 of EIR states that information is exempt if it is the personal data of someone other than the person making the request and its disclosure would breach the data protection principles set out in the

Data Protection Act 1998 (DPA). The Council has applied this exception to a limited number of paragraphs in chapter 1, the majority of chapter 2 and all of chapters 3 and 4. It has also been applied to some names contained in the appendices and two emails included in the appendices.

20. Personal data is defined by the DPA as being information which both relates to a living individual and from which that individual can be identified. The Commissioner accepts that the majority of the information identified by the Council as being exempt under regulation 13, is personal data. There are exceptions to this however, particularly in respect of chapter 2. For example there are sections within this chapter which simply explain the economic conditions which shaped the project, identify the critical events in the project, or set out the procedures that were either in place at the time or that were actually followed. Nor is the Commissioner satisfied that one email, forming one of the appendices, contains personal data apart from the names of the sender and recipient. This information has been identified in a copy of the DIP's report which forms a confidential annex to this notice.
21. To be exempt under regulation 13 the information does not only have to be personal data, its disclosure must also breach at least one of the principles of the DPA. The Council has claimed that disclosing the personal data would breach the first data protection principle. The first principle states, as far as is relevant to this case, that personal data must be processed fairly and lawfully and that at least one of the conditions set out in Schedule 2 of the DPA must be satisfied. The Commissioner will first consider whether the disclosure of the information is fair.
22. One of the main considerations when looking at fairness is the expectations of the individuals in question. The report was an investigation into allegations of misconduct and therefore concerned disciplinary matters. Any employee would generally expect that their employer would treat information about personnel issues as being confidential and this is particularly true when it comes to disciplinary matters. In this case the expectation was reinforced by the formality of the investigation and fact that all those involved were asked to sign an agreement to keep any information disclosed to them confidential. It is clear therefore that those who were the focus of the misconduct allegations would have expected the information to be kept confidential.
23. There was also the potential for the investigation to identify others against whom disciplinary action was appropriate, and even those whose roles were not under scrutiny gave their evidence on the basis that the information would be treated as confidential. The Commissioner is clear that the expectations of the council officers who feature in the report are

that it would remain confidential and would only be distributed to a very limited number of people within the Council.

24. Furthermore the Commissioner is satisfied that disclosing the report would be detrimental to those criticised in it. It would obviously be detrimental to those criticised in the report as it could have the potential to jeopardise their career prospects. The detriment to others who are criticised to a lesser extent, or are simply referred to in the report is not so great. However the Commissioner considers that they could still attract adverse criticism or attention by the public because of their association with the Lyme Green project. This would particularly be the case if their involvement was disclosed but that of others, more deeply involved, continued to be withheld.
25. However when determining whether it would fair to disclose information the reasonable expectations of the individuals and the impact the disclosure would have on them, has to be balanced against the legitimate interests in disclosure. There is a very strong public interest in disclosing the information in this case.
26. The information relates to the performance of individuals in their capacity as senior officials and managers with responsibility for decisions involving large sums of public money and which affect local residents. There is clearly a public interest in holding the Council to account for the decisions that culminated in the project being abandoned and the significant amount of public money that was spent. It is also apparent that the public's confidence in the Council's ability to manage projects, the operation of its planning functions and its ability to safeguard the interests of local residents has been damaged by the events surrounding Lyme Green.
27. Increased transparency of these events would help the public understand what went on and perhaps reassure them that the Council is now in a position to learn from the lessons of Lyme Green. It is certainly arguable that greater transparency offers the best way for the Council to put the events of Lyme Green behind it and rebuild the trust of the people it serves.
28. The arguments that the disclosure would be unfair, ie the expectations of, and detriment to, the individuals concerned is very finely balanced against the legitimate interests in disclosure. However because the information relates to the performance of senior officers and because of the damage the Lyme Green project has done to the reputation of the Council, the Commissioner finds that disclosing the information in these exceptional circumstances would be fair.

29. Although the disclosure would be fair it also has to be lawful and meet one of the conditions set out in Schedule 2 of the DPA. The only condition from Schedule 2 that appears relevant is that provided by condition 6. This permits personal data to be disclosed if it is necessary for the purposes of the legitimate interests of the data controller, or by the third party or parties to whom the information is disclosed, except where it is unwarranted by reason of prejudice to the rights and freedoms or the legitimate interests of the data subjects. A disclosure under the EIR is regarded as being made to the world at large. Therefore the test boils down to whether the disclosure is necessary to meet the legitimate interest of the public and whether this public interest overrides the interests of the data subjects.
30. It can be seen that to a large extent the test is similar to the balancing exercise required when assessing whether a disclosure is fair. Having already concluded that the disclosure would be fair the Commissioner finds the legitimate public interest in disclosure does outweigh the interests of the data subjects. These elements of the sixth condition are satisfied.
31. However it is still important to consider whether the disclosure of the DIP's report is necessary to meet that legitimate interest. The Commissioner has considered whether there are any other means of fully satisfying the public interest in explaining what happened in the Lyme Green project. The Commissioner is aware that the Council had already published the Internal Audit report by the time of the request. Although this goes some way to explaining the events around Lyme Green it does not provide as full a picture as the DIP's report. The internal audit report deals mainly with the procedures that were or were not followed. The DIP report allocates blame for these failings.
32. Also the Commissioner considers that there is a pressing social need to disclose information that would allow the public to understand what went on and alleviate the sense of mistrust that existed at the time of the request.
33. The Commissioner finds that disclosing the personal data is necessary to meet the legitimate interest identified above. Therefore the disclosure would satisfy the sixth condition.
34. It still remains to consider whether the disclosure would be lawful. The Commissioner has considered the formality of the DIP's investigation and the fact that all those involved signed an undertaking to keep any information that was disclosed to them as part of that investigation confidential. The Commissioner is satisfied that the nature of the investigation and the procedures followed during the investigation created an implied duty of confidence owed to the senior officers who



were the focus of the investigation, at least in respect to some of the personal data.

35. For this and other reasons that cannot be discussed in the open version of this decision notice the Commissioner is satisfied that a large proportion of the information which the Council has withheld under regulation 13 is confidential information. Therefore its disclosure would be unlawful and so breach the first data protection principle. It follows that in respect of this information regulation 13 is engaged.
36. However there is other information, to which the Council has applied regulation 13, which although being personal data, is not of a type that can be properly be considered confidential. This information is not extensive.
37. The Council has also argued that the report is the personal data of the DIP himself as it sets out his opinions and conclusions. The Commissioner accepts that report does represent the personal judgement of the DIP himself and that he can clearly be identified from the report. The Commissioner is therefore satisfied that the report does constitute the personal data of the DIP.
38. The DIP conducted his investigation on a confidential basis and the report itself is labelled as 'Strictly Private and Confidential'. Therefore it is clear that the DIP's expectation was that the report would not be disclosed. However it is not obvious what detriment the DIP would suffer if the report was disclosed as he is not the focus of its contents. He was commissioned to produce the report on a professional basis and to carry out the investigation in the statutory capacity of a DIP. Therefore the Commissioner can see no grounds for considering the disclosure of the report would be unfair to the DIP.
39. The sixth condition is satisfied on the same basis as it is in respect to the disclosure of the personal data of the council officers involved. As there does not appear to be any ground for concluding the disclosure would be detrimental to the DIP, there is no duty of confidence owed to the DIP. The Council has not advanced any other grounds as to why the disclosure would be unlawful. The Commissioner is therefore satisfied that the disclosure of the personal data of the DIP would not breach the data protection principles.

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

40. Regulation 12(5)(d) allows a public authority to refuse a request if disclosing the information would adversely affect the confidentiality of the proceedings of that public authority, or any other public authority,

where that confidentiality is provided by law. Cheshire East Council has applied this exception to the entire report apart from some information which was already in the public domain at the time of the request. By referring to information already in the public domain the Commissioner considers that the Council intended to refer to a number of the appendices. However as will become apparent the Commissioner considers that some information contained in the body of the report is already public knowledge.

41. The term 'proceedings' is not defined within the EIR but the Commissioner considers that an activity has to have a degree of formality to qualify as such. The DIP's report is part of the very formal process relating to the investigation of allegations of misconduct against very senior council officers and any subsequent disciplinary action that could follow. To pursue such allegations the Council was required to appoint a DIP. The DIP is appointed under statutory regulations which set out the process which has to be followed in his appointment and which establish his role. Once appointed the Council then provide him with formal terms of reference which establish the actual matters he is required to investigate. Upon receipt of that report the Council then formally considers its content and decides what action, if any, is appropriate. The Commissioner is therefore satisfied that the DIP report is part of the Council's formal disciplinary process.
42. It is not sufficient that the information relates to formal proceedings for it to be exempt under regulation 12(5)(b). Those proceedings also have to be confidential under UK law. This means that the information has to be protected by either a statutory duty of confidence or the common law duty of confidence. In this case the Council has argued that the information is covered by a common law duty of confidence owed to the individuals who participated in the DIP's investigation. This includes both those who were the main focus of the allegations of misconduct and also other officers and councillors who were involved in the investigation.
43. For information to be protected by a common law duty of confidence it has to have been provided in circumstances which would have given rise to an expectation of confidence, the information must have the necessary quality of confidence and an unauthorised disclosure of that information should, generally, be detrimental to the party to whom the duty of confidence is owed. The Commissioner will look at each of these conditions in turn.
44. In respect of those officers who were the subject of the allegations the very fact that the investigation was part of a disciplinary process and that such processes are commonly dealt with on a confidential basis would give rise to an expectation that the contents of the report would remain confidential. In other words these circumstances would create an

implied duty of confidence. This expectation would be have been reinforced by the fact that those participating in the investigation signed an undertaking not to disclose any information they were provided with as part of that investigation. Furthermore in respect of these individuals there are other circumstances which the Commissioner is aware of but is unable to discuss in the open version of this notice, which satisfy the Commissioner that the Council owes these individuals a duty of confidence.

45. The Commissioner is also satisfied that the other officers and councillors who were involved in the investigation would also have had an expectation that any information they contributed would have been kept confidential. Although the investigation focussed on allegations against several named officers, other officers would have been aware of the potential for the investigation to lead to disciplinary action against them if it concluded such action was warranted. Therefore all those involved would have regarded the information they contributed as being sensitive. Again the formality of the proceedings and the undertaking not to disclose any information they were asked to sign would have led them to understand that the DIP and the Council had no intention of disclosing the information. This would have created an implied duty of confidence.
46. Having established that the information contained in the report was imparted in circumstances which gave rise to an expectation of confidentiality, it is now necessary to consider whether the information has the necessary quality of confidence. This itself has two elements. Firstly although the information need not be highly sensitive, it cannot be trivial. The Commissioner is satisfied that the subject matter ie the events around the Lyme Green project and who was responsible for what went wrong, are not trivial.
47. Secondly the information must not be readily available by other means. The Commissioner notes that the Council has not tried to apply this exception to certain information contained in the appendices which are already public documents.
48. In terms of the information contained in the body of the report the Commissioner accepts that some of the information, particularly that in chapter 3 and 4, is not in the public domain. The Commissioner is satisfied that this information has the necessary quality of confidence.
49. However much of the information in chapter 1 and some parts of chapter 2 are already public knowledge. This is because some of the activities that are referred to were played out in public, for example the actual works that took place on site and the concerns raised by local residents. Other factual information and time lines are set out in the

Council's Internal Audit report which had already been published at the time of the request. This information does not have the necessary quality of confidence. Nor can its disclosure affect the confidentiality of the proceedings as a whole. This point is discussed later at paragraph 53.

50. The final test of confidentiality is that an unauthorised disclosure of the information would result in a detriment to the confider ie the individual who provided the information. Given the nature of the information in question, the fact that it relates to the culpability or not of those involved in the Lyme Green project for its problems, the Commissioner would accept that disclosing the information would be detrimental to anyone criticised in that report.
51. To a far lesser extent, the disclosure of information could be unwelcome to others, not criticised in the report. This is simply because they may still attract media attention or become the subject of comment, especially if information on those who were responsible was not released.
52. The Commissioner is therefore satisfied that the information identified in the confidential annexe engages the exception. The proceedings to which the information relates are confidential and disclosing the information on what is a crucial element of those disciplinary proceedings would adversely affect their confidentiality.
53. However the information which the Commissioner finds is already public knowledge does not engage the exception. The Commissioner recognises that what is important to regulation 12(5)(d) is the confidentiality of the proceedings which is not necessarily the same as the confidentiality of an individual document that forms part of those proceedings. For example it is possible that although a document is in the public domain its relevance to a particular inquiry is not known and revealing its relationship to those proceedings would undermine the confidentiality of those proceedings. However this does not prevent the disclosure of information in this case as the fact that a DIP had been appointed was known, it was certainly reported on in the published minutes of the Council Meeting held on 13 December 2012. Furthermore, the information in question is self-evidently relevant to the DIP's investigation. Therefore the Commissioner is satisfied that disclosing this information would not adversely affect the confidentiality of the proceedings.

### **Public interest in regulation 12(5)(d)**

54. As with all the exceptions provided by regulation 12, regulation 12(5)(d) is subject to the public interest test. Therefore in respect of the

information which the Commissioner has found does engage the exception it is necessary to consider public interest in maintaining the exception. The public interest test is set out at regulation 12(1)(b). It 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 disclosing the information”.

55. The purpose of the exception for confidential proceedings is to ensure those proceedings can fulfil their objective. In this case, the objective is, in broad terms, to allow the Council to determine what went wrong with the Lyme Green project, who, if anyone was responsible for those failings and to take appropriate action including any disciplinary action against those involved.
56. It is important to remember that although the DIP had concluded his investigation in December 2012, at the time of the request the Council was still considering the DIP's findings and dealing with those criticised by him. Even though the event to which the report related may have taken place nearly a year earlier the actual matters arising from those events were very much live. Therefore it is important to consider the impact that disclosing the information would have on the ability of the Council to conclude the disciplinary proceedings. The request was received at a crucial time when the Council was actively taking steps to resolve the issues raised in the report and prevent their reoccurrence. The Commissioner recognises that confidentiality was needed to allow the Council to take those steps. Ultimately the removal of confidentiality by the disclosure of the report could have resulted in protracted and costly disciplinary proceedings. Therefore, at the time of the request, there was a strong public interest argument in favour of withholding information that would undermine the confidentiality of the proceedings in terms of the disciplinary process as a whole.
57. Furthermore the Commissioner considers that public authorities need to have mechanisms available to investigate problems in detail and, if appropriate, apportion blame and then extricate themselves from those problems and move on. The Commissioner accepts that such mechanisms will often depend on a degree of confidentiality. Without that confidentiality parties to an investigation would be reluctant to cooperate or adopt a more defensive position. This would delay proceedings at least and possibly prevent the full facts being unearthed. Such eventualities would not be in the public interest, it is important that public authorities can get to the bottom of a problem as soon as possible and start putting things right in the interests of the people they serve and who pay for those services. The Commissioner places great weight on the public interest in public authorities being able to

effectively and efficiently investigate events such as those that occurred at Lyme Green.

58. These arguments apply not only to the DIP's investigation into Lyme Green but apply to DIP's reports in general. There is a real risk that if this DIP's report was disclosed people would have less faith in a public authority's ability to protect the confidentiality of information contributed to future DIP reports. The Commissioner is always cautious of accepting such chilling effect arguments, but finds substance in this argument when applied to DIP reports. The Lyme Green affair has seriously undermined the standing of Cheshire East Council and therefore it could be argued that the disclosure of this report would have to be seen in the context of those exceptional circumstances. However a DIP is only ever appointed to investigate allegations against very senior officers within a council. It is very possible that future investigations would concern equally high profile and controversial events. It follows that parallels could be drawn between the disclosure of this report and future DIP reports. The Commissioner places great weight on preserving the effectiveness of investigations by DIPs in the future.
59. In line with the Commissioner's guidance on this exception, he has also taken account of the public interest in maintaining the principle of confidentiality, that is the value in preserving the ability of one party to trust another. This also weighs in favour of maintaining the exception.
60. The Commissioner is aware that at the time of the request the Lyme Green project was continuing to attract a great deal of coverage in the local media. Furthermore, the residents of Cheshire East, and in particular those living close to the Lyme Green site, were still very concerned about what had occurred. It is apparent to anyone who followed the story that the problems had arisen through serious failings within the Council. In this situation there is a very strong argument in favour of transparency so that the public can satisfy itself that those responsible have been identified and held to account.
61. There is also a credible argument that it would be in the interests of the Council to disclose the DIP's findings in order to help draw a line under the episode. The Council needs to be able to put the events of Lyme Green behind it and rebuild its relationship with residents.
62. There are weighty public interest arguments on both sides of the public interest test. The Commissioner can understand that many would argue that in the case of Lyme Green there is an overriding public interest in transparency and accountability. However because the requests were received at a time when confidentiality was critical to the successful conclusion of the proceedings, but mainly because of the need to preserve DIP investigations as a means of dealing with these very

difficult issues, the Commissioner finds that the public interest favours maintaining the exception in respect of the vast majority of the information which engages the exception.

63. There is a very limited amount of information contained in chapters 3 and 4 where the Commissioner finds that the public interest favours disclosure. The information in question is identified in a confidential annexe to this notice and relates either to arrangements that were followed in terms of the overspend on the project, or the extent to which the elected members as a whole and in particular the cabinet, were aware of the overspend.
64. The Commissioner finds that there is an increased public interest in disclosing this information because of the importance in local residents knowing whether or not the cabinet had an opportunity to take action to address the problems at the Lyme Green earlier. The reason for disclosing additional information on the overspend is that if the correct financial procedures had been followed there would have been opportunities to alert the cabinet to the problems sooner.

#### **Regulation 12(4)(e) – internal communications**

65. Regulation 12(4)(e) provides that information can be withheld to the extent that the request involves the disclosure of internal communications. The Council has applied the exception to the report in general, excluding certain information from the appendices.
66. The obvious issue to address first is whether the DIP's report can be considered an internal communication, ie can the DIP himself be regarded as acting as part of the Council when conducting his investigation and producing his report.
67. There is no dispute that the report was created by the DIP and that he then passed it to the Council. The Commissioner's guidance states that communications between a public authority and a third party such as a contractors or an expert adviser will not generally be considered an internal communication. However the guidance does concede that there may be exceptional cases where a third party can be considered an integral part of the public authority for the purpose of regulation 12(4)(e). This will depend on the form and substance of the relationship between the parties and the nature of the information.
68. The Council has referred to the Chief Executives handbook produced by the Joint Negotiating Committee for Local Authority Chief Executives (the JNC Handbook) when arguing that the report should be regarded as an internal communication. The JNC Handbook deals with the conditions of service for Chief Executives including the role of the DIP in any

disciplinary proceedings. The JNC Handbook explains at paragraph 2.9 that, "The role is best understood as an independent element of what remains essentially an internal and confidential process of the authority".

69. The Commissioner would accept that taken as whole any such disciplinary process is internal to the authority. He has also had regard for the understanding of confidentiality between the DIP and those involved in the investigation, together with the nature of the actual information contained in the report itself. He acknowledges that there is an argument that this is one of those exceptional cases where a communication from a third party ie the DIP, should be regarded as an internal communication.
70. However the DIP is not a public employee, he is, in this case a private lawyer. DIPs are appointed because there is a need to bring an objective expert view to bear on the allegations of misconduct and this is best achieved by someone from outside the authority. The DIP's independence from the authority that has appointed him is essential to the process. For this reason the Commissioner is satisfied that the DIP cannot be regarded as part of the Council. It follows that the report cannot be considered an internal communication and that the exception does not apply.
71. The Commissioner has considered whether any parallels can be drawn with the position of Sir Rod Eddington in the DfT v Information Commissioner (EA/2008/0052). In that case the Tribunal accepted that the draft transport study produced by Sir Rod as an independent adviser to the government, was an internal communication. The Tribunal found that in preparing his study Sir Rod had been invited in to the private thinking space of ministers. He was effectively treated as part of the 'team'. That is not the case with the DIP who has an inquisitorial role which sets him apart from the organisation he was investigating.
72. The Commissioner also notes that when applying section 41 – information provided in confidence, under FOIA, the Council argued that the DIP should be regarded as a third party who provided the Council with the report. This provides some support to the contention that although the disciplinary process as a whole was regarded as an internal process, the DIP was still seen as someone external to the Council.

**Regulation 12(5)(b) – Course of justice and inquiries of a disciplinary nature.**

73. Regulation 12(5)(b) states that a public authority may refuse to disclose information to the extent that its 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 inquiry of a criminal or disciplinary nature.

74. The Council has applied the exception on two grounds. Firstly it argues that the report is subject to legal professional privilege and that therefore its disclosure would adversely affect the course of justice. Secondly the Council has argued that disclosing the report would adversely affect its ability to conduct an inquiry of a disciplinary nature.

### **Legal professional privilege**

75. In respect of the first argument, it has been established at Tribunal that the regulation 12(5)(b) can be used to prevent the disclosure of documents that are covered by legal professional privilege. It is understood that the Council considers that the report as a whole is covered by legal professional privilege apart from certain information contained in the appendices.
76. In brief legal professional privilege is the principle that clients should be able to seek advice from their legal advisers and that to do so they must be able to speak freely and frankly with that adviser. It is therefore important that the communications between a client and a legal adviser remains confidential. The Tribunal has accepted that to disclose any documents covered by privilege would erode this concept and would therefore have the potential to adversely affect the course of justice by undermining individuals' ability to obtain the best legal advice.
77. Legal professional privilege can only protect communications made between a client and their legal adviser for the dominant purpose of obtaining legal advice.
78. In this case the person appointed as the DIP by the Council is a solicitor. The Council has argued that the purpose of seeking the DIP's report was to obtain advice on whether or not officials were guilty of misconduct, and to obtain recommendations as to what disciplinary action was appropriate. In particular the Council has explained that the DIP is required to establish fact, make a judgement on whether action amounted to misconduct and if so to recommend disciplinary proceedings. The Council argues that these matters raise legal issues and that the DIP's role involves the exercise of legal judgement.
79. The Council has also referred to the following case, *Three Rivers (No 6)* [2005] 1 AC 610. That case established that legal advice was not limited to advice on the interpretation of the law. Legal advice could include advice which relates to the rights, liabilities, obligations or remedies of the client under private law or public law. The Council has argued that the DIP's role was in effect to provide such advice and that therefore the

report is legal advice which is capable of attracting legal professional privilege.

80. However the Commissioner notes that such advice would only attract legal professional privilege if it is provided by a professional legal adviser in that professional capacity.
81. The Commissioner does not accept the Council's argument that the DIP was acting as a professional legal adviser. The Commissioner has looked at the Local Authorities (Standing Order) (England) Regulation 2001 under which the DIP was appointed. Under regulation 7 a local authority must appoint a DIP where it appears to the local authority that an allegation of misconduct by a 'relevant officer' requires investigation. Regulation 7 goes on to set out the task of the DIP, he must make a report stating his opinion as to whether (and if so to what extent) the evidence he has obtained supports any allegation of misconduct and recommending any disciplinary action which appears to him to be appropriate.
82. There is no requirement for the DIP to be legally qualified. The DIPs role could be carried out by someone with no legal training. Regulation 7 merely provides that the DIP must be such a person as may be agreed between the authority and the relevant officer.
83. As discussed, whether information attracts legal professional privilege depends on the nature of the relationship between the adviser and the client at the time when the communication is made. In this case this would be the time at which the DIP collected his evidence, produced his report and then passed that report to the Council for consideration. The Commissioner is satisfied that at the time in question the author of the report was not acting in the capacity of professional legal adviser. He was acting in his role as a DIP. That role was not to provide advice on what legal action could be taken against the relevant officers or how such legal action should be progressed. He was simply fulfilling the role set out in the Local Authority Regulations, ie setting out his opinion whether the evidence obtained supports an allegation of misconduct and recommending what action, if any, is appropriate (rather than advising on available options). These functions could have been carried out by a non-legally qualified person.
84. Where a practising solicitor provides advice in a capacity other than that of professional legal adviser the advice will not attract legal professional privilege. In such circumstances the lawyer is said to be merely acting in his capacity as a person having legal knowledge.
85. The Commissioner is satisfied that in performing his role as a DIP the lawyer was not acting as a legal adviser, albeit he was acting as a

person with legal knowledge. It follows that the report is not a communication made for the dominant purpose of providing legal advice and therefore cannot attract legal professional privilege. The EIR exception provided by regulation 12(5)(b) does not apply on the grounds that the report is covered by legal professional privilege.

### **Adverse affect to an inquiry of a disciplinary nature**

86. The Council's second reason for applying regulation 12(5)(b) is that disclosing the report would have an adverse affect on the conduct of an inquiry of a disciplinary nature. The Council has not explicitly limited the application of this exception apart from stating that it does not apply to certain information contained in the appendices. Therefore the Commissioner understands that it has been applied to the entirety of the main body of the report.
87. It is clear that the DIP's report was an essential part of the Council's disciplinary process which had the objective of determining whether there had been misconduct by senior officers and if so what action was required. The Commissioner is satisfied that this entire process, and the DIP's investigation in particular, can be characterised as an inquiry of a disciplinary nature. At the time of the request the DIP had obviously completed his investigation but the Council were still considering the report as there were still unresolved issues to be decided.
88. The Council has argued that to release the report at this time would have seriously undermined its ability to successfully conclude the disciplinary proceedings. Releasing the report would have raised doubts about the fairness of the proceedings. If the report had been released, the public and media spotlight would have been focussed on those criticised in the report. In such an environment it is possible that decisions would be unduly influenced by the publicity or at very least any individual subject to disciplinary action could have argued that this was the case. This would have made it more difficult for the Council to deal with the individuals involved and would have prolonged the proceedings. It is even possible that anyone who was subsequently disciplined could have taken legal action on the basis that the process had been unfair.
89. The Council has also argued that if this DIP's report was disclosed it would undermine peoples' confidence that future DIP reports would not be released. This is the chilling effect described at paragraph 58 above. The Commissioner accepts that these same arguments are relevant to the application of regulation 12(5)(b). If the disclosure of this report would lead to those involved in future inquiries being reticent to cooperate fully, the Commissioner would accept this would have an adverse affect on future inquiries of a disciplinary nature. Such reticence

would at least delay those inquiries and possibly prevent future inquiries getting to the bottom of an issue.

90. In light of the above the Commissioner agrees that if some elements of the report had been released at the time of the request it would have had the effects described by the Council. He is satisfied that in respect of those elements of the report, the exception provided by regulation 12(5)(b) is engaged. However there are some parts of the report which the Commissioner considers could be disclosed without having these effects. Those parts include the majority of chapter 1 and elements of chapter 2. There is only a very limited amount of chapters 3 and 4 which would not have the adverse effect described.
91. The information to which the Commissioner considers the exception does not apply is essentially the same as that which he found was not covered by the exception relating to the confidentiality of proceedings, regulation 12(5)(d). This is information which is already public knowledge either because some of the events, ie the actual building works, took place in public, or the information simply records the well-publicised concerns of local residents, or is factual information that is already detailed in published council documents such as the Internal Audit report. In respect of this information, which is identified in the copy of the DIP's report in the confidential annex, the exception provided by regulation 12(5)(b) is not engaged.

### **Public interest in maintaining regulation 12(5)(b)**

92. In respect of those elements of the report which the Commissioner considers to be exempt under regulation 12(5)(b), it is necessary to carry out the public interest test. Under the public interest test information can only be withheld under an exception if the public interest in maintaining the exception outweighs the public interest in disclosing the information.
93. The public interest in maintaining the exception relates to both the value in the Council being able to conclude the Lyme Green disciplinary inquiry and in the ability of it, or any other local authority, to rely on DIP inquiries as an effective means of resolving allegations of misconduct against senior officers in the future.
94. In respect to the impact that disclosing the information would have on the Lyme Green inquiry the Commissioner has had regard for the fact that at the time of the request the inquiry has reached a critical point. The report had only recently been provided to the Council and the Council was still in the process of considering what actions were necessary in light of its findings. The Commissioner is satisfied that

disclosing the report would have severely hampered the ability of the Council to conclude these proceedings.

95. The Commissioner also considers that there is a strong public interest in preserving DIP inquiries as an efficient and effective means of investigating allegations of misconduct against senior officers in the future. Therefore, for the same reasons as explained in respect to the public interest in maintaining regulation 12(5)(d) – confidentiality of proceedings, the Commissioner finds that significant weight should be attached to the public interest in preventing any adverse affect to both the disciplinary inquiry relating to Lyme Green and any future inquiries by a DIP. This is hardly surprising as the confidential proceedings being protected by regulation 12(5)(d) is the very same inquiry of a disciplinary nature that is being protected by regulation 12(5)(b).
96. Similarly the public interest arguments for disclosing the report are also the same as those discussed in relation to regulation 12(5)(d). However when looking at the public interest balance in respect of the regulation 12(5)(b) the Commissioner has also considered whether there is any credible suggestion or independent evidence that the DIP's investigation was not properly conducted. Clearly if there was evidence that the investigation was flawed there would be an increased value in disclosing it and less value in protecting it. However the Commissioner is not aware of any reason to conclude that the DIP's report is anything other than the result of thorough and vigorous investigation.
97. In light of the above the Commissioner is satisfied that to the extent that the exception applied to the report, the public interest in maintaining the exception outweighs the public interest in disclosure in respect of the vast majority of the information.
98. There however is a very limited amount of information contained in chapters 3 and 4 where the Commissioner finds that the public interest favours disclosure. The information in question is identified in a confidential annexe to this notice and relates either to the arrangements that were followed in terms of the overspend on the project or the extent to which the elected members as a whole and in particular the cabinet, were aware of the overspend.
99. The Commissioner finds that there is an increased public interest in disclosing this information because of the importance in local residents knowing whether or not the cabinet had an opportunity to take action to address the problems at the Lyme Green earlier. The reason for disclosing additional information on the overspend is that if the correct financial procedures had been followed there would have been opportunities to alert cabinet to the problems sooner.

## **Aggregation of the public interest**

100. Under the EIR, where more than one exception applies to the same information the public interest in maintaining those exceptions must be aggregated. As a general rule the different exceptions will protect different interests. The aggregation of the public interest allows account to be taken of the overall value in protecting a piece of information by combining the weight given to protecting these different interests.
101. The public interest in disclosure is constant regardless of which exception has been applied. Therefore where the Commissioner finds that the public interest in disclosure has already been outweighed by the value in maintaining just one exception the consideration of additional exceptions cannot alter that outcome.
102. It follows that there is only a need to aggregate the public interest where the value in maintaining one exception is not in itself sufficient to outweigh the public interest in disclosure. This will allow the total benefits in withholding information to be properly balanced against the value in disclosing that information.
103. In this case the Commissioner has found that the exceptions provided by regulations 12(5)(b) and 12(5)(d) are engaged in respect of the same information but that in respect of some information relating to the financial procedures that were followed and the awareness of the cabinet, the public interest favoured disclosure when each exception was considered on its own.
104. However as the inquiry of a disciplinary nature protected by regulation 12(5)(b) is the very same set of proceedings protected by regulation 12(5)(d) the Commissioner is satisfied that the public interest arguments in favour of maintaining both exceptions is the same. It follows that no additional public interest factors arise by aggregating the weight of the public interest which attaches to each exception separately. The Commissioner is satisfied that having considered the aggregation of the public interest in maintaining these exceptions the public interest still favours disclosing the information in question.

## Right of appeal

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105. 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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

106. 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.

107. 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 .....**

**Gerrard Tracey**  
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