

SHEFFIELD CITY COUNCIL
Freedom of Information Act 2000 &
Environmental Information Regulations 2004
Evaluation Report (**Report**)

July 2022

1 Executive Summary

- 1.1 Sheffield City Council (**the Council**) has received a number of requests for information (**Tree Requests**) under the Freedom of Information Act 2000 (**FoIA**) and the Environmental Information Regulations 2004 (**EIR**) regarding a large scale tree felling programme by its PFI Contractor Amey. The Council has been subject to significant scrutiny and a number of complaints relating to the tree felling programme since it began in 2013.
- 1.2 The Council has received a complaint (**Complaint**) from a member of the public (**Complainant**) regarding the way in which the Tree Requests have been dealt with. We understand that the Council has exempt some information from disclosure under section 42 of FoIA (**s.42 FoIA**) which relates to information which is legally privileged and under Regulation 12(5)(b) of the EIR (**reg. 12(5)(b) EIR**) which relates to information which, if disclosed, would adversely affect the course of justice. The Complaint includes allegations of information being marked as 'not subject to FOI' and being incorrectly withheld.
- 1.3 We understand that the Complaint also includes allegations against Council Members regarding the handling of the Tree Requests. This is being dealt with separately by the Council under the Member's Code of Conduct and therefore falls outside of the scope of this Report.

Objectives and Approach

- 1.4 In summary, we have been instructed by the Council to undertake an independent evaluation which considers:
 - 1.4.1 Whether the Council's FoIA/EIR policy accords with the Information Commissioner's Office (**ICO**) guidance and the relevant law;
 - 1.4.2 The Council's approach to the application of s.42 FoIA/reg. and 12(5)(b) EIR. In order to achieve this the Council has requested that we:
 - (a) interview relevant staff members to understand how they have approached the application of s. 42 FoIA/reg. 12(5)(b) EIR; and
 - (b) review a sample of ten Tree Requests and ten other requests for information which are not related to trees (**General Requests**) where s. 42 FoIA or reg. 12(5)(b) EIR has been applied, and determine whether s. 42 FoIA and/or reg. 12(5)(b) EIR have been applied in accordance with law and best practice in each instance.
 - 1.4.3 Whether law and best practice was complied with in relation to the FoIA request which formed the subject of the Complaint.

For the avoidance of doubt, our independent evaluation does not include consideration/assessment of the application or failure to apply other exemptions contained within FoIA and EIR.

Key Findings

- 1.5 Our key findings can be summarised as follows. These should be viewed in context of the rest of the Report which includes insight into the background to the handling of the Tree Requests and General Requests:
 - 1.5.1 At the time of conducting this review, it was unclear whether the Council had an overarching FoIA/EIR policy and we were not provided with this documentation. It has subsequently come to light that there were two Standard Operating Procedures and guidance on how to respond to FOIA/EIR requests in place. These documents were not flagged to us during the interviews but this in part may have been due to a number of individuals who may have had knowledge of the relevant guidance and its location had left the Council.

- 1.5.2 We were unable to determine whether s.42 FoIA and reg. 12(5)(b) EIR were correctly applied in relation to the majority of the Requests reviewed. In order for us to consider the objectives set out at 1.4 we requested all relevant information relating to the sample of Tree Requests and General Requests, including the information that was deemed to be exempt. The Council were not always able to provide us with sufficient information to allow us to conduct our review. This again may in part be due to a number of individuals having left the Council and therefore limiting the organisational memory as to the location of the relevant information. The inability to provide all relevant information however suggests a failure in the Council's records management procedures and/or a failure of the Council in some instances to locate, retrieve and review information which was the subject of FoIA/EIR requests;
- 1.5.3 Of the limited number of Requests we were able to fully review, we concluded that s.42 FoIA and reg. 12(5)(b) EIR were correctly applied in most instances; and
- 1.5.4 In some instances, officers had in relation to information relating to the tree felling programme, carried out a practice of inappropriately labelling information as being '*not subject to FOI*,' and in at least one instance this resulted in information which should have been disclosed being incorrectly withheld (although it was later disclosed in that particular instance). The instance in question relates to a Request made by the Complainant.

Conclusion

- 1.5.5 In summary, our ability to evaluate whether s.42FoIA/reg. 12(5)(b) EIR has been correctly applied by the Council in respect of the Tree Requests and General Requests has been significantly hampered by the Council's inability to locate and provide us with all of the relevant information. Without access to the information sought under each request, it has not been possible to consider the application of exemptions/exceptions and understand the approach taken by the Council. This has also limited our ability to make findings and recommendations.
- 1.5.6 Of the requests we were able to fully review, in our view s.42 FoIA/reg. 12(5)(b) was applied correctly in five out of six cases.
- 1.5.7 Where s.42 FoIA/Reg.12(5)(b) was incorrectly applied, the reasons for this were unclear. We have not seen evidence that information was deliberately withheld to avoid publication.
- 1.5.8 We have seen evidence in several cases of Council officers carefully deliberating factors relevant to the application of s.42 FoIA/reg. 12(5)(b) EIR, but in those instances we often did not have the information which was withheld in order to determine whether they were correctly applied.
- 1.5.9 The Council had in some instances undertaken a practice of labelling information arising from the tree felling programme which they considered to be sensitive as '*Not Subject to FOIA*.' This practice was inappropriate. Officers accept this and the practice is (as far as we are aware) no longer used. We have seen evidence that the intended purpose of the labelling process was to flag information which is sensitive, for the IMT to then review carefully before making decisions on disclosure under FoIA, and not to intentionally withhold information which should otherwise be disclosable. We have seen evidence that in one instance this practice resulted in information being incorrectly withheld under FoIA; that information was later disclosed.

Key Recommendations

- 1.6 Our key recommendations are as follows:

- 1.6.1 The Council should review the Standard Operating Procedures and guidance to ensure it sets out each stage of the process from the receipt of a new request to the provision of the response to the applicant. The procedure should also include information on how appeals are dealt with. This should be clearly communicated to officers and also to new joiners, and should be easily accessible for reference.
- 1.6.2 Having regard to the requirements of the UK General Data Protection Regulation and the Data Protection Act 2018 (**Data Protection Legislation**) to ensure that personal data is being properly retained/destroyed, the Council should review its record management system in relation to FoIA/EIR requests and implement measures to ensure that, for each request, the following information is logically stored and easily retrievable:
- (a) The original FoIA/EIR request;
 - (b) A copy of the information held which falls within the scope of the request;
 - (c) Internal communications which evidence deliberations and decision making regarding the scope of the request, the information held, whether the information should be disclosed or withheld and exemptions applied;
 - (d) A copy of the response sent to the applicant;
 - (e) A copy of request for internal review, relevant internal communications/evidence of decision making, and response to internal review; and
 - (f) A copy of any ICO correspondence, should an appeal be made by the applicant, and evidence of internal decision making together with copies off the Council's response to the appeal and ultimately the outcome.
- 1.6.3 The Council should consider and if practical establish a system whereby FoIA/EIR responses are reviewed and signed off by a member of the management team. This should ensure a more consistent approach to FoIA/EIR responses. It is however important that whatever process is implemented does not delay responses to requests from being sent out and statutory deadlines being met.
- 1.6.4 Review the numbers of FoIA/EIR requests/workload being handled by the IMT and consider whether the Council would benefit from additional resource within IMT.
- 1.6.5 In relation to the Tree Requests and General Requests where we have found that the exemption in s.42 FoIA/re. 12(5)(b) EIR was incorrectly applied, revisit the information and consider whether it can and should be disclosed to the relevant applicants (we appreciate other exemptions may apply, and this should be assessed).
- 1.6.6 Review the Council's FoIA training for all employees to raise awareness around the scope of FoIA and EIR and how the exemptions can be applied in practice. Training should also cover the application of the exemptions in s.42 FoIA and reg. 12(5)(b) EIR and emphasise the importance of reviewing information which has been requested, before considering whether it is disclosable, rather than making assumptions in relation to the application of exemptions without having sight of the relevant documents.

2 Introduction, Background and Objectives

Background

- 2.1 Our understanding of the background to the Complaint and ultimately to this Report being commissioned is as follows:
- 2.1.1 In 2010 the Council's roads needed significant improvement and therefore the Council entered into a Private Finance Initiative (**PFI**) contract with Amey. A road programme was agreed to run for 25 years with a 5 year investment period.
 - 2.1.2 The Council's objective was for Amey to rectify the road problems. Out of that work arose the need to fell trees adjacent to the highways. The proposed programme of felling brought the Council into conflict with members of the public based in the West of Sheffield.
 - 2.1.3 In 2016 there was significant conflict in relation to proposed felling at Rustlings Road. A campaign group brought judicial review proceedings to challenge the felling programme, including the way in which the Council had engaged with the public in relation to it. The judicial review was ultimately unsuccessful and judgement was awarded in the Council's favour. The campaigners attempted to appeal the judicial review decision, but the appeal failed.
 - 2.1.4 Separately, campaigners also raised concerns regarding the content of the PFI contract. We understand that campaigners raised allegations that Amey was being 'incentivised' to cut down trees. The Council has informed us that the PFI contract refers to a target number of trees which allowed Amey to 'price their bid.' There were requests for disclosure of the PFI contract which was eventually disclosed with some redactions.
 - 2.1.5 Amey continued to try and carry out the tree related works, and were at times stopped by protesters. Amey and the Council started to search for solutions which would enable them to continue with the tree works. Initially the focus was on the Police to support Amey in relation to public order. Additionally, the Council issued injunction proceedings. One of those served with an injunction was a Council Member.
 - 2.1.6 The campaigning continued and the injunctions did not prevent the protests sufficiently to allow the tree works to continue. Eventually a mediation took place which was facilitated by the Bishop of Sheffield, and an Amey working group was set up in around 2015. The Council reached the conclusion that it should have '*better conversations*' with the public and consequently it created an Independent Tree Panel (**ITP**).
 - 2.1.7 During the period between 2016 and 2020 in particular, the Council received numerous FoIA/EIR requests for information relating to the tree felling programme and issues which surrounded it.
 - 2.1.8 On 15th March 2021, the Complainant made the Complaint which, in summary, alleged that a practice of marking information '*not subject to FOI*' had come about within the Council, in order to '*hide*' records from the FoIA regime. The Complainant specifically referred to one individual having initiated the practice, initially without the IMT having any knowledge of it. The Complaint also referred to the fact that the Council's Highways Team did not hand over documents marked in this way to the IMT when they were requested under FoIA. The Complaint also alleged that the Council were attempting to incorrectly withhold information on the basis that it was subject to LPP.

Objectives

- 2.1.9 Following the Complaint, we were instructed to carry out an evaluation of the Council's handling of certain FoIA/EIR requests. We have previously had no involvement with any of the Tree Requests or General Requests.
- 2.1.10 The Council specifically wishes to determine whether, in relation to the Tree Requests and the General Requests, information has been incorrectly withheld under the guise of legal professional privilege. This Report seeks to answer the following questions in accordance with the Terms of Reference appended at Appendix 1:
- (a) Is the Council's FoIA/EIR Policy/Procedure drafted in accordance with the relevant law and guidance?
 - (b) Has the Council applied s. 42 FoIA or reg. 12(5)(b) EIR in accordance with law and best practice in relation to the FoIA request which was cited as part of the Complaint?
 - (c) Has the Council applied s. 42 FoIA/reg. 12(5)(b) EIR in accordance with law and best practice in relation to our sample of ten Tree Requests?
 - (d) Has the Council correctly applied s. 42 FoIA/reg. 12(5)(b) EIR in accordance with law and best practice in relation to our sample of ten General Requests?
 - (e) Has the Council applied s.42 FoIA/reg. 12(5)(b) EIR consistently in relation to both the Tree Requests and the General Requests?
 - (f) Do the relevant Council officers appear to process FoIA/EIR requests in accordance with FoIA and EIR?

3 Relevant Law

In order to put our findings in context, we summarise below a number of key issues relating to the legal framework and best practice when dealing with FoIA and EIR requests. Both FoIA and EIR came into force on 1st January 2005, the aim of both pieces of legislation being to create openness and transparency to public bodies.

3.1 FoIA: Legal Framework

3.1.1 FoIA provides public access to any recorded information held by public authorities through obliging public authorities (including Councils) to publish certain information about their activities; and entitling members of the public to request information from public authorities.

3.1.2 Public authorities are not however, always obliged under FoIA to provide information requested. FoIA contains a number of exemptions which allow public authorities to withhold information from an applicant. The exemptions can be found in s.21-44 of Part II of FoIA.

s.42 FoIA

3.1.3 The exemption of particular relevance to this Report is the exemption which covers information subject to legal professional privilege ('LPP'). This is set out in s. 42 FoIA which states,

'42(1) - Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

42(2) - The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.'

3.1.4 S.42 FoIA applies where complying with a request would reveal information that is subject to LPP. The exemption is 'qualified' meaning that it is subject to the 'public interest test' which is explained in more detail below.

LLP

3.1.5 There are two types of LPP which may apply:

(a) **Litigation privilege** which applies to confidential communications made for the main purposes of providing or obtaining legal advice about proposed or contemplated litigation. This type of LPP covers communication with third parties as well as communications with lawyers; and

(b) **Advice privilege** which covers confidential communications between clients and lawyers made for the main purpose of giving or receiving legal advice.

3.1.6 To assess whether LPP applies to information, it is important to establish who the parties to the confidential communication are, including who the client is and who the lawyer is, as well as considering whether there has been a 'communication'. A 'communication' is any document that conveys information and doesn't necessarily need to have been sent. A draft document intended to be put before a legal adviser could be caught by the term. Enclosures or attachments to communications are usually only covered by LPP if created with the intention of seeking advice or for use in litigation.

3.1.7 In a FoIA context, LPP will have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered to be confidential.

LPP can also be lost where communications are shared widely internally. Where confidentiality is lost, the Council cannot claim that s. 42 FoIA applies.

- 3.1.8 When dealing with a request for information, once a public authority has established that LPP applies to a communication, it should then turn its attention to the question of whether it can refuse to comply with the requirement under s. 1(1)(a) FoIA to confirm or deny whether it holds information.
- 3.1.9 S. 42(2) FoIA removes the duty to confirm or deny whether the information is held, if to do so would involve the disclosure of any legally privileged information.
- 3.1.10 It should be noted that the exemption under s. 42(2) FoIA specifically protects the substance (meaning the content) of communications between a lawyer and client, rather than the fact of whether such legal advice has been sought.
- 3.1.11 The exemption in s.42 FoIA refers to information “whether or not already recorded”, but it still only applies if there is some legally privileged information to disclose. If a public authority has not sought or obtained legal advice on the issue that is the subject of the request, then it cannot apply s. 42(2) FoIA, because disclosure would not involve the provision of legally privileged information.
- 3.1.12 The key question is whether disclosure would release to the world at large any legally privileged information. If it would, then the Council must then carry out the public interest test to decide whether to disclose.

The Public Interest Test

- 3.1.13 The exemption under s. 42 FoIA is not absolute and once it has been established that it applies, the public interest test must be applied. In practical terms this means that a public authority should consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
- 3.1.14 The public interest inherent in the LPP exemption will always be strong because of the importance of the principle of LPP. LPP safeguards openness in all communications between clients and lawyers and ensures access to full and frank legal advice which is in turn fundamental to the administration of justice.
- 3.1.15 Case law has established that there must be some clear, compelling and specific justification for disclosure so as to outweigh communications covered by LPP. Alongside the significance of the actual information and what it reveals, the ICO’s guidance note on s.42 FoIA, states that factors to consider when applying the public interest test are as follows:

Factors in favour of maintaining the exemption	Factors in favour of disclosure
The concept of legal professional privilege and the rationale behind the concept (i.e. ensuring frankness between lawyer and client which goes to serve the wider administration of justice etc.)	The assumption in favour of disclosure and the rationale behind the assumption (i.e. accountability, transparency, furthering public debate etc).
Additional weight may be added to the above factor if the advice is:- <ul style="list-style-type: none"> • recent; • live; and/or • protects the rights of individuals. 	Additional weight may be added to the above factor if the following issues are relevant in the particular case: <ul style="list-style-type: none"> • large amount of money involved; • large number of people affected; • lack of transparency in the public body’s actions; • misrepresentation of advice that was given; • selective disclosure of only part of advice that was given.

3.2 EIR: Legal Framework

3.2.1 Unlike FoIA which covers a wide range of information held by public authorities, EIR covers only 'environmental information' which is defined in reg.2(1) EIR. In brief, for the purposes of EIR, 'environmental information' includes,

- (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 those elements;
- (b) factor, 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 any 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 matters referred to in (b) and (c).

EIR provides public access to environmental information held by public authorities through:

- (a) obliging public authorities to make environmental information available proactively; and
- (b) entitling members of the public to request environmental information from public authorities.

3.2.2 Like FoIA, EIR includes a number of exceptions which allow public bodies to refuse to provide information in specified circumstances.

Reg. 12(5)(b) EIR

3.2.3 Reg. 12(5)(b) EIR allows public authorities to 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.

3.2.4 The exemption has some similarities to s. 42 FoIA, however reg. 12(5)(b) EIR covers a wider range of information and for the exception to apply the threshold is higher, in that public authorities must demonstrate that "disclosure would adversely affect" the interests listed.

What is meant by 'adversely affect'?

3.2.5 To demonstrate that disclosing information would harm the interests listed in reg. 12(5)(b) EIR a public authority must:

- (a) identify a negative consequence (adverse effect) of the disclosure that is significant (more than trivial) and is relevant to the exception claimed;
- (b) show a link between the disclosure and the negative consequence, explaining how one thing would cause the other; and
- (c) show that the harm is more likely than not to happen.

What does reg. 12(5)(b) EIR cover?

3.2.6 The exception is broad. In particular, the reference to the 'course of justice' element could cover a wide range of information and the other aspects listed in the exception at reg. 12(5)(b) EIR are in practice, sub-sets of the 'course of justice' element. Examples of where you may wish to consider applying the 'course of justice' element of this exception include requests for:

- (a) Information covered by LPP; and
- (b) Information about 'Law enforcement, investigations and proceedings.'

How does information subject to LPP engage reg. 12(5)(b) EIR?

3.2.7 For reg. 12(5)(b) EIR to apply to LPP information, public authorities must demonstrate that disclosure of the requested information would adversely affect the course of justice. This could be because disclosure could undermine a court case or confidence in the efficacy of LPP. It is not always inevitable that disclosure of LPP information will adversely affect the course of justice, however, there does need to be special or unusual factors in play for this not to be the case.

Information about 'Law enforcement, investigations and proceedings'

3.2.8 The principle of an adverse effect on the course of justice is wide enough to cover any adverse effect on law enforcement, investigations and proceedings. This would include the work of obvious law enforcement authorities such as the police and HM Revenue and Customs, but might also include less obvious investigations such as road safety investigations or other functions carried out by a council.

3.2.9 Factors which public authorities should take into account when considering the disclosure of information about criminal investigations under reg. 12(5)(b) EIR include:

- (a) whether disclosure would hinder the ability to find witnesses willing to participate in investigations, once they knew their contributions could be disclosed, thereby adversely affecting the ability to conduct criminal investigations;
- (b) whether disclosure would reveal how the investigation was conducted – i.e. whether awareness of an authority's techniques enable suspects to evade detection or conviction; and
- (c) how recently the investigation was conducted, whether techniques used under the investigation are still current and how recent witness statements are.

Court, tribunal and inquiry records

3.2.10 This covers any adverse effect caused by disclosure of court records and information held for the purpose of an inquiry or arbitration. The Civil Procedure Rules and Criminal Procedure Rules already provide an access regime for such records. Circumventing these rules by allowing access to records under EIR could potentially adversely affect the course of justice, as parties involved in proceedings expect such information may only be disclosed

under the established regime of those rules. Disclosure under EIR may therefore undermine confidence in the judicial or inquiry system or might prejudice an individual ongoing case. The applicability of the exception to such records is not automatic and will depend on the nature of the information requested and whether the court has already allowed its disclosure.

The public interest test

- 3.2.11 The exception under reg. 12(5)(b) EIR is not absolute. Once it has been established that the exception has been engaged, the public interest test must be applied. To do this, the public authority should consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.
- 3.2.12 The general public interest inherent in this exemption will always be strong because of the importance of the general principle of upholding the administration of justice. It is however still important to consider the facts of each case and the strong public interest in transparency as to how justice is administered.
- 3.2.13 Examples of the types of public interest factors to consider as regards the different types of information included under the exception in reg. 12(5)(b) EIR are:
- (a) **LPP Information and ‘without prejudice’ correspondence** – consider the importance of safeguarding openness in all communications between clients and lawyers to ensure access to full and frank legal advice. Consider the timing of a request for a ‘without prejudice’ communication – the public interest in maintaining the exception will be stronger if ‘without prejudice’ negotiations are recent or ongoing, or before an agreed settlement or the conclusion of a court case.
 - (b) **Civil and criminal investigations, proceedings and inquiries** – the public interest here is in not prejudicing such investigations, proceedings or inquiries. Consider: (i) the stage reached in the investigation, proceedings or inquiry, (ii) the extent to which the information is already in the public domain, (iii) the significance or sensitivity of the information, (iv) any available independent evidence on whether the investigation has been properly conducted; and (v) the age of the information.
 - (c) **Court and tribunal records** - the public interest here is in preserving public confidence in the judicial system and upholding the existing access regime provided by the Civil Procedure Rules. Consider (i) the content of the information, (ii) the timing of the request (during litigation or an inquiry or where there is still a real prospect of future litigation, the public interest in preserving the course of justice will be paramount), (iii) whether the information is also held for another purpose unconnected to court proceedings (if so this may indicate it is less sensitive or already in the public domain) and (iv) the accessibility of the information.

4 Evaluation of Tree Requests and General Requests

- 4.1 As part of our evaluation, we reviewed a total of seventeen FoIA/EIR requests in which the Council informed us that the exemption in s.42 FoIA or reg. 12(5)(b) EIR was applied to some or all of the information requested. The requests we reviewed comprised of:
- 4.1.1 Seven General Requests, i.e. FoIA/EIR requests for information unrelated to the Council's tree felling (we had initially aimed to review ten as per the ToRs at Appendix 1), but the Council confirmed that it held only information relating to seven relevant General Requests); and
 - 4.1.2 Ten Tree Requests, i.e. FoIA/EIR requests where the information sought related to the Council's tree felling programme.
- 4.2 For each of the requests we reviewed, we requested the following information from the Council:
- 4.2.1 The original FoIA/EIR request;
 - 4.2.2 The information held by the Council which falls within the scope of the request;
 - 4.2.3 Internal communications including emails and attendance notes which cover discussions, deliberations and decision making regarding the scope of the request and application of FoIA/EIR exemptions and evidence how the Council reached its decision in relation to the application of s.42 of FoIA;
 - 4.2.4 A copy of the Council's response to the FoIA/EIR applicant (and any other correspondence with the applicant, such as requests for clarification and so on);
 - 4.2.5 Documentation covering any requests for and responses to requests for internal review and appeals to the ICO.
- 4.3 The Council has cooperated with our requests for documentation. However, there have been numerous instances in which we have not received the information sought. On these occasions, we notified the Council of the missing information and they conducted further searches to determine whether it was held, but not all of the information could be found. We are aware that individuals who may have been involved with the requests had left the Council which may have impacted on the ability to locate information. We would however still expect the Council to have a suitable document management system in place and the lack of information had a significant impact on our ability to determine whether s.42 FoIA/Reg.12(5)(b) EIR has been correctly applied.
- 4.4 For ease of reference we set out below a summary table of the requests we have reviewed. More detailed commentary of our review can be found in sections 4.8 and 4.9 of this Report.

Summary of Requests

Request No.	Tree Request or General Request?	Did we receive all of the information we requested?	What information, if any, is outstanding?	In our opinion was the exemption for LPP (s.42 FoIA) correctly applied?
1216	General Request	No	Some of the information falling within the scope of the request which was withheld from disclosure.	Yes in relation to the information we were provided with. However we did not have access to all of the withheld information for evaluation.
163	General Request	It is likely we have received all of the information but we could not verify this.		Yes
2743	General Request	Yes	N/A	Yes
2893	General Request	No	Copies of withheld information.	Insufficient information for evaluation.
437	General Request	No	Copies of withheld information and evidence of internal considerations.	Insufficient information for evaluation.
438	General Request	No	Copies of withheld information and evidence of internal considerations.	Insufficient information for evaluation.
997	General Request	No	Legal advice provided by solicitor.	Insufficient information for evaluation.
1358	Tree Request	Yes	N/A	Yes
1369	Tree Request	No	Copies of withheld information.	Insufficient information for evaluation.

Request No.	Tree Request or General Request?	Did we receive all of the information we requested?	What information, if any, is outstanding?	In our opinion was the exemption for LPP (s.42 FoIA) correctly applied?
140	Tree Request	No	Copies of withheld information.	No. It transpires the information which was withheld is not actually held by the Council.
1438	Tree Request	No	Copies of withheld information.	Insufficient information for evaluation.
1487	Tree Request	Yes	N/A.	Yes
1719	Tree Request	No	Copies of withheld information.	Insufficient information for evaluation.
2390	Tree Request	No	Copies of withheld information.	Insufficient information for evaluation.
295	Tree Request	No	Copies of withheld information.	Insufficient information for evaluation, however from the evidence we have seen it seems likely that s.42 FoIA was correctly applied.
3672	Tree Request	No	Copies of withheld information.	Insufficient information for evaluation, however from the evidence we have seen it seems likely that s.42 FoIA was incorrectly applied.
872	Tree Request	No	Copies of withheld information.	Insufficient information for evaluation, however from the evidence we have seen it seems likely that s.42 FoIA was correctly applied.

- 4.5 Of the seventeen requests reviewed:
- 4.5.1 The Council could not locate and provide all of the relevant information in the case of thirteen requests. In particular, in many instances the information that was requested by the applicant could not be provided. The Council was unable to locate the information falling within the scope of the request, which raises concerns regarding records management, and the possibility that disclosure may have been refused when the information falling within the scope of the requests had not been located, retrieved or reviewed in some instances. In the alternative, information may have been subsequently deleted or lost after responding to a request, without a suitable audit trail to demonstrate the approach taken by the Council;
 - 4.5.2 S.42 FoIA/reg.12(5)(b) EIR appears to have been correctly applied in relation to five of the requests. Of those five requests, two are Tree Requests and three are General Requests;
 - 4.5.3 S.42 FoIA/reg.12(5)(b) EIR appears to have been incorrectly applied in relation to one of the requests, (which is a Tree Request); and
 - 4.5.4 We were unable to categorically confirm whether s.42 FoIA/reg.12(5)(b) EIR was correctly applied in the case of eleven of the requests, due to insufficient information being available.
- 4.6 Despite our comments in paragraph 4.5.4 above, we have seen examples of good practice in relation to several of the eleven requests for which we did not receive sufficient information. For example, in some instances, there is evidence that the information which falls within the scope of the request has been reviewed and the correct types of issues have been considered. Therefore in those instances we consider it feasible that s.42 FoIA/reg. 12(5)(b) EIR has been correctly applied, but without seeing the information falling within the scope of the request, we cannot be certain.
- 4.7 **Analysis of General Requests**
- 4.7.1 **Request 1216**
 - (a) This request was for copies of all emails sent and received by a Council officer between 4 November 2019 and 13 November 2019 which relate to a specific case the Council's Social Care team was dealing with.
 - (b) The Council noted that this request was in effect for information held by the Director of Children's Social Care as it relates to a family. The matter related to children placed in interim care whilst care proceedings were before the Family Courts. The case attracted significant media and public attention and there was to be a Serious Case Review which was in the process of being commissioned at the time of this request. It was not yet known whether inquests would be reconvened but it seemed unlikely at the time.
 - (c) The Council held 43 relevant emails falling within the scope of the request. We have been provided with some but not all of these.
 - (d) Given the nature of the information sought, we are of the view that this request has been dealt with under the correct regime, i.e. FoIA. There was a delay in responding to the applicant. The deadline was initially extended by a further 20 working days to consider the public interest test. The response was then delayed due to Christmas break and staff absence.
 - (e) The Council has disclosed 8 pages of relevant emails (with some redactions applied) and withheld other information on various exemptions under the FoIA. For the purposes of this Report, only the information withheld under s.42 (1) FoIA is relevant.

The Council withheld emails between one individual and the Council's solicitors under s. 42 FoIA.

- (f) The Council appears to have applied s. 42 FoIA on the basis of litigation privilege. In one officer's internal email regarding the request, they explain:

"There is a large amount of material in the files provided passing between lawyers and XX. I don't particularly want to spend time trawling through them individually but I would want to reiterate the importance of the particular confidentiality which legal and litigation privilege provide. This very request evidences how few "safe spaces" there are for local authorities to reflect on difficult decisions in confidence. Legal & (even more so) litigation privilege provide an essential "space" where difficult and ambiguous issues can be chewed over. I recognise the value of transparency in our modern society, but I am firmly of the view that the value of transparency on a particular case would only very rarely trump the significant public importance of privilege. I fully recognise that privilege "belongs" to the client but SCC is a corporate identity and can only make decisions on advice and my advice is clear. Only in wholly exceptional circumstances would I recommend waiving privilege and this is not one of them. In fact the very opposite is the case. This is just the kind of situation where the benefits of privilege are essential."

- (g) This email suggests that not all of the information was reviewed individually. However, the Council has also provided us with some, but not all, of the emails they withheld under LPP, which would suggest that some emails were reviewed on an individual basis.
- (h) The emails we have reviewed relate to ongoing proceedings and consist of the Council obtaining legal advice about how to proceed. We agree that s. 42 FoIA has been correctly applied to those emails. However we cannot assess whether all of the emails withheld under s.42 FoIA were correctly withheld, or whether the public interest test has been properly applied, as we have not been provided with copies of them for review.

4.7.2 **Request 163**

- (a) This request was for information relating to a change to a Community Infrastructure Levy (**CIL**) liability calculated by the Council.
- (b) The applicant requested:
- (i) An extract of the appropriate authorisation of delegation to officers in relation to issuing/not issuing the CIL Liability Notices;
 - (ii) A copy of the written record required by Regulation 7 of the Openness of Local Government Regulations 2014 in relation to this delegation/decision making in addition to the written record in respect of the decision to issue CIL Liability Notice LN00000570 on 15 March 2018, together with any internal correspondence, notes, or other information which relate to the decision of the Council to replace CIL Liability Notice LN 00000544 with CIL Liability Notice LN00000570.
- (c) The Council did not hold all of the information. However, the Council did hold emails between its Legal and Planning Departments which it stated are legally privileged. These include:
- (i) Emails between an officer and the Legal Department; and
 - (ii) An email between an officer and Citu Group Developments Ltd notifying it of the reviewed Liability Notice.

- (d) The Council responded to the applicant to explain that:
 - (i) There was no delegated decision to issue Liability Notice LN00000570 thereby causing LN00000544 to have no effect. Whether a local authority issues a Liability Notice or not is a legal obligation as set out in the CIL Regulations 2010. There is no discretion over the process and consequently no duty to comply with the Openness of Local Government Bodies Regulations 2014.
 - (ii) The Council did hold emails between Legal and the Planning Departments but would not be disclosing these on the basis that they were exempt under s. 42 FoIA, and included a brief statement about the public interest test favouring maintaining the exemption.
- (e) When referring to the information held, a memo prepared by one officer states that:

“The correspondence was clearly intended to cover the giving of legal advice and as such should remain confidential between the planning department and Legal. In actual fact no advice was given in writing (it was all given verbally) and the emails merely show the questions/ thoughts planning were putting to Legal.”
- (f) The Council has provided some emails which we assume were withheld from disclosure, but it is not clear as to whether we have all of the information that was withheld. The documents we do have comprise of brief exchanges between a solicitor and officer. Having reviewed these, we are of the view that s.42 FoIA has been appropriately applied.
- (g) The Council has undertaken the public interest test.
- (h) In summary, s. 42 FoIA was appropriately applied to the information we have been provided with.

4.7.3 Request 2743

- (a) This request was for correspondence from or to other senior councillors and senior employees engaged in the process to obtain an interim chief executive, and gave a number of names of individuals that the Council should search for in emails as part of the request.
- (b) The Council held councillor correspondence falling within the scope of the requests.
- (c) There was a delay in responding due to a “backlog of requests, intermittent ICT problems and pressures on employees of the pandemic.” The Council copied in the ICO to its response as the ICO was about to issue a decision notice against the Council due to the delay in responding to this request.
- (d) Councillor correspondence was provided to the applicant in three batches. The first batch is correspondence between councillors. The second batch relates to procurement of an executive search agency to provide an interim chief executive. The third batch is emails which were contained within the archive of the former chief executive of the Council.
- (e) The Council has provided us with detailed correspondence about the request and we had sight of the information which was withheld. However, in relation to the application of s. 42 FoIA there were only a few emails which addressed this decision.

- (f) S.42 FoIA was applied to redact the body of one email on the basis that this email was a confidential communication between the Director of Legal and Governance Services and the council leader containing legal advice.
- (g) The Council has undertaken the public interest test.
- (h) It appears that s.42 FoIA has been correctly applied in this instance. Failure to respond to the request on time led to ICO involvement and a threat to issue a decision notice; however, there did not appear to be any complaints or issues in relation to the Council's application of s. 42 FoIA.

4.7.4 Request 2893

- (a) This request was for all correspondence between the Council's Planning and Legal Services Department regarding the planning application 20/01220/FUL in relation to alterations and extensions to a retained outbuilding and rebuilding/extension of former toilet block to provide home offices/a part subterranean building.
- (b) The Council held correspondence between its legal and planning departments in relation to planning application 20/01220/FUL.
- (c) We cannot evaluate whether this request was dealt with under the correct legislation, as we have not been provided with the withheld information.
- (d) The applicant was informed that all the requested information was exempt from disclosure under s. 42(1) FoIA.
- (e) The Council, in its response to the request, explained that LPP protects advice given by a lawyer to a client and confidential communications between them about that advice. In this case, communications between the Council's legal service and its client, the planning service, in relation to planning application 20/01220/FUL, are considered by the Council to be confidential, and, as such caught by the exemption. The Council also provided a brief statement to the applicant in relation to the application of the public interest test.
- (f) Our understanding is that the relevant information consists of communications between the legal department and planning department. However we cannot evaluate whether s.42 FoIA has been correctly applied as we have not had sight of the relevant information.

4.7.5 Request 437

- (a) This request was for copies of all information held by Sheffield City Council, Business Rates, Legal Services and Equita, regarding Ecclesfield 35 Limited.
- (b) At the time of the request, there were three relevant cases with legal services.
- (c) The information requested is quite broad and includes all information held by various departments at the Council including Business Rates and Legal Services, and Equita (an enforcement/debt recovery service).
- (d) The Council explained that the information requested is held by the Council but is exempt under several different exemptions, including s. 42 FoIA.
- (e) S. 42 FoIA was applied to some but not all of the information. One officer explained in an email to colleagues:

“A large chunk of what is being requested is legally privileged or before the Court of which XXXXX should be aware being a party to those proceedings. A significant further chunk will have been disclosed to them in the course of those proceedings, again which they should be aware but that doesn’t excuse that and a lot of this has been disposed of to make way for other documentation as regards the Lexel accreditation. Third party personal data may be included which would have been part of disclosure (as that overrides the DPA).”

- (f) We have not been provided with the withheld information or detailed considerations as to why s. 42 FoIA applies and cannot therefore comment on whether the information was correctly withheld from disclosure. The public interest test is referred to in the response, but it is not clear as to what factors have been considered/balanced.

4.7.6 **Request 438**

- (a) This request was for copies of all information held by Sheffield City Council, Business Rates, Legal Services and Equita, regarding Blenheim Engineering Limited.
- (b) At the time of the request, several Council departments including business rates and legal held information falling within the scope of this request.
- (c) The Council withheld the information sought from the applicant on the basis of several of the FoIA exemptions, including s.42 FoIA on the basis that some of the information was subject to litigation privilege.
- (d) We have seen some email correspondence between the IMT and the Council’s legal team. One officer stated, *“A large chunk of what is being requested is legally privileged or before the Court of which Blenheim should be aware being a party to those proceedings. A significant further chunk will have been disclosed to them in the course of those proceedings, again which they should be aware but that doesn’t excuse that and a lot of this has been disposed of to make way for other documentation as regards the Lexel accreditation. Third party personal data may be included which would have been part of disclosure (as that overrides the DPA).”*
- (e) We cannot assess whether s.42 FoIA has been correctly applied as the Council has not supplied us with the withheld information. Given the nature of the information being sought, it seems likely that the request was dealt with under the correct regime, i.e. FoIA, but again we cannot be sure without sight of the relevant information. The public interest test is referred to in the response, but it is not clear as to what factors have been considered/balanced.

Request 997

- (a) This request is for any and all correspondence, memoranda, documents, reports, records, statements, audits, letters, calendar or diary, notes, opinions, forms, drawings, charts, electronic mail, and other documents and things that refer of relate to: Sheffield City Council’s response to the successful submission of the It’s Our City petition. The request related to a specific time frame.
- (b) The Council held the information requested including communications and other related documents.
- (c) We are of the view that the Council dealt with the request in accordance with the correct legislative regime, i.e. FoIA.
- (d) The Council disclosed some information but withheld one email under s.42 FoIA and also redacted some information on the basis of another FoIA exemption. The Council did undertake the public interest test.

- (e) The email withheld under s.42 FoIA is not between lawyer and client, and the author states “*I’ve had another look at the regulations. I’m not a lawyer, and you may need to get some legal advice from XXX separately.*” A member of IMT advised that the email should be withheld on the basis of LLP given that it was repeating legal advice of a Council lawyer which was given elsewhere, by stating that, “*I suggest this is legal professional privilege even though XXXXXX was not involved, but reflected advice XXX had given elsewhere.*” However our reading of the situation is that the withheld email may have contained the views of the author.
- (f) We are not completely clear as to whether s.42 FoIA has been correctly applied here. If the email which has been withheld is a genuine reflection of legal advice given by a Council lawyer to officers, then it is very likely that LPP will attach to it and s.42 FoIA can be applied. However, as stated above, it does appear possible that the advice may have been that of the author of the email rather than a Council lawyer. Therefore we cannot confirm whether s.42 FoIA has been correctly applied. It does seem likely however, that this information would be exempt in any event in accordance with an alternative exemption.

4.8 Analysis of Tree Requests

4.8.1 Request 1358

- (a) This request was for all documents and emails in relation to the Independent Tree Panel (ITP), including but not limited to emails between Council officers and elected members, members of the ITP, unpublished minutes of relevant meetings and evidence submitted to the ITP.
- (b) The Council held the information requested, and the request was correctly dealt with under EIR, but the response was not sent within 20 working days. The applicant raised this with the Council on multiple occasions. The response was delayed by roughly one month.
- (c) In its response to the applicant, the Council provided 93 pages of information with information redacted on various FoIA grounds including an email from a Council solicitor on 28 October 2016 under reg. 12(5)(b) EIR on the basis that this was covered by LPP.
- (d) We have been provided with and reviewed the unredacted documents and in our view reg. 12(5)(b) EIR has been applied correctly. The email in question was from a Council solicitor to a client officer providing legal advice, and is covered by advice privilege. From the information we have reviewed, there does not appear to have been a loss of privilege. The client appears to have correctly applied the public interest test.

4.8.2 Request 1369

- (a) This request is for all data held and related to any legal entity containing the word ‘Amey’ and their communications with South Yorkshire Police and their Crime Commissioner, specifically data associated with Sheffield’s tree felling programme.
- (b) The Council held information falling within the scope of this request, including correspondence with the Police.
- (c) In our view the request was handled correctly under EIR, however the response was very overdue, by some eight months.
- (d) In response, the Council disclosed 12 pages of information and withheld some information under various exemptions, including certain redactions made under reg. 12(5)(b) EIR on the basis that it was covered by legal professional privilege.

- (e) The Council has not provided us with the information which was withheld under reg. 12(5)(b) EIR. However, we have reviewed the Council's internal correspondence and correspondence between the Council and Amey deliberating as to whether the information in question is subject to 'common interest privilege' or litigation privilege. That correspondence appears to highlight a possible disagreement as to whether the information was subject to privilege. One officer stated,

"The emails can't be legal advice privilege if there were no lawyers involved, which there weren't if the emails were from XXX to XXX.

Litigation privilege is a narrower concept and only covers "any document or communication which has been produced for the purpose of obtaining information or advice in connection with existing or contemplated litigation subject to certain conditions". I don't think the information falls into this category either, in which case it isn't privileged. Therefore, it can't be subject to common interest privilege."

- (f) Another officer appeared to suggest that a different approach was taken, and stated

"Good answers for me. Only observation from me is, in terms of meetings, there have been numerous uncounted operational meetings. I have attended a number of legally privileged meetings. Not sure whether you want to allude to those?"

- (g) This email in itself does not seem to suggest there is ongoing litigation or intended litigation, nor does it contain legal advice from a lawyer to a client. Therefore, it brings into question whether the exemption was appropriately applied by the Council. As stated, we cannot assess this as we have not been provided with copies of all of the emails which were withheld under reg. 12(5)(b) EIR.

- (h) It does seem from the correspondence we have seen that the Council were considering the application of reg.12(5)(b) EIR. In particular, one Council officer states,

"Furthermore, due to the uncertainty surrounding common interest privilege and how it has been treated by the courts we believe that we should define the parameters of common interest privilege to ensure that any material disclosed between Amey and the legal team of Sheffield City Council remains privileged where necessary. We suggest that the following principles should be observed:

- *a common interest exists between Amey and Sheffield City Council and their respective legal representatives;*
- *the parties should look to specify when documents are subject to common interest privilege by marking and describing all correspondence and emails as "subject to common interest privilege";*
- *if any disclosures are under common interest privilege, the information disclosed is not to be shared with any other parties without prior approval of the disclosing party; and*
- *once the matter in relation to the tree felling and the associated protests have been resolved, neither Amey nor Sheffield City Council will use any of the documentation provided under common interest privilege for any purpose other than for what it was intended."*

- (i) It appears that the Council has agreed to this approach (although without the relevant information we cannot be sure) as one officer states,

"I agree with your approach and the basis on which you set it out. I have copied in my lead client officer, XXX, & the lawyers in my team XXXXX, so they are aware.

For information, I usually also add "not subject to FOIA" in the header. It acts as a flag then if searches of emails are undertaken in response to FOIA queries, something like a flashing red light."

- (j) Interestingly, this email recognises that there was a practice at least in relation to one officer of applying a header to emails to suggest that they are 'not subject to FOIA.' Having said that, the stated aim of this was apparently to ensure that sensitive documents were carefully reviewed or 'flagged', rather than necessarily automatically withheld. This is discussed more in relation to the officer interviews.
- (k) In summary, it appears that the Council has deliberated whether the information which they ultimately withheld is subject to legal privilege, however it is unclear whether the exemption in reg.12(5)(b) EIR was appropriately applied, as we have not had sight of the withheld information.

4.8.3 Request 140

- (a) This request was for details of,
 - (i) the contract/agreement between the Council and Amey in respect of tree felling;
 - (ii) any policy documentation of agreements with South Yorkshire police concerning protests against the felling of trees;
 - (iii) any press releases issued by the Council;
 - (iv) documents relating to the early operation of tree felling at Rustlings Road on 17 November 2016;
 - (v) any details of tree felling on Marden Road on 2 November 2016;
 - (vi) any details of tree felling on Chippinghouse Road on 6 February 2017 and any liaison with South Yorkshire Police;
 - (vii) any details of tree felling on Chippinghouse Road on 8 February 2017 and any liaison with South Yorkshire Police;
 - (viii) details of any minutes of meetings with South Yorkshire Police over the ongoing protests;
 - (ix) details of any advice given/documents provided to the Council by South Yorkshire Police;
 - (x) any video evidence; and any documentation from Amey PLC.
- (b) In respect of each of the items outlined at (i) to (x) of paragraph 4.9.3(a) above the Council held information falling within the scope of the request as follows:
 - (i) A partially redacted version of the contract is already published on the Council's website at: <http://www.sheffield.gov.uk/home/roads-pavements/streets-ahead>
 - (ii) There is no formal agreement or policy documentation. The Council does not hold this information.

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- (iii) Press releases from the Council are all published at <http://www.sheffieldnewsroom.co.uk/>
 - (iv) All police documentation and emails on this matter have already been published at <http://www.southyorkshire.police.uk/foi/disclosurelog/sheffield-tree-felling-2016-2017>, in addition to this the Council has provided a redacted copy of Amey's operational plan in PDF format.
 - (v) Teams attended to carry out tree replacement works to the tree specific addresses at Marden Road. No residents had objected to the works through the Council's Independent Tree Panel survey process. This information is already published online. The Council does not hold records of liaison with South Yorkshire Police.
 - (vi) On 6th February, teams attended to carry out tree replacement works to a number of specific trees on Chippinghouse Road:

83% of residents had written to the Council in support of the works through the Council's Independent Tree Panel survey process. This information is already published online and the Council does not hold records of liaison with South Yorkshire Police.
 - (vii) On 8th February, teams attended to continue carrying out tree replacement works to the specified trees on Chippinghouse Road:

83% of residents had written to the Council in support of the works through the Council's Independent Tree Panel survey process.

This information is already published online and the Council does not hold records of liaison with South Yorkshire Police.
 - (viii) The Council does not hold minutes of meetings with South Yorkshire Police.
 - (ix) All correspondence between South Yorkshire Police and the Council including police documentation and emails on this matter have already been published online.

The Council holds legal notes passed between South Yorkshire Police legal department and Sheffield City Council legal department but did not supply them on the basis of s.42 FoIA as they considered them to be subject to legal privilege.
 - (x) The Council does not hold this information.
 - (xi) This is too broad a question, and as such was regarded as manifestly unreasonable and beyond the time constraints of a FoIA response to produce the information requested.
- (c) We are of the view that the Council dealt with this request under the correct legislative regime, i.e. FoIA. There was a small delay in replying to the applicant due to IT issues.
- (d) Internal correspondence demonstrates some level of discussion around the application of s.42 FoIA and a clear appreciation of the need to consider the public interest in disclosure. One officer wrote,

"I think that you should liaise with XXX in XXX team over this. In effect, some of this is a refusal notice e.g. on legal privilege. That needs doing properly if it is to withstand

challenge. For example, we have to apply a public interest test to whether or not to invoke privilege.”

- (e) We have not had sight of the information to which the Council applied s.42 FOIA and therefore cannot reach a view as to whether the exemption was correctly applied. The Council has confirmed that it does not hold this information but has not explained why.

4.8.4 Request 1438

- (a) This request is for any recorded information relating to trees, street trees, STAG and protests contained within a specific email account. It appears that the applicant has also added a second part to the request which is to identify on a yearly basis how many records held for this purpose exist from January 2016.
- (b) The Council held a number of emails relating to the request, including 110 emails which contain the header, ‘Covered by legal privilege and not subject to FOI.’ We understand however that 8 of these emails had been disclosed previously.
- (c) We are of the view that the Council dealt with the request under the correct regime; EIR.
- (d) We understand that the Council disclosed various emails/documents and redacted some information under various exemptions, including reg.12(5)(b) EIR.
- (e) The Council has provided us with information which was partially disclosed (i.e. by having been redacted), but not the unredacted information which was withheld in its entirety.
- (f) It appears from general correspondence between officers that emails between the Council and Amey’s legal teams relating to court proceedings, committals, injunctions etc. that may have been withheld under reg. 12(5)(b) EIR have been withheld. However this is assumption and we cannot be certain without seeing copies of the withheld information.
- (g) One officer in an internal communication explained the rationale for the application of the header referred to in 5.9.4.2 above.

“Just to be clear, in case questions are raised about this, I asked for potentially privileged emails involving lawyers to carry this header right at the start of the process. I recognised that there would be a huge amount of email traffic and, in due course, a number of FOIA’s. I was aware, in that context, that identifying which emails might be subject to FOIA would be a mammoth task. The purpose of those header was to facilitate filtering potentially applicable emails to make life easier.

I was well aware that the ‘Public Interest Test’ has to be applied so there would always need to be that extra layer of checking but I was of the view that, without something like this:

1. *The task would be monumentally time consuming and difficult*
2. *Emails which shoddily remain confidential because of privilege might be inappropriately released. It would facilitate a process of “thinking”.*

I was also aware that there was a risk that it would be wrongly applied but, also, that the necessary checking process would also pick this up so I wasn’t concerned about that. I considered that the bigger risk was the opposite: emails being released wrongly.”

- (h) The Council appears aware of the risks in labelling information as '*not subject to FOI*', and in one officer's email to Amey, they attached a document which contains principles for handling FOIA/EIR requests and how the Council proposes to work with Amey in relation to these requests. The document makes it clear that the Council will only apply exemptions where they are "*legitimately available when responding to information requests*" and that "*any final reply is the responsibility of [the Council].*"
- (i) It is also clear that the use of the heading was not used as a blanket approach by the Council, but was more likely to have been used by a small number of officers as a direct consequence of the Tree Requests. To illustrate this, in one email an officer states:

"With regards to the emails, the use of the term 'legal professional privilege not subject to FOI' is incorrect. Recorded information held by public authorities is covered by the Freedom of Information Act unless an exemption applies and although legal professional privilege is a valid exemption (used by legal officers providing legal advice and opinion, subject to the public interest test), it isn't relevant to the emails or the content we want to release."
- (j) This position is further supported by a further internal email which states:

"So, there will be some disclosure of non-privileged material which, nevertheless, carried the header "Legally privileged etc". We agreed that there should be a covering narrative developed to make it clear that these are being disclosed despite the header because we have carefully considered each individual doc and applied exemptions when appropriate."
- (k) There is evidence that the Council has considered and applied the public interest test.
- (l) There is evidence that the Council has had internal discussions around the application of LPP in relation to the information falling within the scope of this request, and that officers had an appreciation of the importance of considering the information on its own merit and not applying a blanket exemption to any of the information. However, we cannot determine whether reg.12(5)(b) EIR has been correctly applied as the Council has not provided us with the information withheld under that exemption.

4.8.5 Request 1487

- (a) This request was for copies of documentation arising from a review by Council officers which the applicant stated had taken place following a health and safety fatality involving Amey. The applicant stated that the fatality was brought to the Council's attention when it was reported in the media in 2011. In particular the request was for documentation pertaining to the review, including minutes taken, with details of:
 - (i) When the review took place;
 - (ii) Which Council officers were involved in the review;
 - (iii) What was considered in the review;
 - (iv) How the decision was arrived at in relation to the outcome; and
 - (v) The communication of that outcome to XXXXX and also the PFI Project Board.
- (b) The applicant asked for original word documents to be provided.

- (c) The Council held information falling within the scope of the request, in the form of email chains.
- (d) We are of the view that the Council dealt with this request under the correct legislative regime; FoIA.
- (e) The applicant asked for an internal review of the Council's original response, raising several concerns including having been sent 'dead links', the authenticity of certain emails (on account of their font colour having been changed), and requesting email document properties. They also stated that

"The question about whether Amey did/should have declared this incident in their PQQ submission was sent internally to HighwaysProcurementTeam at SCC, therefore is not subject to legal privilege. Could you please advise what the response was of the HighwaysProcurementTeam to this question."

- (f) The applicant further added,

"As I already know the answer to the question asked in the email at the top of the page (from previous FOI requests), that the incident SHOULD have been reported in the PQQ by Amey, and that they DID NOT do so, could you please provide a copy of the response to this question by the person to whom it was sent. It is relevant in the context of my enquiry."

The second email down the page makes reference to trade unions (TUs). Can you provide details of any information provide to any Trade Union in this regard, and any information or advice provided by the Trade Union(s) in return."

- (g) With regard to the original request, the Council provided an email chain evidencing that they were aware of a health and safety conviction in 2011 and explained that this information was provided in PDF format to allow for the redaction of information in its original disclosure to the applicant. The Council explained that certain information was withheld due to LPP and other exemptions. Specifically in relation to LPP, the Council provided a partial refusal notice under section 42 whereby it explained that

"The release of information encompassing the instruction and advice from the Council Legal Services is deemed to be exempt in this case as the release would require the disclosure of legally privileged information."

The redacted information is determined to be exempt as it constitutes the instruction to and provision of legal advice to the Council by its lawyers. This information is therefore legally privileged and exempt under Section 42."

- (h) With regard to the internal review, the Council considered that s.42 FoIA,

"has been correctly applied and in this case protects the confidentiality of communications between the Council as client with our internal legal advisers and that the redaction of the relevant details specifically protects is the substances of those communications."

- (i) The Council also considered that the public interest test upheld the use of the exemption and *"was applied correctly."*

- (j) The Council did however add an additional factor in relation to the public interest arguments in favour of disclosing the information, specifically because such disclosure could *"identify the specific advice provision in regard to Health and Safety concerns raised in this request."*

- (k) The Council has provided us with the withheld information, internal correspondence and also correspondence with the ICO, including the ICO's decision notice, as the applicant raised a complaint in relation to this request. In its decision notice, the ICO held that the Council had correctly applied s. 42 FoIA in relation to the redactions on the documents originally provided to the applicant and no further action was required.
- (l) We reviewed all of the relevant information and are of the view that s.42 FoIA was correctly applied by the Council.

4.8.6 Request 1719

- (a) This request is for all documents and communications between the Council's councillors, officers or partner organisations and South Yorkshire Police in relation to Trade Union Law being used against tree protesters or others in 2016, 2017, and 2018.
- (b) The Council raised a clarification with the applicant who responded by explaining that the request is solely a request for communications and documents shared between the Council (and its partners) and South Yorkshire Police in relation to preparation, use and evaluation of the Trade Union Law used against tree protesters.
- (c) The Council held nine documents which fell within the scope of the request which relate to its Streets Ahead Programme and the management of trees on the highway.
- (d) The Council incorrectly handled the request under FoIA where it should have been handled under EIR. The Council did later recognise this in communication with the applicant, which stated:

"We erred in processing your original request under the Freedom of Information Act 2000. According to the Environmental Information Regulations 2004 (EIR), environmental information includes any information on the state of the elements of the environment and the interaction among these elements; factors affecting or likely to affect those elements; and measures or activities affecting or likely to affect those factors or elements, or designed to protect those elements."

- (e) The Council disclosed some information, but withheld information contained within emails and/or advice notes passing between officers of the Council and the police and/or the Council's legal department on the basis that these were subject to legal advice and/or litigation privilege under s.42 FoIA. It also withheld some information under another exemption.
- (f) The applicant requested an internal review on the basis that *"Not all emails and advice notes between SCC, Amey and SYP will be subject to the exemption under Section 42"* and that *"the public interest test should be used to release information that is relevant and important to the public."*
- (g) The Council responded and explained that they had made a mistake in applying FoIA and that this request should have been considered under EIR. As such, the Council explained that reg. 12(5)(b) applied to the information:

"Regulation 12(5)(b) provides an exception from the disclosure of environmental information which would adversely affect the course of justice. This includes material covered by legal professional privilege... There are two types of privilege: litigation privilege and legal advice privilege. The information that has been withheld from you attracts legal advice privilege. The client is the council, specifically senior officers in the Place portfolio who were responsible for the contract with Amey. The lawyers were in-house and those appointed externally by the council for legal advice. At various points between 14/02/17 and 20/10/17 s. 241 of the Trade Union and Labour

Relations (Consolidation) Act 1992 (TULCRA) was considered as a criminal offence against direct action to prevent the lawful exercise of statutory powers and duties by the council in relation to the public highway. Only the police can investigate a criminal offence and not the council or Amey."

- (h) The Council then highlighted that the disclosure *"would result in the council being discouraged from seeking legal advice, particularly in the context of contentious matters such as tree management, which are potentially damaging to its interests and which would inhibit the effectiveness of its public function."*
- (i) The Council also explained that its interests were legal *"in respect of s.41 Highways Act 1980, which is to keep the highway in good repair, the failure of which would result in injuries and legal claims,"* and financial *"because the progress, or otherwise, of tree replacement has implications in the private finance initiative contract between the council and contractor, Amey."* Therefore, the Council withheld *"the advice about the enforcement of TULCRA and prosecutions, the strengths and weaknesses of the council's position, and recommendations for action if they were to be disclosed would have the adverse effect specified in the exception."*
- (j) The Council explained in their response to the internal review that some of the information requested attracts legal advice privilege because the Council was communicating with its in-house lawyers and external lawyers. The Council has provided a log of the information which it reviewed and either disclosed or withheld.
- (k) This log explains where legal advice was considered, and it appears that the subject matter of the emails where legal advice privilege was deemed to apply all relate to thresholds for arrests, pros and cons of applying injunctions, police process, legality of protests and other similar topics. It is not entirely clear whether these emails always included the Council (as client) and a lawyer; however, and/or whether they were replicating previously received legal advice.
- (l) In an internal email, one Council officer agrees with another who asked whether the Council should waive their legal privilege relating to the Council/Amey/Police discussions, and recommended that the Council should not on the basis that the Council needed to safeguard one of the *"few safe "spaces" that we have to discuss difficult issues."* The officer explained that *"If we give ground on this how do we ever discuss anything to formulate a plan and discount other ideas without being at risk for having to disclose confidential discussion and policy formulation prior to adopting a fully considered course of action."*
- (m) We have not had sight of the information which has been withheld under reg.12(5)(b) EIR. It is not entirely clear, on this basis, whether the emails were always subject to LPP as there is no specific mention of obtaining legal advice. However, the log of emails we have seen would suggest that the subject matter of the withheld emails primarily relates to legal issues. Without having sight of the emails which were specifically withheld, we cannot provide a view as to whether reg. 12(5)(b) EIR was correctly applied.

4.8.7 Request 2390

- (a) This request is for the number of FoIA requests awaiting a response pending a meeting with Amey, the date of each of the requests identified, and any and all information associated with the arrangement of the 'meeting' with Amey.
- (b) The Council held the information requested.
- (c) We are of the view that the Council dealt with this request under the correct legislative regime; FoIA.

- (d) In its response to the applicant, the Council explained that as of the date of the request, there were three open FoIA/EIR requests where the Council needed to consult with Amey before responding. There were no further open requests which were awaiting a response pending a meeting with Amey.
- (e) The Council also provided information associated with the meeting with Amey but withheld the following some information by way of redaction under s.42 FoIA on the grounds of LPP. It withheld some other information on another FoIA grounds.
- (f) It appears that decisions regarding what information should be redacted were made during a meeting between Council officers which we have not seen minutes for. We have been provided with the information which was held by the Council, but it is not clear as to which information was withheld. Some of the emails which were subject to the request very clearly contained legal advice (i.e. advice provided by lawyers to officers) and consequently it is very likely that s.42 FoIA would have applied to these. However, there were other emails which did not appear to contain advice and consequently it is unlikely that s.42 FoIA would have applied to these.
- (g) The Council did undertake the public interest test and appeared to have considered relevant factors.
- (h) We cannot determine whether s.42 FoIA was correctly applied. We have seen the information falling within the scope of the request, it is clear that some of it is subject to LPP and some of it is not. We do not know, however, which aspects of the information falling within the scope of the request the Council applied s.42 FoIA to.

4.8.8 Request 295

- (a) This request was for the briefing documents prepared for Lewis Dagnell to read, prior to and subsequent to his appointment as Cabinet Member for Environment and Streetscene. Also for copies of all documents prepared in 2018 relating to The Streets Ahead contract, specifically to street trees and related issues, their management, and Amey's performance.
- (b) The applicant requested an internal review specifically asking:
 - (i) Whether the legal briefing document referred to in the Council's response was the only document presented to Lewis Dagnall related to his appointment as Cabinet Member for Environment and Streetscene;
 - (ii) Whether s. 42 FoIA was applied in relation to "advice" or "litigation" privilege; and
 - (iii) Whether the public interest test was applied correctly.
- (c) The applicant specifically questioned whether the Council was applying a blanket exemption by saying: *"I was not specifically asking for legally privileged information regarding the injunction. Indeed, I believe by invoking a blanket exemption based on Section 42(1) you are obfuscating and wilfully failing to comply with the law in not answering my original request, as required by the Freedom of Information Act 2000."*
- (d) The Council held information which fell within the scope of the request. The Council has not supplied us with this.

It is difficult to assess whether FoIA was the correct regime in this case, as we have not had sight of the withheld document.

- (e) S.42 FoIA was applied to all of the requested information in the Council's original response to the applicant, and this decision was upheld on internal review. The Council confirmed that a legal briefing document which was presented to Cllr Dagnal was covered by both litigation and advice privilege, as the Council has been subject to litigation in regard to highway tree maintenance and the likelihood of further action remained. The document also included the provision of advice between the Council Legal Service Department and the elected member who was acting on behalf of the Council in his position within the Cabinet.
- (f) We have been provided with some internal correspondence relating to this request. In one email, an officer states, "*I Can only speak for legal but I have one document prepared after his appointment and I am not willing to waive legal and litigation privilege. The public interest requires that an elected member can consider his legal options in private to weigh risks and ensure wise decision making.*"
- (g) There is evidence that the Council has considered and applied the public interest test. The Council reached the conclusion that whilst there is a public interest in the disclosure of the legal briefing document prepared for Cllr Dagnell this is outweighed by the factors in favour of maintaining the exemption, due to the value of the free and frank use of legal advisors by the Council and the support of the client/legal representative relationship.
- (h) We cannot reach a view as to whether s.42 FoIA was correctly applied without having sight of the withheld information. However, purely on the face of it, it seems likely that the information was covered by LPP given that it was apparently prepared by the Council's legal team as a "legal briefing document."

4.8.9 **Request 3672**

- (a) This request related to whether the Council had received a threat of action, written or verbal, from any resident under Section 154 Highways Act that could justify felling a specific oak tree growing on Vernon Road, S17 3QE.
- (b) The Council did hold some information including emails in relation to this request.
- (c) The Council responded to the applicant by withholding the requested information partially under s. 42 FoIA, in particular noting that "*the Council considers that any information appertaining to legal challenges would also be subject to legal privilege.*" The Council also cited another exemption.
- (d) Some limited information was provided to the applicant.
- (e) The Council has not provided us with the withheld information so we cannot evaluate whether it would be subject to s.42 FoIA. It does appear that the public interest test was not undertaken.

4.8.10 **Request 872**

- (a) By way of background, the applicant in this request stated that a report in The Yorkshire Post on 23rd June 2018 states that The Forestry Commission is investigating the lawfulness of the felling of healthy highway trees in Sheffield and the legal requirement for a licence from The Forestry Commission.
- (b) The request is for copies and records of all the Council's internal and external communications and any other documents to date (14th August 2018) that relate to this investigation and the requirement for a licence, including but not exclusive to: The Forestry Commission, South Yorkshire Police, Amey Hallam Highways Ltd, Amey LG Ltd, Acorn Environmental Management Group and any other authorities,

bodies, companies or individuals, subject to reasonable redaction adhering to the relevant statutory provision.

- (c) The Council held communications relating to The Forestry Commission investigation.
- (d) The request was dealt with partly under FoIA and partly under EIR on the basis that the information requested was about trees which had already been removed. However, this request should have been dealt with under EIR on the basis that it still relates to the environment and would fall within the definition of “environmental information.”
- (e) The Council has withheld all of the information requested under the following exemptions:
 - (i) Section 31(1)(c) FoIA ‘law enforcement’ – the Forestry Commission investigation is ongoing and could lead to criminal charges against the Council, therefore the disclosure of information would prejudice the administration of justice;
 - (ii) Reg. 12(5)(b) EIR – disclosure would adversely affect the Council’s ability to receive a fair trial and seek protection for information which is legally privileged
- (f) The Council also noted that *“the information requested would also contain legally privileged communications and be further protected under Section 42 FOI.”*
- (g) Reg. 12(5)(b) would appear to have been applied to part of the information, although it is difficult to assess without seeing copies of the withheld information.
- (h) The Council appears to have undertaken the public interest test, and appears to have given thought to the various factors for and against disclosure.
- (i) In summary, we cannot assess whether reg. 12(5)(b) EIR/s.42 FoIA were applied correctly as we have not been provided with the relevant information, but it does appear that the Council has considered the public interest test.

5 Summary of Interviews

- 5.1 As part of our evaluation, we met with a number of Council officers at different levels of seniority and asked them a series of questions covering:
- 5.1.1 Role within the Council;
 - 5.1.2 Role in relation to FoIA/EIR within the Council;
 - 5.1.3 Understanding of the Council's FoIA/EIR procedures;
 - 5.1.4 Understanding of the exemption covering legally privileged information;
 - 5.1.5 Background relating to the Council's tree felling programme; and
 - 5.1.6 FoIA/EIR requests arising from the Council's tree felling programme.

Approach to Interviews and Evaluation

- 5.2 Firstly we should point out that all of the officers we interviewed appeared to be helpful and open regarding the questions they were asked. They were given reassurance that to the extent possible (bearing in mind the requirements of FoIA/EIR) the information they provided would be kept confidential. Each and every person we spoke to provided a detailed account of their experiences of the tree felling programme and related FoIA requests. They also provided a lot of detail regarding the FoIA process and the way in which they would usually assist in providing responses/support in relation to requests. This open approach has assisted us a great deal in understanding both the background to the tree felling related requests, and the Council's FoIA practices. The interview process was enlightening in relation to several issues. We have set these out below.

Training on FoIA/EIR

- 5.3 When asked whether employees had received training in relation to FoIA, all of the individuals interviewed confirmed that the Council has compulsory annual online training which covers data protection/information security and FoIA, although it has little focus on EIR. One lawyer referred to the fact that they had received specialist external training on FoIA.

Information Management Team

- 5.4 We spoke to members of the IMT, who described the team's functions as being responsible for compliance with the Data Protection Legislation. They are also the central point for information requests under FoIA, EIR and also the subject access regime for individuals to access their personal data. The team provides advice on records management and undertake training in information rights awareness.
- 5.5 The IMT also support the senior information risk owner, the chair of the Information Governance Board which is responsible for strategic risk and performance, and support the Data Protection Officer. The team liaises with the ICO and undertake internal reviews on complaints about how requests have been handled. The team handles around 2000 FoIA/EIR requests per year and about 300 subject access requests. One member of the team described the work as busy and challenging.
- 5.6 Staff explained that the team is structured in three levels. The management level, then Information Management Officers, and then Access to Information Officers. The Access to Information Officers log requests, allocate them to the relevant services within the Council who hold the information sought, compile responses and apply exemptions. The Information Management Officers then get involved at the internal review stage and in relation to ICO appeals (they also deal with data breaches and other areas of data protection work in addition to FoIA). The management tends to focus more on information security.

FoIA/EIR Process

- 5.7 Most officers agreed that the IMT are experts in their field. There was also an understanding amongst all of the officers we spoke to that all FoIA/EIR requests must be processed through the IMT.
- 5.8 Some officers referred to the annual training providing insight into the Council's processes around FoIA, and also mentioned a 'self-help' guide on the intranet. Not all officers appeared to have knowledge of this.
- 5.9 There was also a general view that most of the Council's lawyers have a base knowledge of FoIA/EIR, and provide support in the form of opinions on the application of FoIA exemptions to the IMT. However the view of some lawyers was that because the IMT are experts, they are able to deal with a lot of requests themselves, but that every now and then they ask the Legal Team for support on highly technical points, such as the application of s.36 of FoIA¹.
- 5.10 One individual commented that on occasion they would review draft decisions on disclosure, and that in particular they did a 'fair bit of work' with the IMT in relation to the tree felling FoIA/EIR requests. However some officers explained that the Legal Team would not get involved in FoIA/EIR requests as a matter of course, only if either they held the relevant information, or if the requests were particularly complex.
- 5.11 There seems to be a lack of clarity and documentation in relation to the Council's FoIA/EIR process. Individually, officers appeared to be clear about their specific roles in respect of processing requests. However, some officers' views of the process seemed to contradict others, meaning there was a lack of certainty around issues such as who is responsible for making the decision on whether information is disclosed, what exemptions are applied and so on.
- 5.12 Some officers suggested that the IMT is solely responsible for deciding whether information is disclosed. Others said that the decision was collaborative and that the IMT would advise on exemptions but the decision was ultimately for the information asset owners within the Council's various service areas.
- 5.13 Other officers commented that the decision making process would depend upon the sensitivity of the request, and where disclosure could prejudice Council work, the relevant service area would be heavily involved in decision making. We note that the Council's Legal Services team will assist the IMT with the interpretation of exemptions where the issues involved are particularly complex. This was a widely held view; that the Legal team become involved only where either they hold the information which has been requested, or where the request is complex and their more detailed legal knowledge is required in order to determine how requests should be dealt with. The Legal team does not become involved with all requests.
- 5.14 The general process appears to be that a request is received, generally directly with the IMT, it is logged and given a unique number. If a request is received by a team other than the IMT, the request is sent to the IMT for logging/processing.
- 5.15 The IMT send the request to the team/s likely to hold the requested information to gather the information and provide copies to the IMT. Our understanding is that the IMT has a standard form email that they send out internally for this purpose.
- 5.16 One officer from the IMT stated that the procedures around FoIA/EIR are very strict. The process has been centralised since 2015 and every request has to come through the central FoI/EIR inbox. The requests come in to a trained officer who recognises that the request is one which should be treated under FoIA/EIR rather than as a 'business as usual' request. The officer described how the team is a corporate team with seven staff (this may have since changed) supporting a Council with 8000 employees and dealing with some 2000 requests per year. They explained that requests are allocated

¹ S.36 FoIA provides an exemption for information which, if disclosed, would or would be likely to prejudice the free and frank exchange of view, provision of advice or otherwise be prejudicial to the effective conduct of public affairs.

to the relevant service area on the day of receipt and the service area is given 3 weeks to provide its responses.

Decisions on Disclosure

- 5.17 As stated earlier, some officers are of the view that it is for the service holding the information to make decisions on disclosure, whereas others were of the view that the IMT are the experts and should make that determination. One lawyer referred to the IMT as '*working independently within the Council.*'
- 5.18 One lawyer discussed the fact that although some requests are not clearly framed, the Council does its best to answer the question posed and does not consider why the request has been made.
- 5.19 It appears from our discussions with staff that there is not a process for senior management 'signing off' responses to FoIA/EIR requests before they are sent out to members of the public. One lawyer referred to the fact that different Council departments will have their own authorisation routes.
- 5.20 Another lawyer explained that with regard to the Tree Requests, those directly involved in the litigation would go to the Legal team, they would provide the information to the IMT who would then apply their expertise to respond to the applicant.
- 5.21 A member of the IMT stated that the team has an independent role and that their advice is respected and protected. They did also explain that there are fifteen 'information asset owners' across the Council, and that they consider the Council's information essentially 'belongs' to those owners. Where the IMT disagree with the relevant information asset owner in relation to disclosure, they work with them to try and seek agreement.
- 5.22 With regard to sign off for each request at a senior level, the IMT explained that the process is less formal. They gave an example of another Council where a request could not '*leave the building*' without being signed off by a director. At the Council, however, the IMT are more conscious of what is contentious and seeks agreement with the relevant Information Asset Owners.
- 5.23 One member of staff did refer to the tree felling, and said it had been contentious. They gave the example of a request back in December 2019 where despite asking directors to approve a disclosure under FoIA a number of times, they didn't due to workload. The officer explained that they are cautious to avoid disclosure under pressure of a statutory deadline where the issues involved are contentious.

Application of s.42 FoIA Legal Professional Privilege/reg. 12(5)(b) EIR Course of Justice

- 5.24 We asked officers about their understanding of s.42 FoIA/reg.12(5)(b) EIR and LPP. One lawyer we spoke to explained that there are very few 'safe spaces' in which Council officers are able to '*chew things over.*' The officer referred to privilege allowing lawyers and their client Council officers to seek and take advice in relation to complex and sometimes high profile issues such as the tree felling and related litigation, in a '*safe space.*' The lawyer was well aware that the exemption in s.42 FoIA is qualified and therefore subject to a public interest test, but (in line with ICO guidance) considered there to be very few situations in which the public interest in disclosure would outweigh that in maintaining LPP.
- 5.25 Officers had a grasp of the general concept of LPP. As we would expect, some officers, such as lawyers, appeared to have a better understanding than others of LPP.

Document labels

- 5.26 One of the issues which came out during the interviews, was around the marking of some internal documentation '*Legally Privileged- Not Subject to FOI.*' A number of staff were aware of this and provided their views on how this practice came about and the reasons for it.
- 5.27 One individual spoke about there being a lot of documents subject to LPP arising from the tree felling injunction litigation. They mentioned that staff were anxious about their emails being put into the public

domain. One officer said that some staff struggled to understand what LPP was, and consequently one individual suggested a header was placed on some documents which stated '*confidential, LPP applies, not subject to FOI*' or words to that effect.

- 5.28 At the time, that individual was aware that this was a '*strong set of words*' and suggested it for two purposes. Firstly, to act as a 'red flag' to individuals in other services that the information needed careful consideration in the FoIA context, and secondly using a standard header would make searching easier.
- 5.29 Overall the individual suggested that it was designed to make a '*strong statement*' that would be recognised by services other than the Legal team. The individual said that they were '*not too worried*' about the header at the time and had confidence in IMT to deal with FoIA/EIR requests properly, but that in hindsight they wish that they had not used that header as it was '*too strong*.' The individual (and other members of staff) talked a lot about the FoIA requests and the header as being a response to a very fast moving and intense situation regarding the wider litigation/protests in relation to tree felling (which we explain more below). They referred to how '*incredibly contentious*' the situation felt at times and that staff had to '*make judgement calls as they came up*.' Another officer was aware of the '*LPP badge*' being used sometimes to 'mark emails' but that they would be reviewed by the IMT if they were ever the subject of a FoIA/EIR request (i.e. that IMT would make an independent judgement on disclosure based on the content of the emails rather than the labelling).
- 5.30 One officer stated that the first time issues around the use of s.42 FoIA caught their attention was when the Council started to receive public questions on it. They stated that as far as they are aware, there is no policy in relation to the application of s.42 FoIA. That officer was informed by their colleague, (the officer who had suggested the header) that the wording was around information not being subject to FoIA rather than around legal professional privilege specifically. Their understanding was that the priority at the time was to deliver the 'streets ahead' contract and that the Council was in a rush, time was ticking as the Council had a five year investment period as part of the PFI contract, after which no more money would be spent on roads.
- 5.31 Officers explained that at this stage, the Council was three and a half years into that period and there was 'real pressure' on to keep the programme moving, to '*get as much out of AMEY*' as they could. Prior to this, the Council had national newspapers referring to Sheffield as '*pothole city*.' One officer went on to state that Heads of Service leading on the programme were really anxious about FoIA, and had sought advice around it as they knew they needed to have difficult internal conversations about the approach to the contract, which presumably they did not want to have under a high level of scrutiny.
- 5.32 The officer suggested the header stated that it was merely a response to this anxiety, and simply said that those sorts of communications probably '*won't be FoIA*' because of LPP. At the time, the officers dealing with the PFI were nervous partly because, one officer said, they '*live in Sheffield, and they got quite nasty the tree protestors. It was a very difficult time*.' The officer stated that it was a hard balance in relation to protecting staff and that with hindsight '*it (the header) probably wasn't the best thing to do*.' At the time, the officer who came up with the header was trying to provide reassurance to officers, as they were so concerned that they were even discussing '*not putting things in writing*.'
- 5.33 The officer who suggested the header was of the view that Council officers needed to be able to have discussion that would not be subject to FoIA/EIR. However, it should be noted that there was a general view of both the officer who suggested the header and also of other colleagues, that the decision on disclosure arising from any FoIA/EIR requests would not be theirs. It would be one taken by the IMT who would take any information marked with a header, and review it in accordance with the relevant legislation and guidance. As stated earlier, it appears that the header was intended to be a flag that officers may have concerns about that information being released under FoIA/EIR, however there does not appear to have ever been a deliberate attempt to conceal information, on the basis that officers knew that anything marked with a header would still need to be reviewed by the IMT before a decision on disclosure in response to any FoIA request was made.
- 5.34 One officer commented, '*For me, I was comforted by the fact that this is not something we do all the time; it was done for a specific reason for a specific project at a specific time. The reasons for doing it were honourable and justified and that there is an arbiter within the council that looks at exemptions*.'

I never considered that by having that label that something that should have been disclosed wouldn't be. Never doubted that. Regardless of the label, it would still be considered as whether an exemption was applied. The whole purpose was to make sure that all the docs were considered. It was expected this would make the job easier.'

- 5.35 Another officer stated that they were aware of the header. They suggested it was, '*probably a bit of a cloak, to prevent and enable the officer to talk freely without concern that what he said would have been subject to FOI.*' When asked why that was and whether it was a result of public pressure, they said, '*I think it was a lot to do with that, but I think the officer concerned was often targeted by people in public meetings. Things were said and comments were said to XXX which were unpleasant. I don't think XXX ever told me there were threats against XXX personally. Tensions were quite high, and some campaigners were unpleasant to council officers in public, which stays with you. I think sometimes you can use those emails to let off a bit of steam. That is not unusual, in officers with these sorts of issues. The advice from XXXXXX if you have something to say like that you don't say it in an email. We don't hide/destroy info if it is subject to FOI.*'

Tree Felling Programme

- 5.36 All of those interviewed had some knowledge of the Council's tree felling programme, and some including the Council's lawyers had a detailed knowledge. The background information provided by officers during the interviews can be summarised below.
- 5.37 In around 2010 the Council had a poor reputation in relation to roads and therefore entered into a PFI contract with AMEY. A road programme was agreed to run for 25 years with a 5 year investment period. The aim was for AMEY to rectify the Council's road problems, and out of that work arose the need to work on highway trees. This bought the Council into conflict with members of the public based in the West of Sheffield.
- 5.38 In 2016 there was 'tremendous' conflict in relation to proposed felling at Rustlings Road. A campaign group challenged the felling programme and the way the Council had engaged with the public by way of judicial review. The judicial review was unsuccessful and judgement was in the Council's favour. The campaigners attempted to appeal the judicial review decision, but the appeal failed. Separately, campaigners also raised concerns regarding the PFI contract. There were requests for disclosure of the contract which was eventually disclosed with some redactions.
- 5.39 We understand that AMEY continued to try and carry out the tree related works, and were at times stopped by protesters. AMEY and the Council started to search for solutions which would enable them to continue with the tree works. Initially the focus was on the Police to support AMEY in relation to public order and eventually the Council's legal team instructed by the Highways team to consider injunction proceedings.
- 5.40 One of those served with an injunction was one of the Council's own Members. The campaigning continued and the injunctions did not prevent the protests sufficiently to allow the tree works to continue. Eventually mediation took place which was facilitated by the Bishop of Sheffield, and an AMEY working group was set up in around 2020. The Council reached the conclusion that it should have 'better conversations' with the public and consequently it created an Independent Tree Panel. Staff mentioned that some of the controversy around the tree felling program had arisen from 'conspiracy theories' around AMEY being 'incentivised' to cut down trees, whilst the reality is that the PFI contract refers to a target number of trees which allowed AMEY to 'price their bid.'

Pressure felt by Council Officers

- 5.41 One of the themes which arose in most of the interviews was the significant pressure on Council officers in relation to the controversy around the tree felling programme. The dispute was described as '*unprecedented*' and '*very time intensive.*' One lawyer stated that campaigners were at one stage requesting substantial volumes of information from the Council, and that whilst this was a '*legitimate tactic*' they were surprised by the extent of the requests and their repetitive nature.

- 5.42 One officer stated that the volume of requests, particularly around late 2019, was so *'overwhelming'* that redactions which should have been made in documents for disclosure were inadvertently missed, causing further pressure and *'upset'* by Council officers. One lawyer also comments that the Highways team were receiving a lot of FoIA requests about processing relating to tree felling. As the litigation gathered pace, more requests came in.
- 5.43 Another officer referred to how *'incredibly challenging'* the injunction litigation and events that followed were and commented that the Council was *'scathed'* by the Guardian and Daily Mail, and that the issues involved have been very political and continue to be so. They also commented that *'many requests were aimed at process, in terms of which trees. They would not really involve litigation, the client team were trying to put together information for the legal process, and it was time pressure for them. The group of people that were part of the protest group was a far reach group of people who have a lot of time at their disposal. They could make numerous requests. It was probably part of campaign, to distract the council from the work it was trying to do.'* They further described how following the protestors' success in preventing some of the trees from coming down, a decision was taken to *'take people to Court'* and that is probably the most intense piece of work that the Council has been involved in, in its history. In terms of data, an officer described how, *'one file which is all about the injunction and it was 29,000 items which are saved on CMS. Huge number of items in what is a relatively short period of time.'*
- 5.44 One lawyer mentioned that the pressure around the tree felling programme did not just centre on FoIA and litigation, but also related to public questions. They explained that questions are posed at every Cabinet and Council meeting in relation to tree felling. If an answer cannot be provided in the meeting, the Council will have to draft responses afterwards and send them in writing. There was a view from the Legal team that the Council's processes are set up in such a way that they are accommodating to the public in meetings (in comparison with some other Councils) and they feel aggrieved that they have been *'slammed'* for sometimes having to provide answers in writing afterwards which feels *'cruel'* given that the Council is *'so open.'*
- 5.45 One officer described social media relating to the tree felling programme having been terrible and that the Council couldn't challenge the things that were being said, they just had to *'take it on the chin.'*
- 5.46 Another officer described how there were around 50 to 200 people who were very active on social media. Michael Gove came to Sheffield to assess the situation, there was a lot of political pressure; it was constantly in the forefront of people's minds.
- 5.47 Staff agreed that having an 'independent voice' in relation to the tree felling FoIA/EIR requests was needed. One member of staff said that the Council needed to draw a line under the FoIA/EIR issues arising from the tree felling programme; there is a lack of Trust on the part of some members of the public, and that the only way to deal with it is for somebody to consider matters from an independent perspective, and identify whether s.42 FoIA has been correctly applied. One member of the Legal Team felt that the IMT was being 'tainted' by it and that there is so much good work they do, that this lack of trust on the part of the public is having a negative impact on *'morale, trust, and respect on the team as well as their peers.'*

Tree Archive

- 5.48 Several officers referred to the fact that a tree archive is being set up by the Local Studies and Archives Service of the Council, in response to a report prepared by the Local Government Ombudsman. Lawyers mentioned the fact that they had been asked for the relevant legal files to be placed into archives for the future, but alluded to the fact that they could not be released into the public domain at this time. We understand that there has been engagement with stakeholders in relation to the project.

6 Conclusion

6.1 Our conclusions in relation to the questions posed in the ToRs are as follows:

6.2 Is the Council's FoIA/EIR Policy/Procedure drafted in accordance with the relevant law and guidance?

During the review we were not provided with all relevant policy and procedure and whilst there was guidance and two standard operating procedures in place, staff who we interviewed did not draw our attention to it at the time. We have subsequently reviewed the documentation in brief but would recommend the Council should review to ensure there is a comprehensive guide for staff on how requests should be dealt with.

6.3 Has the Council applied s. 42 FoIA or reg. 12(5)(b) EIR in accordance with law and best practice in relation to the FoIA request which was cited as part of the Complaint?

We do not have sufficient information to answer this. However it does appear that information which should have been disclosed was not disclosed to the applicant. This appears to be on the basis that it was labelled '*Not subject to FOI*' and therefore was not provided to the IMT during their initial search. The information was provided to the Complainant upon appeal.

6.4 Has the Council applied s. 42 FoIA/reg. 12(5)(b) EIR in accordance with law and best practice in relation to our sample of Tree Requests?

We do not have sufficient information to assess this. Of the seven Tree Requests we reviewed, we found that s.42 FoIA/Reg. 12(5)(b) EIR had been correctly applied in one instance and incorrectly applied in one instance. The Council did not provide us with the information that would have allowed us to assess the application of s.42 FoIA/reg.12(5)(b) EIR in relation to the remaining Tree Requests, so we could not determine whether they were dealt with correctly or not.

6.5 Has the Council correctly applied s. 42 FoIA/reg. 12(5)(b) EIR in accordance with law and best practice in relation to our sample of ten General Requests?

We do not have sufficient information to assess this. Of the ten General Requests we found that s.42 FoIA/Reg. 12(5)(b) EIR had been correctly applied in three instances and incorrectly applied in one instance. In relation to the remaining seven General Requests, we do not have the information required to determine whether s.42 FoIA/reg. 12(5)(b) have been correctly applied.

6.6 Has the Council applied s.42 FoIA/reg. 12(5)(b) EIR consistently in relation to both the Tree Requests and the General Requests?

We do not have sufficient information to assess this.

6.7 Do the relevant Council officers appear to process FoIA/EIR requests in accordance with FoIA and EIR?

The response to this is mixed; in some instances yes and in others no. We found that,

6.7.1 officers had in some instances in relation to tree information, carried out a practice of incorrectly labelling information as being 'not subject to FoIA,' and that in at least one instance this resulted in information which should have been disclosed, being incorrectly withheld initially (it was later disclosed on appeal);

6.7.2 officers had a widely held view that the IMT is under resourced and consequently FoIA/EIR requests are not being dealt with as quickly as they should be;

6.7.3 all Council officers stated that they undertook annual training which included a FoIA element and some specialist officers had also taken part in external FoIA training;

- 6.7.4 there appears to be a general understanding of the concept of legal privilege and the fact that information could be withheld under FoIA as a result of it;
- 6.7.5 there are examples of good practice in relation to Requests we reviewed. In some instances, there is evidence that the correct issues have been considered and we therefore feel it is likely that s.42 FoIA has been correctly applied, but without seeing the information falling within the scope of the request, we cannot be certain.

7 Recommendations

- 7.1 If the Council does not already have one, a FoIA/EIR procedure note should be produced which sets out each stage of the process from the receipt of a new request to the provision of the response to the applicant. The procedure should also include information on how appeals are dealt with. This should be clearly communicated to officers and also to new joiners, and should be easily accessible for reference.
- 7.2 Having regard to the requirements of the UK General Data Protection Regulation and the Data Protection Act 2018 (**Data Protection Legislation**) to ensure that personal data is being properly retained/destroyed, the Council should review its record management system in relation to FoIA/EIR requests and implement measures to ensure that, for each request, the following information is logically stored and easily retrievable:
- (a) The original FoIA/EIR request;
 - (b) A copy of the information held which falls within the scope of the request;
 - (c) Internal communications which evidence deliberations and decision making regarding the scope of the request, the information held, whether the information should be disclosed or withheld and exemptions applied;
 - (d) A copy of the response sent to the applicant;
 - (e) A copy of request for internal review, relevant internal communications/evidence of decision making, and response to internal review; and
 - (f) A copy of any ICO correspondence, should an appeal be made by the applicant, and evidence of internal decision making together with copies off the Council's response to the appeal and ultimately the outcome.
- 7.3 The Council should consider and if practical establish a system whereby FoIA/EIR responses are reviewed and signed off by a member of the management team. This should ensure a more consistent approach to FoIA/EIR responses. It is however important that whatever process is implemented does not delay responses to requests from being sent out and statutory deadlines being met.
- 7.4 Review the numbers of FoIA/EIR requests/workload being handled by the IMT and consider whether the Council would benefit from additional resource within IMT.
- 7.5 In relation to the Tree Requests and General Requests where we have found that the exemption in s.42 FoIA/re. 12(5)(b) EIR was incorrectly applied, revisit the information and consider whether it can and should be disclosed to the relevant applicants (we appreciate other exemptions may apply, and this should be assessed).
- 7.6 Review the Council's FoIA training for all employees to raise awareness around the scope of FoIA and EIR and how the exemptions can be applied in practice. Training should also cover the application of the exemptions in s.42 FoIA and reg. 12(5)(b) EIR and emphasise the importance of reviewing information which has been requested, before considering whether it is disclosable, rather than making assumptions in relation to the application of exemptions without having sight of the relevant documents.

Resources

Freedom of Information Act 2000

[Freedom of Information Act 2000 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2000/36/section/1)

[Environmental Information Regulations 2004](https://www.legislation.gov.uk/uksi/2004/1433/section/1)

[The Environmental Information Regulations 2004 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2004/1433/section/1)

ICO's guidance, *Legal professional privilege (section 42)*

[legal_professional_privilege_exemption_s42.pdf \(ico.org.uk\)](https://ico.org.uk/for-organisations/articles-and-guidance/subject-access/legal-professional-privilege-exemption-s42.pdf)

ICO's guidance, *Course of Justice and inquiries exception (regulation 12(5)(b))*

[Course of justice and inquiries exception eir guidance 20140211 \(ico.org.uk\)](https://ico.org.uk/for-organisations/articles-and-guidance/subject-access/course-of-justice-and-inquiries-exception-eir-guidance-20140211)

Bevan Brittan LLP
August 2022

Appendix 1

SHEFFIELD CITY COUNCIL
Freedom of Information Act 2000 and
Environmental Information Regulations 2004
Evaluation
Terms of Reference
20th May 2021

1.0 Background and rationale

- 1.1 Sheffield City Council (**the Council**) has received a number of requests for information (**Tree Requests**) under the Freedom of Information Act 2000 (**FoIA**) and the Environmental Information Regulations 2004 (**EIR**) regarding a large scale tree felling programme by its PFI Contractor Amey. We understand that the Council has been subject to significant scrutiny and a number of complaints relating to the tree felling programme since it began in 2013.
- 1.2 The Council has recently received a complaint from a member of the public (**the Complaint**) regarding the way in which the Tree Requests have been dealt with. We understand that the Council has exempted some information from disclosure under section 42 of FoIA which relates to information which is legally privileged and under Regulation 12(5)(b) of the EIR which relates to information which would adversely affect the course of justice. The Complaint centres on whether information has been correctly withheld. We understand that the Complaint also levelled allegations against Council Members regarding the handling of the Requests which is being dealt with as a complaint under the Member's Code of Conduct.
- 1.3 We have been instructed by the Council to undertake an independent evaluation which considers:
 - 1.3.1 whether section 42 FoIA was applied in accordance with law and best practice in relation to the FOI request which formed the subject of the Complaint;
 - 1.3.2 a sample of ten of the Tree Requests and ten other requests for information which are not related to trees (**the General Requests**) where section 42 FoIA or Regulation 12(5)(b) of the EIR has been applied and to determine whether section 42 or Regulation 12(5)(b) has been applied in accordance with law and best practice in each case; and
 - 1.3.3 to review the Council's FoIA policy to determine whether it accords with ICO guidance and the relevant law.
- 1.4 The Council has asked that we interview relevant staff members where appropriate, to identify how they have approached the application of section 42 of FoIA or Regulation 12(5)(b) of the EIR.

2.0 Specific Objectives of Evaluation & Evaluation Questions

- 2.1 The Council specifically wishes to determine whether, in relation to the Tree Requests and the General Requests, information has been incorrectly withheld under the guise of legal privilege. Once our fact finding is complete, we will prepare a report (**the Report**) which seeks to answer the following questions:
 - 2.1.1 Is the Council's FoIA/EIR Policy/Procedure drafted in accordance with the relevant law and guidance?
 - 2.1.2 Has the Council applied section 42 FoIA or Regulation 12(5)(b) of the EIR in accordance with law and best practice in relation to the FOI request which was cited as part of the Complaint?
 - 2.1.3 Has the Council applied section 42 FoIA or Regulation 12(5)(b) of the EIR in accordance with law and best practice in relation to our sample of ten Tree Requests?
 - 2.1.4 Has the Council correctly applied section 42 FoIA or Regulation 12(5)(b) of the EIR in accordance with law and best practice in relation to our sample of ten General Requests?
 - 2.1.5 Has the Council applied section 42 FoIA or Regulation 12(5)(b) of the EIR consistently in relation to both the Tree Requests and the General Requests?
 - 2.1.6 Do the relevant Council officers appear to process FoIA/EIR requests in accordance with FoIA and EIR?

- 2.1.7 Has the correct regime (FoIA or EIR) been consistently applied in relation to both the Tree Requests and the General Requests?

3.0 Scope of Evaluation

3.1 FoIA/EIR Policy/Procedure



- 3.1.1 We have been asked as part of our evaluation to review the Council's FoIA/EIR Policy to ensure that it accords with the relevant law and guidance in respect of the aspects which cover section 42 of FoIA or Regulation 12(5)(b) of the EIR. In our experience, public bodies' FoIA/EIR policies and procedures are often approached differently and can be quite subjective. On that basis we will comment on any aspect of the FoIA/EIR Policy which is, in our view, in direct conflict with FoIA/EIR, but we will not elaborate beyond that.

3.2 Evaluation of Requests

- 3.2.1 We understand that the Council has received 11,802 General Requests and 470 Tree Requests since 1 April 2015 until 31 May 2021 (the Council does not have records prior to 1 April 2015 to identify Tree Requests). Our remit is to focus on a sample of those requests, which will include ten General Requests and ten Tree Requests which will be selected at random. We will focus purely on whether section 42 FoIA or Regulation 12(5)(b) of the EIR has been applied in accordance with law and best practice in relation to information which has been withheld. We will not focus on any other aspects including the timeliness with which requests have been dealt with or whether exemptions other than section 42 FoIA or Regulation 12(5)(b) of the EIR have been correctly applied.

3.3 Interviews

- 3.3.1 As part of our evaluation, we have been asked by the Council to interview a small number of Council Officers who are involved in the FoIA/EIR process, particularly in relation to the Tree Requests. The findings of our evaluation of the Requests will determine who we interview, but it may include:

- (a) 
- (b) 
- (c) 
- (d) 
- (e) 
- (f) 
- (g) 
- (h) 

4.0 Approach and Methodology

4.1 Review of FoIA/EIR Policy/Procedure

- 4.1.1 We will review the Council's FoIA/EIR Policy/Procedure and identify whether it is compliant with law, guidance and best practice.

4.2 Evaluation of Requests

4.2.1 We will request the following information from the Senior Information Management Officer:

- (a) A list of all Tree Requests dating back to 1st January 2013 by the Council's FoIA/EIR number only (without any detail regarding the content of the requests) where information has been withheld in accordance with section 42 of FoIA or Regulation 12(5)(b) of the EIR; and
- (b) A list of all General Requests dating back to 1st January 2013 by the Council's FoIA/EIR number only (without any detail regarding the content of the requests) where information has been withheld in accordance with section 42 of FoIA or Regulation 12(5)(b) of the EIR.

4.2.2 We will then select at random ten Tree Requests and ten General Requests.

4.2.3 In relation to each of the selected requests, we will request the following information from the Council's Senior Information Management Officer:

- (c) A copy of the request from the FoIA/EIR applicant;
- (d) A copy of internal correspondence relating to the request;
- (e) A copy of the information falling within the scope of the request;
- (f) A copy of the response to the applicant.

4.2.4 In relation to each of the requests we will review the information falling within a-d above to determine:

- (g) What information, if any, was subject to legal professional privilege at the time the request was made;
- (h) Whether that information was subject to advice privilege or litigation privilege.

4.2.5 In order to determine the above, we may consider the following specific questions:

- (i) Who is the client?
- (j) Who is the legal advisor?
- (k) Is there any evidence that privilege has been waived?
- (l) Has the public interest test been applied in accordance with law and best practice?

4.3 Interviews

4.3.1 We will interview the individuals referred to above, in an attempt to ascertain the following:

- (m) Their role in responding to Tree Requests and General Requests;
- (n) Their understanding of FoIA/EIR;
- (o) Their approach to FoIA/EIR requests; and
- (p) Their understanding of section 42 of FoIA and Regulation 12(5)(b) of the EIR.

5.0 Structure of Report

5.1 To an extent, the structure of the report will depend upon the information gathered, however as a general framework we would envisage including the following:

- Executive Summary
- Introduction
- Objectives
- ToRs
- Review of FoIA/EIR Policy/Procedure
- Evaluation of Tree Requests and General Requests
- Summary of Interviews
- Conclusion as to whether the Council has, in relation to the sample dealt with by our evaluation, applied section 42 of FoIA or Regulation 12(5)(b) of the EIR in accordance with law and best practice.
- Recommendations (if any)

6.0 Resources

Freedom of Information Act 2000

[Freedom of Information Act 2000 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2000/36)

[Environmental Information Regulations 2004](https://www.legislation.gov.uk/uksi/2004/1033)

[The Environmental Information Regulations 2004 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2004/1033)

ICO's guidance, *Legal professional privilege (section 42)*

[legal_professional_privilege_exemption_s42.pdf \(ico.org.uk\)](https://ico.org.uk/for-organisations/guidance-and-advice/our-guidance-advice/legal-professional-privilege-exemption-s42.pdf)

ICO's guidance, *Course of Justice and inquiries exception (regulation 12(5)(b))*

[Course of justice and inquiries exception eir guidance 20140211 \(ico.org.uk\)](https://ico.org.uk/for-organisations/guidance-and-advice/our-guidance-advice/course-of-justice-and-inquiries-exception-eir-guidance-20140211)

ICO Guidance

ICO/FTT/UTT decisions where appropriate.

Bevan Brittan LLP
20 May 2021