



Appeal Number: EA/2022/0208

Neutral Citation number: [2023] UKFTT 00103 (GRC)

**First-Tier Tribunal
(General Regulatory Chamber)
Information Rights**

Between:

Breckland District Council

Appellant:

And

The Information Commissioner

First Respondent:

and

Timothy Birt

Second Respondent:

Heard: on Cloud Video Platform on 17th January 2023.

Panel: Brian Kennedy KC, Marion Saunders, and Susan Wolf.

Representation:

For the Appellant: Jane Oldham of Counsel -11 KBW.

For the Second Respondent: Timothy Birt, as litigant in person.

Decision: The Appeal is allowed. (Please see also attached Appendix A) – which is the Gist of the Closed hearing)

REASONS

Introduction:

- [1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 05 July 2022 (reference IC-114973-F7D3), which is a matter of public record.

Factual Background to this Appeal:

- [2] Details of the background to this appeal, the Second Respondent’s request for information and the Commissioner’s decision are set out in the DN. The appeal concerns a request for information from the Second Respondent to Breckland District Council (the “Council”). The information relates to the sale, and other matters arising therefrom, of Barnham Broom Golf and Country Club. The Council withheld the information under the exemption for commercial interest – section 43(2) FOIA. At the Commissioner’s direction the Council reconsidered the request under the Environmental Information Regulations 2004 (the EIR”) and disclosed some information to the Second Respondent. Other information was withheld under the exception for commercial interests – regulation 12(5)(e) of the EIR.
- [3] The Commissioner maintains the position set out in the DN; namely that the Council wrongly handled the request under the FOIA and breached regulation 5(1) and regulation 14 of the EIR and that it failed to demonstrate that the exception in regulation 12(5)(e) is engaged. The Council acknowledge the correct course is reliance upon the exception under regulation 12(5)(e) EIR (which reflects the wording in Article 4.4 (d) of the Aarhus Convention).
- [4] The Council now appeals against the DN. The Commissioner opposes the appeal and invites the Tribunal to uphold the DN.

History and Chronology:

- [5] The Second Respondent, representing one of the Council's Wards wrote to the Council on 1 March 2021, requesting information thus:

"Dear FoI team,

On 14-01-2021 the whole of the discussion on item 8 was held below the line after the chairman said, "a disaggregation would not be appropriate". Mr [redacted] said at the meeting that disaggregation would be 'difficult' when preparing the report, which I suggest, implies at least some information could be disaggregated for inclusion in the minutes.

The minutes of both Cabinet (04-01-2021) and OSC (14-02-2021) meetings on this matter have been kept entirely confidential; neither has the full text of the OSC call-in request been disclosed. I suggest this is not in keeping either with Mr [redacted] comment nor our Council's duty of openness and transparency. The chairman of OSC has suggested that I test the situation with an FoI request I there wish to make a request that a copy of the minutes be released for both meeting with only those parts which genuinely pass a public interest test for confidentiality be redacted - with a clear justification as to which statute is used to withhold information for each redaction.

I further request in relation to Barnham Broom Golf and Country Club that the annual (tax year) rental income from this complex be disclosed for the last 10 years, since we have not completed this tax year data be income from April-December 2020."

- [6] The Council responded on 29 March 2021, confirming it was withholding all the information under s43(2) of the Freedom of Information Act 2000 which is the exemption for commercial interests. The Council completed an internal review on 2 June 2021, maintaining its position.

The Commissioner's investigation:

- [7] The Second Respondent contacted the Commissioner on 29 June 2021 to complain

about the refusal of the Council to provide the information he had requested.

- [8]** The Commissioner wrote to the Council to request a copy of the withheld information. The Council provided the withheld information to the Commissioner on 12 May 2022. It comprised of:
- a. Full unredacted minutes of Cabinet Meeting 4 January 2021.
 - b. Full unredacted minutes of OSC Meeting 14 January 2021.
 - c. Full unredacted Call-in Reason.
 - d. A breakdown of Rent payments for land asset for the 10 years to 2022 (this was subsequently corrected, during the hearing, to the period in the Request: 2010/2011 – December 2020)".
- [9]** Upon his review of the withheld information, the Commissioner opined that the information was environmental in nature. As such, the Council should have considered the request under the EIR. The Commissioner asked the Council to reconsider the request under the EIR.
- [10]** On 17 June 2022, the Council wrote to the Second Respondent, having reconsidered the request under the EIR. The Council explained that it did not hold OSC minutes from 14 February 2021 as the OSC did not meet on this date. Instead, it held OSC minutes from 14 January 2021, and disclosed a redacted version of these minutes, along with redacted versions of the minutes of the Cabinet Meeting of 4 January 2021 and a redacted version of the Call-in Reason. The Council explained the redactions were made to information that was commercial in nature and relied upon Regulation 12(5)(e) of the EIR (commercial or industrial information). The Council also withheld the Breakdown of Rent payments in their entirety, also relying upon Regulation 12(5)(e).
- [11]** The scope of the Commissioner’s investigation changed to considering whether the Council was entitled to apply Regulation 12(5)(e) the EIR to the withheld information.

[12] Legal Framework:

It is not disputed that the regime applicable in this appeal is the EIR.

A person requesting environmental information from a public authority has a right to have that information communicated to him if the public authority holds it: Regulation 5(1) EIR.

The requestor's right under Regulation 5(1) EIR is subject to certain exceptions, outlined in Regulation 12 EIR which provides (so far as is relevant) as follows: -

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure.

.....

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -

...

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

The exception under regulation 12(5)(e) EIR reflects the wording in Article 4.4 (d) of the Aarhus Convention which provides that: -

“A request for environmental information may be refused if the disclosure would adversely affect:

...

(d) The confidentiality of commercial and industrial information where such confidentiality is protected by law in order to protect a legitimate economic interest.”

If the exception was applicable, then like most exceptions under EIR, the public interest test would have to be considered.

Commissioner’s Decision Notice:

[13] The Commissioner investigated the matter and In the DN dated 5 July 2022 following his investigation, decided that the Council had wrongly handled the request under FOIA (breaching Regulations 5(1) and 14 of the EIR) and that it had failed to demonstrate that the exception in Regulation 12(5)(e) EIR was engaged. *(The issue in this appeal is mostly related to the demonstration by the Council that the regulation was engaged.)*

[14] The Commissioner ordered the Council to disclose the withheld information within 35 calendar days.

[15] The Commissioner decided the Council had failed to demonstrate the exception was engaged for the following reasons:

For the Reg. 12(5)(e) exception to be applicable, 4 conditions must be met, and any public authority must have evidence/explanations for them:

- a. Is the information commercial or industrial in nature?
- b. Is the information subject to confidentiality provided by law?
- c. Is the confidentiality provided to protect a legitimate economic interest?
- d. Would the confidentiality be adversely affected by disclosure?

[16] Although the Commissioner accepted the withheld information met the first condition (being commercial in nature), he considered that the Council, in its EIR response to the Second Respondent dated 17 June 2022, failed to provide sufficient evidence, or explain the last 3 conditions required (see b, c & d) at §15 above) for the exception to

apply. This is because the part of the Council's response in relation to the application of the exception was brief, and too simply stated;

"The Council considers that the information contained within the restricted minutes, unredacted call-in reason and a breakdown of the rental income is not already in the public domain.

The information held is considered confidential commercial information for the purposes of the EIR, and we consider that the disclosure of that information would adversely affect the commercial interests of the Council and of the third party.

Accordingly, the information requested falls within Regulation 12(5)(e) as it is commercial information. The question arises as to whether in all the circumstances of the information, the public interest in maintaining the exception outweighs the public interest in disclosure."

- [17] The Commissioner effectively found these submissions failed to explain how the information was subject to confidentiality provided by law, what economic interest the confidentiality was protecting and whether, and to what extent, this confidentiality would be adversely affected by disclosure.
- [18] Although the Council's response went on to provide public interest arguments this was in the view of the Commissioner premature, since the public interest would only be considered once the exception was engaged, which, according to the Commissioner, was not the case here. Nevertheless, the Commissioner did consider the public interest arguments to see whether any of them had any application to the engagement of regulation 12(5)(e) EIR. He decided they did not. and was left with the impression that the Appellant had applied the exception on a general basis only without adequate analysis or justification.
- [19] For these reasons the Commissioner concluded the Council had failed to show the exception was engaged and ordered disclosure.

Grounds of Appeal:

[20] The Council does not dispute that EIR is the correct regime. The Council stated the Commissioner erred in law in deciding Regulation 12(5)(e) EIR was not engaged under the following Grounds:

- a. The DN failed to make a finding on/ explicitly state whether it considered the information was commercial in nature.
- b. The Council did provide evidence that the information was “*subject to confidentiality provided by law*” in its original Internal Review dated 3 June 2021, when it originally considered the information was withheld under s43(2) FOIA (commercial interests);
- c. The Commissioner erred in stating the Council ‘*had not shown that disclosure would adversely affect confidentiality provided by law to protect a legitimate economic interest*’ as the withheld information clearly demonstrate these.
- d. The Commissioner should have determined the public interest was in favour of withholding the information.

[21] The Council also stated that it wishes to rely on additional documents which it will provide as this appeal progresses, to evidence 12(5)(e) EIR is engaged.

The Commissioner’s Response:

[22] The Commissioner maintained his position as outlined in the DN and resisted the appeal. The Commissioner set out additional observations in respect of the Council’s Grounds of Appeal.

[23] The Commissioner conceded that the DN does not explicitly state it considers the information is commercial in nature. However, this is strongly inferred by the fact that § 29 of the DN states the Council failed to demonstrate the last 3 elements of the exception. Nevertheless, the Commissioner confirmed in this response that the

withheld information is commercial in nature. (*The parties generally agree on this assumption*).

[24] The Council failed to recognise that the FOIA and the EIR are separate regimes. What was evidence under FOIA does not automatically transpose to the EIR. To date in the Commissioners' view, the Council has not provided any material evidence that the information is subject to confidentiality provided by law, under the EIR.

[25] The Commissioner argues that as the owner of the information, the onus is on the Council to demonstrate that disclosure would adversely affect confidentiality provided by law to protect a legitimate economic interest. It is not for the Commissioner to do so. The Tribunal, according to the Commissioner, is likely to be critical of a public authority who wishes to rely on an exception but leaves evidence of the applicability of the exception to the Commissioner. Further, the Council, the Commissioner argues, has failed to demonstrate the exception is engaged accordingly there is no requirement to consider the public interest test. The Commissioner requests that the Tribunal dismiss the appeal. (*~The Tribunal accept the Commissioners criticism levelled at the Council in this regard and are herein investigating the issues ab initio.*)

Council's Replying Submissions:

[26] The Council reiterated the Commissioner's acceptance that the withheld information is commercial in nature. The Council recognised that the FOIA and the EIR regimes are distinct. However, the Council noted, contrary to the Commissioner's suggestion, that did not nullify the factual evidence contained in the material provided by the Council to the Commissioner (in the Council's letter dated 3 June 2021 to the 2nd Respondent):

- a. The information contained sensitive business and financial information pertaining to a third party.
- b. The Council did not have permission to disclose it; and

- c. The Internal Review referred to *“legal ramifications if the Council released the information without permission from a third party”*.

- [27] The Council stated that the Commissioner failed to take this evidence into account.
- [28] The Council submitted that the exception in regulation 12(5)(e) EIR was engaged in relation to the redacted material, and that, in all the circumstances of the case, and even when applying a presumption in favour of disclosure, the public interest in maintaining the exception outweighed the public interest in disclosing the information and that the Council was correct to refuse to disclose the information and should not be required to take any further steps.

The Second Respondent’s Argument:

- [29] The Second Respondent stated that para 4 of the Appellant’s Reply to the Commissioner’s Response to the Appeal referred to a discussion at the 14-Jan-2021 “Overview and Scrutiny Commission” meeting as recorded in the public summary thereof, in which it was debated. Paragraph 4 of that Reply stated that if any parts of this agenda item could be held in public session. In this discussion it was stated that the Second Respondent has: *“never to date indicated to the Council, or to the Commissioner, which parts he accepts are not within his request”* and requests the Second Respondent submit an explanation. The Second Respondent argued that the approach:
- a. Interferes between two distinctly separate items, the FOIA request was to disclose the minutes of the meeting not the full agenda pack and -
 - b. There is an implied criticism that the Second Respondent did not answer a question, despite it never being asked; furthermore, it has rather been superseded by events.
- [30] The Second Respondent recognised that he is not qualified to comment on any detailed legal argument. Nevertheless, he offered the following explanation:
- [31] In Part 5, “openness” of The Seven Principles of Public Life and the Local Government Transparency Code, 2015 there is a clear presumption in favour of disclosure, and he believed the information requested falls within the remit of public disclosure. The

Second Respondent further acknowledged that there are specific and good reasons for keeping certain information confidential such as:

- a. Matters involving safeguarding, especially children and vulnerable adults, or some personnel matters.
- b. While a tender process is in progress as it would be damaging and unfair to disclose competing offers before the process had completed.
- c. To avoid prejudicing a police investigation or prosecution.

The Council's reply to the Second Respondent:

[32] The Council stated at § 4 of the Council's Reply it is not suggested that the Second Respondent had requested the full agenda pack (which included the background officers' report). Further § 4 of the Council's Reply merely quoted the Second Respondents' words as recorded in published summary of the OSC Minutes, in which he accepted that elements of that report should legitimately be excluded from open discussion at the meeting and could not properly be openly discussed (since he said elements could only "largely" - i.e., not wholly - be discussed openly). The Council stated what the Second Respondent did not do when he said that, nor did he do so subsequently in his request, was to indicate which part of the withheld and disputed material fell outside those which he was saying "largely," i.e., not wholly, could be openly discussed and hence fell outside the scope of his request. § 4 of the Council's IC Reply seeks to clarify the scope of his Request, given the lack of clarity introduced by the Second Respondents' own wording both at the OSC meeting (the unredacted minutes of which he seeks to have publicised) and in his request.

[33] The Council repeated § 5 of its Reply headed, "*the relevant date for the purposes of determining whether the exception relied on applies*". The facts and matters in existence as of 29 March 2021 (not 9 December 2022, the date of service of R2 Response) are as a matter of law the relevant ones for determining whether the presently redacted material should continue to be withheld.

Witness Statement of Ralph Burton:

[34] Mr Ralph Burton provided a written witness statement to the Tribunal. Mr Burton is the Assistant Director – Property and Infrastructure at the council.

[35] Mr Burton, inter-alia stated as follows:

“The Council holds this portfolio of property with the main objective to create a commercial return and income stream for which the Council can use to off-set the cost of the delivery of its statutory public services. In other words, the Council is able to use the revenue created from the rental returns received to contribute towards the cost of the delivery of its statutory services. As a District Council this includes being the local planning authority, environmental waste collection and street cleansing and the provision of housing support and provision to those in most need in the community.

Given the size of the Property and the contribution it makes to the total commercial property rental income, any significant fluctuation to the rental income or a reduction in the value of the property would have a sizeable impact on the Council's budget. The financial position of many Local Authorities has become more constrained over the last few years, and this is no different for the Council. Careful but prudent budget management is key to ensuring control, solvency, and the continuation of public service delivery.

By using this income stream the Council has been able to maintain the lowest District Council Tax in the country, thus supporting the cost of living for the residents it serves and keeping the local tax burden as low as possible. Therefore, residents are more enabled to utilise their household income on other outgoings to support their home/family/life.

If the Council was to dispose of the Property and was unable to hold commercially confidential discussions with any potential purchaser and information was to be made publicly available, then the Council's negotiating position would be eroded in that the purchaser would be able to understand for instance any approved agreed threshold for a sale price or how a sale price is below or above the Council's valuation for the property. With these facts the purchasing party would have an unfair advantage during the negotiations. The effect of this is that the negotiations would not be balanced, and the purchasing party would be

able to erode the sale price. This of course also applies in the case of the discussions in respect of the Property and that they would be able to use any information obtained in respect of any financial evidence or valuation to influence the price they would be willing to pay for the Property. Any eroded sale price means that the capital receipt back to the Council would be less. Lower capital receipts would mean the Council is unable to reinvest those receipts in alternative investment or directly into service provision. This would have the effect of the tax paying resident receiving lesser service provision and restriction on the statutory and non-statutory provisions that the Council provides or paying a higher cost for council tax.”

The Appellants’ Skeleton arguments:

[36] Just prior to the hearing Jane Oldham, (“JO”) of Counsel representing the Appellant provided a comprehensive and most helpful Skeleton argument. The skeleton argument amplified para 23 of the Appellant’s Reply to the response of the IC (Open Bundle Doc 4 page 35) that para 23 recognised Reg 12(6) EIR at the same time however, It said: *“Further, the exclusion of these matters from the public, both at the meetings of the Cabinet and OSC and in the subsequent Minutes, was permitted in accordance with Section 100(A) and Schedule 12A Part 1 paragraphs 1-4 of the Local Government Act 1972 as well as being consistent with the Local Government Transparency Code 2015. Hence while the Council appreciates that Reg 12(6) EIR 1 does not provide for other statutory prohibitions to amount to a freestanding exception it is nevertheless a further ground upon which the confidentiality relied on was provided by law i.e. was within the protection from disclosure provided by those provisions.”*

[37] Counsels’ Skeleton argument included the following which we will record herein as we feel it is of significant relevance to this and other cases with similar issues. We Quote her helpful submissions;

”

1. *The Council’s case is already summarised in its Reply to the Response of the Information Commissioner [“IC”] dated 10 October 2022 read with the witness statement and exhibit of Ralph Burton on behalf of the Council, and the Appellant’s*

Reply to the Response of the Second Respondent to the Appeal, dated 19 December 2022. Those are adopted here and not set out a second time.

2. *These submissions do however amplify para 23 of the Council's Reply to the IC's Response to the Appeal referring to background statutory provisions in local government legislation, as well as the Local Government Transparency Code 2015 to which Mr Birt referred in his correspondence with the Council and the IC. All (save the Environmental Information Regulations 2004 ["EIR"]) of the legislative authorities in the final section of the Open bundle relate to this aspect. The purpose of citing them is to ensure that the Tribunal is aware (when considering whether the exception in Reg 12(5)(e) is engaged, and the balance of public interest) that there are, outside of the EIR, statutory structures in place designed to ensure, as regards commercially confidential information, appropriate (but not inappropriate)*

- (1) *public access to documents such as minutes recording the decisions of a local authority cabinet and overview and scrutiny committee and records of payments received in respect of assets (the very categories of documents which Mr Birt has requested be disclosed to the world at large) and*
- (2) *statutory auditor oversight and access to such documents, and public opportunity for inspection and audit intervention.*

[“Pausing here, the Tribunal takes into account Reg 12(6) of the EIRs, as indeed had para 23 of the Council's Reply to the Commissioner's Response to the Appeal in which the Appellant had also stated: “while the Council appreciates that Reg 12(6) EIR does not provide for other statutory prohibitions to amount to a freestanding exception it is nevertheless a further ground upon which the confidentiality relied on was provided by law i.e. was within the protection from disclosure provided by those provisions.”]

3. There are three relevant heads (1) legislation governing public access to meetings and minutes (2) legislation governing public access to accounting records and audit material, regarding payments and other yields arising from assets and (3) government guidance on transparency.

4. *The body of these submissions concern the statutory materials located in the final section of the Open Bundle.*

Legislation governing public access to meetings and minutes

Cabinet meetings and minutes

5. *The Council is a district council that operates executive arrangements by having, as its executive decision-maker, a cabinet. Accordingly, sections 9G and 9GA of the Local Government Act 2000 [“LGA 2000”] apply to the cabinet. The effect of these is that, subject to regulations, it is for the cabinet to decide whether its meeting is to be in public or private (section 9G(1) and (2)) and a written record must be kept of any decision taken in private (section 9G (3)). Those written records must be made available to the public (section 9GA(1)) subject to regulations preventing the whole or part of such record or document containing prescribed information from being made available to members of the public (section 9GA(2)). So for example in the present case the public written record of the cabinet decision is set out in the (redacted) version in the Open Bundle of the Council’s letter to the Information Commissioner dated 4 May 2022.*
6. The applicable regulations are the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 (SI 2012/2089) [“2012 Regulations”]. They apply to decision making bodies, defined in Reg 2 as including cabinet.
7. Reg 4(2)(a) provides that the public “must be excluded from a meeting during an item of business whenever the decision-making body concerned passes a resolution to exclude the public during that item where it is likely, in view of the nature of the item of business, that if members of the public were present during that item, exempt information would be disclosed to them”.
8. *Reg 12 of the 2012 Regulations requires the recording of executive decisions (with reasons) and details of any alternative options considered and rejected by the decision-making body at the meeting at which the decision was made. By Reg 14, subject to Reg 20, records under Reg 12 must be available for inspection by members of the public, as soon as is reasonably practicable, at the offices of the relevant local authority, and on that authority’s website, if it has one.*

9. *Reg 20 has general application to the whole of the 2012 Regulations. By Reg 20(2)(b) nothing in the 2012 Regulations requires a local authority to disclose to the public or make available for public inspection any document or part of document if, in the opinion of the proper officer, that document or part of a document contains or is likely to contain exempt information.*
10. *Reg 2 defines “exempt information” as having the meaning given in section 100I of the Local Government Act 1972 [“LGA 1972”], which in turn provides that the descriptions of exempt information are those for the time being specified in Part 1 of Schedule 12A LGA 1972, but subject to any qualifications contained in Part 2 of that Schedule; and that Part 3 has effect for the interpretation of Parts 1 to 3 of that Schedule.*
11. *One such category, by para 3 in Part 1 of Schedule 12A, is “information relating to the financial or business affairs of any particular person (including the authority holding that information).”*
12. *By para 10 in Part 2 of Schedule 12A, information within, among others, at § 3 in Part 1 is exempt information if and so long as, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

Overview and Scrutiny Committee [“OSC”]

13. *By § 10 in Part 2 of Schedule 12A, information within, among others, para 3 in Part 1 is exempt information if and so long as, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*
14. *Turning to an OSC, by section 9FA(6)(b) LGA 2000 this is to be treated as a committee of the Council for the purposes of the LGA 1972 provisions regarding public access to meetings (section 100A read with section 100E LGA 1972) and documents such as minutes (section 100C read with section 100E). That in turn brings into play the exception in respect of exempt information as defined in section 100I LGA 1972. As to that see paras 11-13 above. The public written record of the OSC decision is set out in the (redacted) version in the Open Bundle of the Council’s letter to the Information*

Commissioner dated 4 May 2022.

15. *Accordingly, as regards meetings and minutes of cabinet and OSC, Parliament's intention in the applicable local government legislation is that information (including that contained in minutes) relating to the financial or business affairs of any person is not required to be disclosed to the public if and so long, as in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

Legislation governing auditor powers and public access to accounting records and audit material, regarding payments and other yields arising from assets.

16. *One part of the request in this case is for the annual rental payments received by the Council in the ten tax years to 1 March 2021 under the lease of a golf club.*
17. *The Council is a "relevant authority" for the purposes of the Local Audit and Accountability Act 2014 (section 2(1) and Schedule 2 para 2).*
18. *By section 3(1) and (2) the authority must keep records that are sufficient to show and explain the relevant authority's transactions, and to disclose at any time, with reasonable accuracy, the financial position of the authority at that time.*

Auditor's powers

19. *By section 4 the authority's accounts must be audited by an auditor, whose duties, under section 20, include (section 20(1)(c)) that the auditor must, by examination of the accounts and otherwise, be satisfied that the authority has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources.*
20. *The auditor has wide powers of inspection and access to information and explanation, for the performance of its functions (section 22) including:*
- (1) the right of access to local authority-related documents ["audit documents"] (section 22(1))*
 - (2) requiring persons holding or accountable for any audit document to provide information or explanation including in person (section 22(3))*
 - (3) accessing computers to inspect an audit document held in electronic form*

(section 22(5))

(4) requiring members and officers to provide documents information or explanation where necessary (section 22(7)).

21. *The auditor can issue an advisory notice (section 29 and Schedule 8) if it thinks that the authority is about to take or has begun to take a course of action which, if followed to its conclusion, would be unlawful and likely to cause a loss or deficiency (Schedule 8 para 1(1)(b)). While such notice has effect it is not lawful for the authority to take or continue to take the course of action (Schedule 8 para 3(1)9b)).*

Public access

22. *In addition to the public's right to inspect accounts and the auditor's opinion thereon at any time (section 25), any person interested can, during an audit, inspect and make copies of the accounting records for the financial year to which the audit relates and all books, deeds, contracts, bills, vouchers, receipts and other documents relating to those records (section 26(2)) and any local elector can question the auditor about the accounting records (section 26(3)).*

23. *However, by section 26(4) this right does not entitle a person to inspect or copy any part of any record or document containing "information which is protected on the grounds of commercial confidentiality, or to require any such information to be disclosed in answer to any question". By section 26(5) information is protected on the grounds of commercial confidentiality "if its disclosure would prejudice commercial confidentiality, and there is no overriding public interest in favour of its disclosure."*

24. *Local government electors have the right to make objections during an audit (section 27).*

25. *Accordingly as regards ensuring (including, where necessary, by means of wide access to documents and explanations in person) that an authority has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources and ensuring that an authority does not take any course of action which would be unlawful and likely to lead to a loss or deficiency, Parliament's intention in the applicable local government legislation is that the auditor will safeguard these matters. The exclusion, in section 26(4), of the public's access to commercial information (such as that of the authority or of a third party) where disclosure would prejudice commercial*

confidentiality, and there is no overriding public interest in favour of its disclosure, arises in this wider context.

Government Guidance on Transparency

26. *The Local Government Transparency Code 2015 refers to commercial confidentiality in paras 20-22. Para 20 refers to contracts already entered into, such as as a result of a procurement, and envisages that publication of contracts containing confidentiality clauses will likely breach commercial confidentiality.*

27. *Para 21 refers to sections 100A LGA 1972 (public access to meetings, save as regards exempt information), 100B (public access to agenda packs save as regards exempt information) and 100F (members' rights to documents relating to matters to be transacted at a meeting, including exempt information under para 3 of Schedule 12A (except to the extent that the information relates to any terms proposed or to be proposed by or to the authority in the course of negotiations for a contract). It does not expressly refer to section 100C (minutes of, say, an OSC) or the LGA 2000 (such as sections 9G and 9GA regarding a cabinet).*

28. *Para 22 refers to the discretion of local authorities to disclose material even if subject to an exception under the EIR or Schedule 12A LGA 1972 and states that they should start from the presumption of openness and disclosure of information, and not rely on exemptions to withhold information unless absolutely necessary”.*

29. *However, this guidance needs to be read in the light of the statutory background referred to above.”*

The Evidence:

[38] For the avoidance of doubt, Mr Birt, the Second Named Respondent, at the outset of the hearing of this appeal (listed on 17 January 2023,) and several times thereafter during the hearing, made it clear in no uncertain terms that he was not making any suggestion of malfeasance, wrongdoing, or fraud by, or on behalf of the Appellant or any Council members or staff therein.

[39] With the above helpful background, and a comprehensive opening by Counsel for the Appellant, the Tribunal heard significant material evidence from Ralph Burton (see (see §34 above) who affirmed and provided a detailed account of the reliance on the exception claimed, and the public interest arising, as follows:

[40] JO identified the full text of the original request (Open Bundle Tab 29 Page 131 & see § 5 above) and clarified the relevant redactions. The Tribunal then went into closed session while Mr Burton gave his lengthy detailed evidence on how the redacted information was subject to confidentiality provided by law, how the confidentiality provided protects a legitimate economic interest and how the confidentiality would be adversely affected by disclosure. This has been recorded by the Tribunal and I have made a section 14 order that it is not to be made available to the public, and for obvious reasons cannot be repeated in this Open decision but JO has provided a Gist summary of the evidence provided (see Annex A attached).

[41] Suffice to say the Tribunal have been persuaded without reservation that the exception at regulation 12(5)(e) EIR is engaged in relation to the redacted material that has been re redacted i.e. version 3 and which was discussed at the hearing (*not the Redacted documents which were attached to the EIR response*) and the public interest in withholding the relevant information outweighs the public interest in disclosure.

[42] Accordingly, The Tribunal allow the appeal.

[See also Appendix A “the Gist” - attached herewith.]

[43] The Tribunal wish to acknowledge the assistance of Mr Burton in the meticulous preparation and presentation of his evidence herein, Mr Birt, the Second Respondent who presented as a conscientious citizen involved in, and expressing a legitimate and honest interest on, the conduct of public affairs relating to the Councils’ business. We also wish to express our specific gratitude to counsel for the Appellant who has provided us with a detailed background to the statutory provisions that assist the public interest being served in this type of case and which will no doubt assist many other such public authorities in a similar position in the future. The Commissioner was

correct to indicate that the onus is on public authorities to provide the exemptions or exceptions on which they rely and provide adequate evidence to support their reliance and evidence of where the public interest is said to prevail.

Brian Kennedy KC.

23 January 2023

Promulgation Date : 03 February 2023

