



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

**Appeal Reference: EA/2015/0231**

**Decided without an oral hearing  
On 24<sup>th</sup> March 2016 and 10<sup>th</sup> October 2016**

**Before**

**FIONA HENDERSON**

**JUDGE**

**MICHAEL JONES  
AND  
NIGEL WATSON**

**TRIBUNAL MEMBER**

**TRIBUNAL MEMBER**

**Between**

**X<sup>1</sup>  
And  
The Information Commissioner  
And  
Hambleton District Council**

**Appellant**

**Respondent**

**Second Respondent**

**Subject:** r13(1) EIRs – personal data

r 12(5)(b) EIRs - the ability to conduct an inquiry of a criminal nature;

**Case Law:** APPGER v ICO and FCO [2015] UKUT 377 (AAC)

**Common Services Agency v Scottish Information Commissioner 2008 1 WLR 1550**

**Promulgation Date:** 22 December 2016

**DECISION AND REASONS**

**Introduction**

1. This appeal is allowed (with minor redactions of 3<sup>rd</sup> party data). This appeal is against the Information Commissioner's Decision Notice FS50588183 dated 1<sup>st</sup> October 2015 which held that Hambleton District Council (the Council) had applied regulation 13 EIRs correctly in order to withhold the disputed information. The Commissioner required no steps to be taken.

**Background**

2. The airfield which is referred to in the information request is located in an administrative area for which the Council is the Local Planning Authority. It has been the subject of active opposition to its activities from parts of the local community for several years. Originally there had been:

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<sup>1</sup> Please see Chamber President's ruling in relation to the restriction upon identification of the Appellant; the Appellant was represented by Goodman Derrick LLP

*“a planning permission limited to a named person and to the number of flights. The airfield has operated in contravention of that permission<sup>2</sup>. The Council missed a number of opportunities to notice the unlawful use and to take appropriate action. As a result the unauthorised use became immune from enforcement action<sup>3</sup> and the Council has lost planning control over the number of aircraft using the airfield...”<sup>4</sup>*

3. There has been a long history of enforcement notices and planning appeals and several public inquiries about the airfield’s activities including a report by the Local Government Ombudsman in light of complaints made relating to the Council’s handling of the situation. The Ombudsman made a finding that *“losing control over the use of land as an airfield is an extreme and most serious failure of planning administration. It has come about because the Council’s planning officers failed to take appropriate action or make appropriate inquiries”<sup>5</sup>*. She made a finding of Council maladministration which had caused local residents injustice in the form of disturbance from flights and apprehension about the possibility of uncontrolled future expansion. The Ombudsman’s recommendations included that the Council should consider taking action to try to stop the current use.
4. Following the LGO report 14 enforcement notices were issued, the appeals against these (the majority of which were dismissed) were heard at Public Inquiry in May 2012. In September 2012 the Planning Committee resolved not to use a discontinuance notice at this time. Further enforcement notices were issued in December 2012 and their appeals were heard in June and October 2013. The appeal relating to the use of a jet fuel facility was unsuccessful and removal in compliance with the order was required by 22<sup>nd</sup> July 2014. In May 2014 the Planning Committee reconsidered the issue of discontinuance and resolved that the making of a Discontinuance Order be not considered further and an appropriate monitoring regime be investigated.
5. For the time period envisaged within the information request the Council was corresponding with the owner of the airfield to try to monitor compliance with planning restrictions, the enforcement notice and to monitor airfield use<sup>6</sup>.

#### Information Request

6. On 2<sup>nd</sup> June 2014 the Appellant wrote to the Council asking for:  
*“details of all contact from 1 January [2014] to the present day between officers or Members of Hambleton District Council and [name redacted] and/or his representatives concerning [named airfield]*  
*This should include copies of all emails, texts, letters, notes of meetings or telephone conversations”*  
A subsequent similar request was submitted dated 9<sup>th</sup> September 2014 which had the effect of increasing the period within the scope of the request to 9<sup>th</sup> September 2014.
7. The Council refused to provide information relating to existing legal challenges and costs issues and in relation to the rest of the information to refuse to confirm or deny that the information was held. However, following a complaint to the Commissioner, a consent order (EA/2015/0064) was agreed and a fresh refusal notice issued leading to the Decision Notice that is the subject of this appeal.

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<sup>2</sup> Since 1997 when the airfield changed hands

<sup>3</sup> Due to uninterrupted use for a period of 10 years since 2007 the Council have had no control over the number of flights.

<sup>4</sup> P153 OB

<sup>5</sup> P164 OB

<sup>6</sup> As apparent from the correspondence in OB3

8. In the refusal notice of 11<sup>th</sup> June 2015 the Council refused the request upon the grounds that the information still in dispute was personal data relating to 3<sup>rd</sup> parties. This decision was upheld upon internal review dated 26<sup>th</sup> June 2015 when the Council further relied upon s30(1)(b) FOIA<sup>7</sup> maintaining that the public interest favoured non-disclosure.

#### Complaint to the Commissioner

9. Following a complaint to the Commissioner dated 3<sup>rd</sup> July 2015, the Commissioner investigated the case. The Commissioner was satisfied that the request fell to be considered under EIRs. There has been no challenge to that determination.

#### Appeal

10. The Appellant appealed on 15<sup>th</sup> October 2015 the grounds can be summarised as being that:

- The information was not personal data,
- There was no expectation of privacy and disclosure would not be unfair,
- There was a pressing social need for disclosure which outweighed any prejudice to the rights and freedoms or legitimate interests of the data subject.

11. In a letter from the Registrar on 20<sup>th</sup> November 2015 the Council were invited to apply to join which would enable them to make any representations relating to the Appeal for example arguments about s30 of FOIA in addition to arguments about the personal data exemption.<sup>8</sup> They did not choose to join at that stage however they were joined by the Tribunal on 29<sup>th</sup> March 2016 as the Tribunal had concerns that not all the disputed information in scope had been identified.

12. All parties have consented to the case being determined upon the papers. The Tribunal has had regard to the overriding objective as set out in rule 2 GRC rules and has had regard to costs, proportionality and the narrow issues in this case and the Tribunal's ability to seek further information through written directions. The Tribunal has had regard to all the documentary evidence before it, even where not mentioned directly in this decision. The Tribunal is satisfied that it can properly determine the issues without a hearing pursuant to rule 32(1) GRC Rules; being in receipt of:

#### i. open material

- Open bundle 1 (comprising 166 pages).
- Open bundle 2 (Attachments from the Appellant and the Council to the Council's open response of 27.4.16 and the Appellant's response of 11.5.16 and the ICO's open submissions of 12.5.16).
- Open bundle 3 (The Council's open response of 1.7.16 and attachments).
- Documents 3,4 and 5 of the Closed bundle of 27.4.16 and some redacted submissions were also disclosed pursuant to the Tribunal's rule 14 ruling of 22.9.16).

#### ii. Closed material

- The original closed bundle of disputed information (and an un-redacted copy of some correspondence to the Commissioner),
- The Council's closed submissions and attachments of 27.4.16.
- The ICO's closed submissions of 12.5.16.

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<sup>7</sup> Concerning investigations which may lead to criminal proceedings by the Council

<sup>8</sup> P73 OB

- The Councils closed submissions and attachments of 1<sup>st</sup> July 2016.
13. The Tribunal has dealt with all matters in the open decision save where direct reference needs to be made to the closed material in which case additional explanation is provided in the closed annex.

#### Scope

14. For the reasons set out in paragraphs 2 and 3 of the open joinder and adjournment directions dated 29<sup>th</sup> March 2016 the Tribunal is satisfied that the period in scope is 1<sup>st</sup> January 2014 to 9<sup>th</sup> September 2014. The Consent order which disposed of EA/2015/0064 and triggered the refusal notice upon which this appeal is based, only dealt with the neither confirm nor deny material. Consequently, we are satisfied that the scope of the appeal excludes the legal challenges and costs material itemised in the letter of 13<sup>th</sup> June 2014.
15. We are required to confine our consideration of the exemptions to the “relevant date” which pursuant to the reasoning in APPGER v ICO and FCO [2015] UKUT 377 (AAC) is the date of the public authority’s refusal. Although the date of the request was 9<sup>th</sup> September 2014 the operative refusal was 11<sup>th</sup> June 2015 (despite the original consideration having been in September 2014). In light of the past history of the case and the correspondence that took place prior to the information request, we are satisfied that there is no material difference in the material factors between these 2 considerations of the request by the Council.
16. Despite being satisfied that the correct date range had been identified by the Council, the Tribunal had concerns that not all the withheld material within scope had been identified. The Tribunal was satisfied that a record of “contact” between the airfield and the Council would include copies of all emails, texts, letters, notes of meetings or telephone conversations, diary entries or handwritten notes recording a personal meeting or a telephone call or an account of a meeting provided in correspondence to a third party. Specific examples based on the withheld information were given in closed directions. The Tribunal also asked for further information about information already in the public domain or disclosed to those outside the Council without restriction. The Tribunal is satisfied that within the scope of this appeal is the issue of whether all the information held by the Council had been correctly identified and considered for disclosure.
17. The Council relied upon reg 13 EIRs and also s 30 FOIA for withholding the information before the Commissioner. The ICO’s decision notice was limited to the first ground in light of its findings. The Council have not pleaded s30 FOIA specifically in their response neither have they withdrawn their reliance upon it. The Tribunal is satisfied that it remains a ground upon which they seek to withhold the information in the alternative. The Tribunal has considered whether it is necessary to adjourn the case again to seek representations upon this ground. Having regard to the overriding objective as set out in rule 2 we are satisfied that it is not in the interests of justice that the case is further adjourned. The Council were alerted to the fact that if the Tribunal did not agree with the ICO’s findings s30 FOIA fell to be considered in the Registrar’s letter of 20<sup>th</sup> November 2015 and were invited to join the appeal and to make representations on that point. They chose not to and the Tribunal proceeds on the basis of the representations made before the Commissioner.

#### Sufficiency of material identified by the Council

18. In light of the further information that has been provided pursuant to adjournment directions, the Tribunal is satisfied that the Council had failed to identify all the

information in scope and had performed an inadequate search. Not all the information in scope was before the Commissioner. The Tribunal is satisfied that:

- Document 1<sup>9</sup>, Document 3 (the Template for monitoring<sup>10</sup>) and Documents 4 and 5 (photographs) were in scope and wrongly omitted from the disputed information in error.
- Document 2 we are satisfied is not in scope.<sup>11</sup>

19. Additionally, there are reports of contact with the airfield set out in the information disclosed to the community which is not reflected in the closed material. The Tribunal has seen examples where the original complaint is reflected in the disputed information but the source of the Airfield's response which was passed on to the complainant does not appear.<sup>12</sup> If the original response is no longer kept, the record of the content as set out in the response to the complainant is still evidence of contact and thus was in scope. This is a case where verbal communication has not been routinely logged and record keeping appears to have been poor. We have considered whether it is proportionate to adjourn again for further information and have concluded that it is not. Disclosure of the fact of this additional contact and the substance of it has now been provided (in OB3) and we accept that the Council have checked such records as they have retained. On a balance of probabilities, we are not satisfied that a further adjournment would reveal any further information.

20. The Open Bundle 3 (OB3) includes correspondence between the Council and Parish Councils and individuals. This correspondence refers to visits which are not reflected in the closed material. Although we are satisfied from the searches that have been made that no notes have been retained (if any were made) and there are no diary entries relating to the visits or email correspondence arranging them, we are satisfied that where correspondence reports what took place at a visit, if the visit was in the presence of a member of airfield staff that would constitute a record of contact within scope and is another example of the Council failing to conduct a sufficient search for information in scope. We have considered whether to adjourn to establish whether these visits were accompanied or not but are satisfied that this is not proportionate as the information potentially in scope has now been disclosed in OB3. However, we highlight the Council's record keeping which we consider inadequate: there are no records of telephone calls and no consistent retained record of meetings. There is no log of the destruction of any handwritten notes the retention of which reflects a judgment upon what information should be retained based on relevance or incorporated elsewhere.

21. The Commissioner observed during the appeal process that information which is within the scope of the request but publicly available should either be provided or itemised and pleaded as an exemption. We consider this particularly important in this case as information already available informs the expectation of the data subject, the fairness of and need for disclosure.

#### EIRs

22. The Commissioner did not consider it necessary to separate the differing access regimes to distinguish between information which is environmental information for the purposes of EIR and FOIA as both access regimes apply in the same way relating to the exemption of third party data. The ICO did however consider that the information

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<sup>9</sup> See closed annex

<sup>10</sup> This has now been disclosed pursuant to this appeal and was included in the consultation with the local community.

<sup>11</sup> See closed annex

<sup>12</sup> See closed annex

was all likely to fall within the scope of the EIRs and provided its reasoning with regard to the regulations.<sup>13</sup>

23. The Council did not dispute the ICO's treatment of the disputed information as environmental information in the Decision notice, and it is not raised by either party in this appeal. However, for the sake of clarity the Tribunal is satisfied that the disputed information falls to be considered under EIRs. Environmental information is defined in reg2 of EIRs as: *any information in written, visual, aural, electronic or any other material form on—*
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape ...;*
  - (b) factors, such as... noise... emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
  - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...*
24. The disputed information relates to planning enforcement and information on changes to the landscape and noise carried out by the owner at the airfield. Consequently, the applicable regulations that fall to be considered by the Tribunal are Regulation 13 EIRs and Regulation 12(5)(b) EIRs.

#### Reg 13 - Personal data

25. 13.—(1) *To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.*

*(2) The first condition is—*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene—*

*(i) any of the data protection principles....*

Schedule 1 of the DPA provides that:

*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—*

*(a) at least one of the conditions in Schedule 2 is met...*

It is not disputed that the relevant condition from Schedule 2 is:

*6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.*

#### Personal Data

26. The Appellant disputes that the information requested is personal data. Section 1 of the Data protection Act provides that:

*“personal data” means data which relate to a living individual who can be identified—*

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<sup>13</sup> Para 10 DN

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

27. There is no presumption in favour of disclosure of personal data.<sup>14</sup> The principle data subject is named in the information request, his status as owner and operator of the airfield is in the public domain and we are satisfied therefore that redaction would not anonymise the information so that it was no longer attributable. We are satisfied having regard to the withheld information that the data subject is identifiable both as the owner and operator of the airfield and also in relation to contact that he has participated in (by way of conversation, meeting or correspondence). For this reason we are satisfied that all of the withheld information constitutes his personal data as it is on his behalf. The disputed information also includes personal data relating to 3<sup>rd</sup> parties who are identified directly within the disputed information as employees or contractors of the airfield. We are satisfied that this is their personal data as the disputed information details their actions, opinions and at times whereabouts. We are satisfied, however, that where necessary their personal details can be redacted as whilst it might be known that an individual is an employee or contractor of the airfield it would not necessarily be known that they were involved in a particular interaction (as opposed to a different employee or contractor).
28. The Appellant maintains that the information will be about the business and not the sole trader and that nothing personally about him will be revealed. We agree with the Commissioner that the personal data relates to the data subjects. In relation to the owner of the airfield it is about his business or professional life. The data subject has a professional life separate from the airfield which the Appellant argues means that the airfield is an ancillary or outside business interest and of insufficient biographical importance to fall within the definition of personal data. We disagree, the fact that it relates to part of his life rather than all of his life does not remove its biographical significance for example in terms of financial implications to be drawn from the success or failure of the business as well as revealing his actions and opinions, his approach to the running of this business and his relationship with the Council's enforcement team.
29. The Appellant also argues that it would be inconsistent if ancillary business interests were capable of exemption under FOIA/EIRs through reliance on DPA whereas one man businesses which are limited companies are not.<sup>15</sup> In relation to sole traders, information relating to their business also relates to their private lives as it is harder to separate the business dealings of a sole trader from their private life than it would an employee of a limited company which has a distinct legal personality and is distanced from the actions of individuals working within them. The success or failure of the business of a sole trader has a direct relationship to the financial and personal interest of the individual. Indeed the Commissioner's decision relied upon by the Appellant reflected the difference and held that information about the business of a sole trader will be about the sole trader.
30. The Appellant further argues that the ICO's finding that the disputed information in this case is personal data is inconsistent with its submissions before the Tribunal in EA/2015/0064 when the ICO asserted that information concerning the airfield would be unlikely to involve "*distinctly private communications*."<sup>16</sup> These arguments did not

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<sup>14</sup> Common Services Agency v Scottish Information Commissioner 2008 1 WLR 1550

<sup>15</sup> FS50450700 High Peak Borough Council

<sup>16</sup> P22 OB

purport to determine whether the content of the disputed information was personal data rather than whether by its nature confirmation of the fact of its existence would breach the data protection principles. The Tribunal has had regard to paragraphs 24 and 25 of the Decision notice and is satisfied that there is no inconsistency in the Commissioner's approach.

Whether disclosure would be fair

31. Schedule 1 part II DPA provides:

*1(1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.*

32. The Appellant argues that the information is only minimally intrusive as they have not asked for enforcement related issues and want the "further information" that the Council holds. They list issues that they believe would be encompassed in this "further information". The Tribunal is satisfied that it is not possible to separate the information in this way, any investigation of complaints, monitoring of activity and compliance with planning regulations is information which may form the basis of subsequent enforcement proceedings or may be used to challenge them should they arise.
33. The information contains some biographical detail: it is already known that the data subject is the proprietor but it reveals the amount of contact with the Council the nature of the relationship (how cordial/how coercive) and may include some detail of whereabouts and the view/opinions of the data subject and the attitude of the Council towards him and his business. However, it relates to business activity and not an activity he undertakes in his private life. Hence, we agree with the ICO who has accepted at paragraph 36 of its submissions that the airfield owner cannot expect the same level of privacy in relation to information concerning his business or professional life as he would if the information related only to his personal or family life.<sup>17</sup>
34. The Council's case is that the information was provided voluntarily (albeit on the understanding that the airfield could be compelled to provide much of the information<sup>18</sup>) the implication being that the data subject might have chosen to be less forthcoming if he had understood that the information was to be disclosed.
35. The Tribunal is satisfied that the data subject's expectation is material in this regard. In the original internal review the Council argued that *"the owner of the airfield could legitimately expect that the Council would not release information about any contacts with the Council other than information relating to formal action by the Council, information already in the public domain or information which that person has agreed should be released."*<sup>19</sup> The Commissioner held that in light of the history of the airfield, the data subject would understand that his dealings would be under scrutiny by the local community, explanations would be reported back to complainants or information disclosed pursuant to normal planning laws. Matter relating to previous enforcement had been published and current issues were subject to media coverage therefore there was less expectation that the information would remain completely private.

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<sup>17</sup> Whilst not bound by previous ICO decisions, the Tribunal is satisfied that the ICO approach was consistent with FS50450700 and FS50547446

<sup>18</sup> eg s196A of the Town and Country Planning Act 1990 makes provision for Council's planning officers to gain entry to land for enforcement and monitoring purposes at any reasonable time. The Act does not require prior approval.

<sup>19</sup> P87 OB



36. The ICO refers to the Enforcement and Compliance Policy<sup>20</sup> which states that the Council will try to resolve matters via negotiation with formal enforcement action being used as a reasonable and last resort. The ICO argues that whilst the data subject would be aware that the contact would be likely to become public should formal enforcement proceedings take place, his expectation until then is that the information would remain private.
37. The Tribunal is not satisfied that in light of the past history of this case that this would create an expectation of privacy. Negotiation does not imply secrecy although it is different from the glare of formal enforcement proceedings and the Tribunal takes into consideration the planning enquiries and challenges to the Council's handling of this case which mean that there has been more information in the public domain historically than might otherwise be the case.
38. Additionally, the Tribunal takes into consideration that the Planning committee had resolved on 29th May 2014 that:  
*"an appropriate monitoring regime be investigated<sup>21</sup>".* The Council were seeking to agree a scheme of monitoring with the airfield management and were explicit that they would consult with the two Parish councils and Action4 Refusal on the proposed monitoring arrangements. It is apparent from the correspondence in the additional open bundle that the airfield were aware of the consultation process and hence that information would be provided to these groups in order to enable the consultation to take place. We are satisfied that this removes any expectation of privacy as to the level of contact and the substance of what is agreed including options that are excluded and the reasoning behind that.
39. Similarly, we are satisfied that there was no expectation of privacy in relation to correspondence relating to complaints. Disclosure to members of the public was understood by the Council to put information in the public domain. The Council's evidence is that a standard response in a complaint is:  
*"for the council to advise the complainant that the complaint would be investigated and a reply given to the complainant. ...  
No restriction was placed on upon the complainant regarding dissemination of the information it is known to the Council that information is circulated between residents with a common interest in the operation of the airfield".<sup>22</sup>*
40. It is apparent from OB3<sup>23</sup> that information emanating from the airfield has been provided to the complainants and that in order to receive this explanation details of the complaint must have been passed to the airfield. In none of the correspondence that we have seen in the open or closed material is there any expression of confidentiality suggesting that the airfield's reply would not be passed on or restriction on the use or subsequent dissemination of the information. Whilst (as in OB3) it is to be expected that the details of the complainants (individuals complaining in relation to their home life) would not be passed on, any explanation must clearly emanate from the airfield even if there is no direct attribution to the owner.
41. The Council's approach as demonstrated in the information that was disclosed without restriction prior to the information request to Parish Councils and members of the public and Action4 Refusal is inconsistent with the withholding of the disputed information. In relation to the monitoring, direct quotations from a named Consultant acting on behalf of the airfield are provided as is a spreadsheet template that the

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<sup>20</sup> P69OB

<sup>21</sup> OB3

<sup>22</sup> From closed submissions of 27.4.16 disclosed pursuant to rule 14 ruling of 22.9.16

<sup>23</sup> E.g. email of 27<sup>th</sup> March 2014 OB3

Council argued was omitted from the disputed information in error but which has now been disclosed pursuant to the Appeal process. It is evident from OB3 that this had in fact already been disclosed without restriction prior to the information request.<sup>24</sup>

42. From OB3 it is also apparent that details of visits to the airfield and their approximate date elements of what was observed/took place and the reasons for the visit were given in this open correspondence prior to the information request<sup>25</sup> and once again the Council's actions are inconsistent with their assertion of the data subject's expectation. Additionally, the Council have provided an outline commentary of the status of the compliance with the enforcement orders and has responded to concerns raised about possible planning infringements.
43. The Council argued that some of the withheld material might be evidence in enforcement proceedings and there was no expectation that information the Appellant might need as evidence would become public prior to formal proceedings commencing. The Tribunal disagrees and observes that there is no distinction between e.g. information given to complainants and the type of evidence that might be needed to be used by the data subject in future enforcement proceedings.
44. In relation to employees, contractors of the airfield and 3<sup>rd</sup> parties referred to within the correspondence, the Tribunal has had regard to their seniority and level of responsibility and the nature of their involvement in the situation and whether the substance of their involvement with the airfield was already in the public domain. Where involvement is in a professional capacity, without restrictions and the detail of the individual's involvement is already in the public domain we are satisfied that disclosure pursuant to this request would not be unfair. In relation to employees, even those with forward facing roles are acting on behalf of the airfield owner whose business venture this is. The Tribunal is satisfied that they would have a greater expectation of privacy as the ultimate responsibility for the way that the airfield is run lies with their employer, they can be assumed to be acting within their employer's instructions and elements of the disputed information may shed light on the nature of their relationship with their employer, the way they conduct themselves at work as well as biographical details such as their whereabouts at specific dates and times. We are satisfied however, that any expectation and unwarranted intrusion can be addressed through redaction of their name and job title. Similarly, where 3<sup>rd</sup> parties are referred to we have had regard to the context of their involvement and whether they have had any input or control over the personal data relating to them. Where they have not we are satisfied that their name should be redacted.

Consequences of disclosure.

45. Much of the information we are satisfied was already in the public domain at the date of the information request. It is argued that the data subject would be distressed by disclosure in light of the data subject's expectation that the information would not be made public unless formal proceedings were commenced. There was a contentious relationship between the data subject and parts of the community hence it is argued that disclosure of correspondence would be distressing.
46. We repeat our findings as set out above relating to the reasonable expectation of the airfield owner in relation to the majority of the withheld information disclosure of which we are satisfied would not be unfair. We acknowledge that in relation to specified

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<sup>24</sup> Email 17.7.14 OB3

<sup>25</sup> Email 20.6.14 and 5.8.14 OB3

information<sup>26</sup> where the correspondence is candid and focused more on administrative issues than public facing matters that the data subject's expectation may have been that he could speak freely in the belief that the information would not be disclosed. There was a contentious relationship between the data subject and parts of the community hence we accept that disclosure of that correspondence would be unwelcome. We are not however, satisfied that disclosure would be unfair both because there was no explicit undertaking of confidentiality and because public scrutiny was to be expected in light of the history of this case and the pressing social need as outlined below.

Schedule 2 condition 6

47. We have gone on to consider whether disclosure meets Schedule 2 condition 6 and whether there was a pressing social need<sup>27</sup> for the information to be disclosed which outweighs the expectations of the individual.
48. The Appellant argues that there is a pressing social need for disclosure:
- a) In light of the Ombudsman's finding of maladministration arising from "*extreme and most serious failure of planning administration...the Council's planning officers failed to take appropriate action or make appropriate inquiries*". There is an enhanced need for transparency to enable checks and scrutiny to assess the adequacy of the Council's handling of the situation. Disclosure would go towards rebuilding lost confidence or ensuring proper control is maintained.
  - b) The information is in the context of local wishes to place operational limits on the airfield's activities. Disclosure would give visibility to the attempts the Council had made to achieve some kind of control other than taking planning enforcement measures which the Appellant argues have failed in the past in important respects.
  - c) The LGO recommended partial discontinuance be considered as an alternative and in the face of considerable local opposition, the Council instead undertook to engage in dialogue leading to an appropriate monitoring system – disclosure would provide scrutiny of the effectiveness of Council's strategic choice. This would show whether the airfield is seriously engaging in an attempt by the Council to bring about agreement of a voluntary code and inform public understanding of the adequacy of the Council's policy choice.
49. The Council argued that there was no pressing social need for disclosure which was therefore unwarranted:
- i. They already published information necessary to demonstrate that it is monitoring the situation at the airfield and to demonstrate the actions it takes in respect of breaches to any planning conditions.
  - ii. There were 2 outstanding enforcement notices against the airfield and subject to appeal – therefore it was evident that the Council continued to monitor and where appropriate seek to regulate the activities of the airfield<sup>28</sup>
  - iii. The Council regulates the planning laws not the community therefore disclosure is not necessary to ensure planning laws are upheld.
  - iv. Disclosure would make it more difficult to monitor and regulate the airfield if the data subject withdraws co-operation and a formal route became necessary in future.
  - v. There are other bodies to complain to about public actions (e.g. the MP, the LGO and Judicial review) which goes some way to satisfy the public interest in ensuring that they are acting as they should and appropriate remedies can be suggested or ordered by these bodies.

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<sup>26</sup> See closed annex

<sup>27</sup> *Corporate Officer of the House of Commons v Information Commissioner* [2008] EWHC 1084 (Admin)

<sup>28</sup> P128 OB

Redaction of employee details and dates

50. We are satisfied that in relation to the names of employees, disclosure would not further the legitimate interests of the information requesters or the public. The responsibility lies with the owner of the airfield and the identity of particular employees does not inform the Council's accountability or further the scrutiny of the conduct of the case.
51. In relation to the rest of the disputed information in light of the unfortunate past history of the Council's handling of the planning situation which included:
- The Council being on notice that the operation of the airfield was in breach of planning conditions but not taking action.
  - Not making arrangements to monitor the number of flights.
  - Despite having identified the need for planning permission taking no further action to follow this up,
  - An enforcement officer wrongly assessed that the 1980 planning permission still applied notwithstanding the change of owner.
- We accept that there is an enhanced need for scrutiny and transparency of the Council's actions, the rigour with which they pursue the case and the accuracy of the factual and legal basis upon which they are operating.
52. We are satisfied that this cannot be fulfilled by the information already made public by the Council in light of previous instances of incomplete or inaccurate information being provided. In relation to information in a letter from the Council to the local MP<sup>29</sup>; the Ombudsman did not find it necessary to make a finding about whether this was a separate instance of maladministration but did find that the letter to the MP: *"does not mention the most significant issues to do with the airfield and does not reflect the spirit of community involvement in town planning. It was factually incorrect..."*<sup>30</sup>
53. Additionally, the information in the public domain does not provide sufficient information relating to the rigour with which the planning regulations and enforcement notices were enforced and the degree to which the airfield was co-operating.
54. It was argued that there was a benefit in having an informal route outside of public view to reach a resolution prior to the expense and risk of enforcement action. The Council were concerned that disclosure might reduce their ability to use an informal route or result in the data subject being less forthcoming, this would make the Council's regulatory role harder and increase the possibility of enforcement action in future. The Tribunal does not accept this and notes that there was some evidence in the public domain prior to the information request that the informal route had failed: *"The new arrangement [the airfield] has implemented is not what the Council understood he was going to do and we are currently seeking legal advice on whether what he has done complies with the Enforcement Notice and if so whether planning permission is required."*<sup>31</sup>
- The situation not being resolved at the date required by the enforcement notice, the public are entitled to know how this has arisen and the reasons why the Council understood a different situation would prevail. Disclosure will shed further light on the effectiveness of the strategy. This is particularly important because residents had raised the issue of prevarication and avoidance prior to the difficulties arising in August 2014:

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<sup>29</sup> P161-2 OB

<sup>30</sup> P165 OB

<sup>31</sup> OB3 letter of 13<sup>th</sup> August 2014

*“What then will HDC do in the face of [name’s] stated intention of using a mobile browser? Wring its hands and say it has done its best or seek to have that removed and go through the appeal process again with all the attendant delays?”<sup>32</sup>”*

We are satisfied that they are entitled to see whether their concerns were actioned appropriately at the time.

55. The need for scrutiny, transparency, and accountability is particularly important in light of the Council’s acknowledgment that the Tribunal might:

*“have expected to see more records concerning these issues. The Council however, has been subject to much criticism over the airfield, not least from residents concerning the contact residents believe the Council has had with [named individual] over the years however incorrect those assumptions may be. The situation locally has become very contentious. Mindful of this the Council has sought to limit its contact with the airfield to try to allay the perceptions of residents.”<sup>33</sup>*

As set out above, the Tribunal has concerns that the information originally identified within the closed material was incomplete and has had the opportunity to compare the open bundles with the material in the disputed information for inconsistencies and to assess the rigour with which all issues were pursued.

56. We are satisfied that disclosure of actual contact, its nature, frequency, tone and content is necessary in order to repair the trust with residents and to assess whether the Council’s contact is sufficient to fulfil their obligations. This applies to all the withheld information including that where the communication was candid and there may have been some expectation that the communication was private. This information is material to assessing the efficacy and appropriateness of the Council’s approach. Although we acknowledge that there are alternative remedies e.g. Complaint to an MP, Ombudsman etc. we repeat our observations relating to the accuracy of information provided to an MP historically and consequently the need for the source material in order to ensure accuracy. Additionally, we accept that in holding the Council to account the residents need evidence of what is being done and before it is too late to remedy it; we take into consideration that by the time the LGO was involved, it was too late, planning control had been lost.

#### Sensitive Personal Data

57. It has not been argued by any of the parties that the withheld material constitutes sensitive personal data. Sensitive personal data is defined in s2 DPA as consisting of information as to:

*(g) the commission or alleged commission by him of any offence*

The Tribunal’s view is that this is not sensitive personal data since at the time that the information was gathered no formal proceedings for breach had been brought. This view is consistent with the Council’s disclosures from the same time period as set out in OB3.

58. However, even if we are wrong and there is sensitive personal data within the disputed information, we are satisfied that disclosure would meet the Schedule 3 condition threshold. The first data protection principle provides that additionally:

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

The Schedule 3 conditions include that the processing—

*... (b) is necessary for the purpose of obtaining legal advice, or*

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<sup>32</sup> Email of 02.04.14 OB3

<sup>33</sup> Closed submissions of 27<sup>th</sup> April 2016 disclosed pursuant to rule 14 ruling of 22.9.16.

*(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.*

59. The Tribunal notes that the community have launched judicial review proceedings of the Council's actions, they have challenged planning decisions and participated in planning enquiries, they have repeatedly sought legal advice about ways to establish, exercise and defend their legal rights relating to disturbance from flights and the possibility of uncontrolled future expansion. This was ongoing at the relevant date and continues now, we are satisfied that disclosure is necessary in furtherance of these aims and that conditions b) and c) above are therefore satisfied.

Regulation 12(5)(b) EIRs

60. Before the Commissioner the Council also raised s30(1)b FOIA (investigations and proceedings conducted by public authorities) as set out above the Tribunal is satisfied that the information falls to be considered under EIRs and that the applicable provision is reg12(5)(b) which provides:

*—(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— ...*

*(b) 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;*

61. The Appellant argues that the exemption is not engaged as it does not concern investigations and proceedings conducted by the Council.

62. The Tribunal is satisfied that the information is in scope because any investigation of complaints, monitoring of activity and compliance with planning regulations is information which may form the basis of subsequent enforcement proceedings or may be used to challenge them should they arise.

63. We do not find that the exemption is engaged as we are not satisfied that disclosure would adversely affect the ability of the Appellant to receive a fair hearing or the Council to conduct any inquiry. We have had regard to the information that was in the public domain at the date of the information request which includes:

- i. That the airfield had told the Council that they would comply with the enforcement notice by the deadline.
- ii. The fact that the situation post the enforcement notice deadline was not *“of the type that had been advised to the Council previously by [named individual]...”*
- iii. The Council were taking legal advice, both on whether this constitutes a breach of the enforcement notice and whether planning permission is required for the new tank arrangement.<sup>34</sup>

64. In any event we are satisfied that the public interest favours disclosure. We take into consideration the presumption in favour of disclosure and the need for accountability, scrutiny and transparency as set out above. Whilst (arguably) the most damaging elements of the situation were in the public domain, (namely what had been observed during visits, what was agreed in terms of compliance and the fact that the Council were taking legal advice with a view to formal proceedings) how the situation had

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<sup>34</sup>Eg letters of 29.8.14 and 8.9.14 OB3

arisen was not apparent nor whether any fault was attributable to the Council's handling of the situation.

65. It is argued that disclosure would reduce the likelihood of co-operation with the airfield in the future which would prejudice their ability to investigate. We disagree and have had regard to the Council's statutory powers and the self interest inherent in not being prosecuted for a breach of an enforcement order in assessing the likely impact of disclosure on future conduct.

### Conclusion

66. For the reasons set out above we are satisfied that (apart from the name and job titles redacted as set out in the closed schedule which should remain redacted as their disclosure would be unfair and would be unwarranted) reg 13 was wrongly relied upon to withhold the disputed information. Additionally, we are satisfied that r12(5)(b) is not engaged in relation to the information and we are satisfied that in any event the public interest favours disclosing the disputed information.

### Steps

67. The Council shall disclose within 35 calendar days from the date of this decision: Document 1 (Documents 3,4 and 5 having already been disclosed) and the disputed information (with the redactions as specified in the closed annex).
68. A redacted version of the closed annex may also be promulgated after paragraph 67 has been complied with.
69. This decision is unanimous.

Signed Fiona Henderson

Judge of the First-tier Tribunal  
Date: 21st December 2016