



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

**Appeal Reference: EA/2019/0281A**

**Before**  
Judge Stephen Cragg Q.C.

**Tribunal Members**  
Ms Jean Nelson  
and  
Mr Andrew Whetnall

**Heard, by way of a telephone hearing, on 24 November 2020.**

**Between**

Kim Purvis

Appellant

-and-

The Information Commissioner  
Lake District National Park Authority

Respondents

The Appellant was represented by Mr Robert McCracken QC  
The Information Commissioner and the Lake District National Park  
Authority (LDNPA) were not represented

DECISION

1. The appeal is allowed.

### MODE OF HEARING

2. The proceedings were held via telephone. The Appellant and leading counsel joined by telephone. Both the Respondents indicated that they did not wish to attend. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The Tribunal considered an open bundle of 68 pages and a closed bundle, together with a witness statement from Mr Leafe for LDNPA and a witness statement from the Appellant. The Appellant also submitted a skeleton argument which was considered by the Tribunal.

### BACKGROUND

4. In this matter, on 27 November 2018 the Appellant requested information on a possible gondola cable car proposal between Thornthwaite and Whinlatter in the north western area of the Lake District. The LDNPA withheld information on the basis of regulation 12(5)(e) and 12(5)(f) of the Environmental Information Regulations. The Commissioner decided that the LDNPA correctly applied the exception from disclosure set out at regulation 12(5)(e) EIR (commercial confidentiality).
5. The request read as follows: -

“1. Regarding the proposed gondola between Thornthwaite and Whinlatter and extensions into the forest from the visitor centre, has LDNPA consulted with or commissioned report from:

- (a) businesses already running cable car/gondola services e.g. Matlock or Annock Moor
- (b) cable car / gondola manufacturers / installers e.g. Dopplemayer

Please supply details of any correspondence and reports with the organisations mentioned in (a) and (b).

2. Supply projected visitor numbers into the Keswick Showcase Area for each of the next 10 years.

3. LDNPA has now released a sustainable transport report. Please provide details and statistics contributing to this report relating to the proposed gondola from Thornthwaite.

4. Has LDNPA completed or commissioned an assessment of the impact on the villages of Thornthwaite and Braithwaite of a gondola and the expansion of the Whinlatter Centre?  
And if so to provide those reports and statistics.

5. Has LDNPA considered other 'solutions' to the traffic problem through the Narrows in Braithwaite regarding vehicular access to Whinlatter?

And if so, why these solutions were discounted in favour of a gondola."

6. The LDNPA responded on 8 December 2018. For questions 1, 2, 3 and 4 it provided responses to the questions, confirming in most cases that information was not held. For question 5 the LDNPA confirmed there was information held that was within the scope of the request that was being withheld on the basis of section 41 FOIA (which relates to confidentiality).
7. The Appellant asked for an internal review of the decision to withhold the information. LDNPA conducted an internal review and responded on 12 December 2018. The internal review found that the information should have been considered under the EIR and confirmed that the LDNPA was withholding information of a commercial nature under regulation 12(5)(e) EIR and information it considered confidential under regulation 12(5)(f) EIR.
8. The Appellant complained to the Commissioner who investigated and issued a decision notice dated 15 July 2019. The Commissioner explained that: -

The information identified by the LDNPA as within the scope of the request, specifically question 5, is **the Whinlatter Mountain Centre Concept and Feasibility Study and a Confidentiality Agreement**. The LDNPA has confirmed it considers that regulation 12(5)(e) provides a basis for refusing to disclose the information in both of these documents (**emphasis added**).

9. Regulation 2 EIR states that: -

“environmental information” has the same meaning as in Article 2(1) of the [Council] Directive [2003/4/EC on public access to environmental information], namely 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 and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

10. The relevant parts of reg 12 EIR read as follows: -

*12. – Exceptions to the duty to disclose environmental information*

(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.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

(4) ...

(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-

(a) ...

(b) ...

(c) ...

(d) ...

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

(f) the interests of the person who provided the information where that person-

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure

11. For withheld information to be exempt from disclosure by virtue of regulation 12(5)(e) EIR, LDNPA must demonstrate that:
  - (a) the information is commercial or industrial in nature;
  - (b) the information is subject to confidentiality provided by law;
  - (c) the confidentiality provided is required to protect a legitimate economic interest; and that the confidentiality would be adversely affected by disclosure.
12. A public authority should only refuse to disclose the information if it considers the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception: reg 12(1)(b) EIR. In accordance with regulation 12(2) EIR a presumption in favour of disclosure should be applied.
13. The Commissioner decided that the information was commercial in nature as 'the LDNPA confirmed that the withheld information contains information of a confidential commercial nature, as it relates to the technical viability of a potential commercial development within the area' (paragraph 12).
14. In relation to the issue of confidentiality the Commissioner stated that the withheld information is subject to a confidentiality agreement between all relevant parties. 'All relevant parties have agreed to and signed the confidentiality agreement which has strict limitations on the disclosure of the withheld information and who it can be shared with' (paragraph 13).
15. However, the Commissioner went on to observe that 'The agreement recognises the requirements of the FOIA and the EIR in this case and states

that information may be subject to disclosure if it is not covered by the exemptions in the FOIA or the exceptions in the EIR' (paragraph 16).

16. In relation to whether disclosure of the withheld information in this case would adversely affect the legitimate economic interests of the parties involved, the Commissioner explained LDNPA's position as follows: -

17. The LDNPA informed the Commissioner that it was approached by a third party with the initial ideas relating to the proposed commercial undertaking. The initial feasibility study was obtained among other information to determine whether or not the project would be technically and financially viable, what work would be needed in terms of costings and the potential commercial value of such a development. It stated that if the proposal is physically possible and financially viable it could lead to some or all the parties investing in substantial infrastructure at Whinlatter from which they could derive an income.

18. ...The third party's approach was not a request for pre-planning advice; the proposal and approach made was at an earlier stage than that. A confidentiality clause was signed by all interested parties at the same time to ensure that the proposal was protected, as are the commercial interests of the parties involved. The LDNPA confirmed that if and when a firm idea or plan is put together it will informally consult with the public before planning. It stated that this will allow the public to consider the plans drawn up and put their points of view across....

17. LDNPA was said to be concerned that if disclosure took place 'prior to any firm ideas being drawn up..., competitors could steal those ideas and market them themselves, or produce opposing schemes with the benefit of the contents of the withheld information' (paragraph 19). The Commissioner notes in the same paragraph that it was also stated that 'it was almost certain one third party would pull out of discussions if disclosure took place at this stage'.

18. The Commissioner concluded that: -

21. The Commissioner acknowledges the circumstances at the time

of the request. She notes that the LDNPA and relevant third parties were in very early discussions about a proposed scheme at Whinlatter. The withheld information discusses the feasibility of the project both in terms of the likelihood of the project going ahead and the costs and potential benefits to be obtained for the parties involved. Both the LDNPA and the third parties involved had already invested time and resource into these plans and discussions and are very concerned that premature disclosure would adversely affect their commercial interests. The Commissioner accepts that disclosure at this stage would enable rivals to develop competing schemes and potentially outbid or take over the ideas or similar from the third parties involved; third parties which have already invested time and resource into investigating and producing proposals for the authority to consider.

22. For the above reasons, the Commissioner is satisfied that regulation 12(5)(e) applies.

19. In relation to the public interest test to be applied, essentially the Commissioner repeated these issues of commercial confidentiality and the adverse effects of disclosure, and found that they outweighed the public interest in the provision of information to enable members of the public, businesses or organisations the opportunity to raise any concerns that they may have about the potential proposals for Whinlatter. The Commissioner accepted that: -

27.....there is a public interest in openness, transparency and accountability. There is also a public interest in ensuring our National Parks are protected and that any development or potential ideas for development are in keeping with the area and in accordance with the relevant policies, procedures and guidance. It is understandable that members of the public will be concerned about any proposals for the area and will wish to be involved in those and be able to have their say at an early stage.

#### THE APPEAL

20. The main thrust of the Appellant's appeal is (a) that it is well known who



has been involved in the proposed gondola scheme; (b) the scheme is at a much more advanced stage than has been said; (c) the public interest in disclosing the information is much higher than the public interest in withholding it. In the Appellant's skeleton argument for the hearing it is stated that: -

The principal issue in this appeal is whether it would be against the public interest for information which includes an agreement and certain studies relating to "*a proposed gondola between Thornthwate and Whinlatter*" and an associated Mountain Centre in the Lake District to be disclosed...".

21. The Tribunal convened to consider this matter on the papers on 11 December 2019. On that date it was noted that the Commissioner considered that 'it may assist the Tribunal for the LDNPA to be joined as a party to the appeal' because the Appellant has 'raised matters on which further information would be required from the LDNPA'. That had not been done, and the Tribunal adjourned consideration of the case and directed that the LDNPA should be joined as a party in order to give it an opportunity to explain further why reg 12(5)(e) EIR applies in this case and to address the issues raised by the Appellant in the notice of appeal.
  
22. The Tribunal also directed the LDNPA to file with the Tribunal a witness statement which (a) addressed the points made in the Appellant's appeal notice and later submissions; (b) elaborated on its case that the exemption in reg 12(5)(e) EIR applies to the withheld information; (c) elaborated on its case that the public interest balance favours non-disclosure; (d) in the event that the scheme is developed to the point of a planning application in which the LDNPA is an active party, perhaps with a financial interest, set out the arrangements if any that would provide for independent examination and determination of the proposal; (e) address the various

closed matters raised by the Tribunal in the closed annex to the directions. The Tribunal also gave permission to the Appellant and the Commissioner to file further submissions in response to the witness statement.

23. Both the LDNPA and the Appellant filed witness statements.

24. Richard Leafe is the Chief Executive of the LDNPA. His statement is dated 28 January 2020. There is no closed annex to the witness statement. He accepts that the following documents are held by LDNPA within the ambit of the request of 27 November 2018 and that these are in the closed bundle before the Tribunal:

- (i) Whinlatter Mountain Centre Concept and Feasibility Study dated 10 April 2018 authored by Alistair Kirkbride.
- (ii) Landscape and Visual Appraisal annexed to (i), by Stephenson Halliday.
- (iii) Heritage Statement annexed to (i), by Stephenson Halliday
- (iv) Confidentiality Agreement 29 January 2018.

25. Mr Leafe states that LDNPA has never had other documents referred to in the grounds of appeal, namely reports from Doppelmayer (commissioned by Mr Kirkbride) and Bushell Raven Ltd (commissioned by Mr Handy), or correspondence with these organisations.

26. Mr Leafe says as follows in his statement: -

17. The Authority was approached by Alistair Kirkbride with an idea for a Whinlatter Mountain Centre. I expressed interest in the suggestion and the Authority entered into a Confidentiality Agreement with Julian Handy (who owns the land), Alastair Kirkbride and the Forestry Commission (another landowner). The parties agreed to explore the options available for the development of such an idea and Mr Kirkbride undertook initial work on the proposal which resulted in the aforementioned Whinlatter Mountain Centre Concept and Visual Appraisal (the Appraisal) dated 10 of April 2018.

18. The Appraisal contained a number of suggested elements for the proposed Mountain Centre together with an initial estimate of costs for each of the elements which were based on figures obtained from Doppelmayer and Bushell Raven Ltd. The Authority has not had sight of any other parts of the report nor the instructions which Mr Kirkbride and Mr Handy may have provided to obtain these figures. The invoices for the work undertaken by Mr Kirkbride were payable by the Forestry Commission; they are the accountable body for this part of the Project

19. Upon receipt of the Appraisal, I considered the proposals as being worthy of further consideration. It became clear upon looking at their proposals that further work would be needed on each of the elements of the proposal, to check the technical feasibility and financial viability, before it would be determined whether the scheme or elements of it would be likely to proceed.

...

21. The assertion that the proposals are at a more advanced stage than the Authority has admitted is also not correct. The parties have agreed that the Project will not progress at any stage until all parties are able to move forward. Progress has therefore been necessarily slow. The parties of the 'Whinlatter Project Group' have met and continued to meet each month.

...

27. The information gleaned so far by the Partnership is to determine the feasibility of the project both in terms of the likelihood of the project going ahead and also in terms of the costs and potential benefits to be obtained. To protect these interests the parties have entered into a confidentiality agreement which imposes a duty of confidence on all parties.

29. ...the Authority is aware that there is a great deal of public interest in any potential large scale or unusual development in the Lake District National Park... Many developers come forward with potential contentious proposals and members of the public are given an opportunity to protect their interests as part of the planning...process.... The Authority must be able to have time and space to consider such proposals, to obtain information including the costs and feasibility of such proposals before they enter into the public domain. The Authority has entered into a number of confidentiality agreements and discussed many such proposals,

some of which have come to fruition and many more that do not. As government funding is reduced the Authority is reliant upon individuals, businesses and other organisations coming forward with schemes that benefit the National Park and the Authority needs to be able to shape these proposals at an early stage as possible, whether they are to benefit from them financially or not. I believe that to require the Authority to disclose information in its early stage will restrict the influence the Authority may exert over such schemes and will discourage individuals coming forward with such projects in the future.

27. Mr Leafe in his witness statement has set out some further comments about the balance of the public interest. He notes that the authority needs to continue to look for innovative solutions to support existing businesses within the Lake District National Park. The current proposals set tests to be passed before development is approved which aim to protect the residents of Braithwaite from increasing traffic. Mr Leafe's view is that, in balancing all arguments relating to whether or not to disclose the information requested, the public interest in maintaining the exception and upholding the Confidentiality Agreement outweighs the public interest in disclosing the withheld information, and he considers that the disclosure of documents subject to a Confidentiality Agreement would have a severe adverse impact in seeking external input and support for plans for the Lake District National Park.

28. Mr Leafe also notes that the Authority has always been clear that there will be informal and formal consultation about any future scheme as it develops, and comments will be invited informally on the various options with a formal consultation on those options that the group may wish to take forward. Any work undertaken in respect of the project would require planning permission and members of the public will have an opportunity to put forward their support and/or concerns for the proposals as part of the formal planning process.

29. The Appellant has filed a witness statement in reply. She points out that

The LDNPA has two statutory purposes under section 5 (1) (a) and (b) NP&ACA 1949. Section 5(1)(a) sets out conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas; and 5(1)(b) sets out promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public. Where there is a conflict between the two purposes, section 11A (2) requires that greater weight should be given to the conservation and enhancement purpose. Section 11A (1) requires LDNPA also to seek to foster the social and economic wellbeing of local communities.

30. The Appellant has raised some points in relation to the public interest in disclosure. The first, is that the failure to disclose the documents means that the public cannot scrutinise the scheme at this stage. She says: -

Projects can easily develop a momentum that is difficult to halt – if the disputed material is not disclosed now, and subject to public scrutiny now, it may be too late to halt it.

31. Next, she says that if the LDNPA sees participation in the Whinlatter project as a potential means of raising revenue to redress reduction in resources, then this would reinforce the need in the public interest for publication of the material: -

This is... because people need to know to what extent the NPA officers are motivated by money in making their recommendations and decisions.

32. She also says that: -

There are a number of practical considerations if the feasibility study is not disclosed now when it can be scrutinized by the public before too late. First, the NPA may invest in a project which loses NPA money...and be committed before public consultation takes place. Second, if the feasibility study is not disclosed now the NPA and its potential partners may not disclose assessed financial and

other risks so that planning permission is given for a development which can only be financially rescued by further permissions for additional environmentally controversial developments (which viability issues may be discussed in the feasibility study but not disclosed during the application process for the initial development). Third contrariwise the application may be made on the basis that some environmentally controversial element is needed for viability when in fact it is not (which would be apparent from examination of the feasibility study but not otherwise).

33. In relation to the argument that the disputed material would give rival developers an opportunity to steal the project, she says this is 'fanciful': -

The project requires landowner consent. The landowner can withhold it. The prospective operator cannot do without them. If the landowners wished to work with other operators the withholding from the public of the disputed material will not prevent them from so doing.

34. Following the submission of witness statements, the Appellant then decided, as is her right, that she wished to have an oral telephone hearing of this matter, which was initially due to be heard in April 2020, but was then postponed because of the Covid-19 situation. At the hearing the Appellant was represented by Mr Robert McCracken QC. The LDNPA and the Commissioner did not appear. The Tribunal heard submissions from Mr McCracken but did not hear any witness evidence.

35. Mr McCracken's submissions largely addressed the skeleton argument that was filed on behalf of the Appellant, emphasising the importance of systematic, informed and early public participation on matters affecting the environment and cited article 6(4) of the Aarhus Convention. He pointed out the tight timescales for formal public participation in the planning process and environmental impact assessments, and that early disclosure could assist public participation.

36. He raised other points about the integrity of the process and pointed out

issues of trust between the LDNPA and members of the public. However, we appreciate Mr McCracken's acceptance that it is not necessary for us to form a view on the wider question of trust in LDNPA's approach, or its integrity and capacity in what is the difficult business of conserving, enhancing and protecting natural beauty, wildlife and heritage while also promoting opportunities for understanding and enjoyment, enhancing economic sustainability and fostering innovative approaches.

## DISCUSSION

37. Most recently in the case of *Vesco v (1) Information Commissioner and (2) Government Legal Department* [2019] UKUT 247 (AAC) the Upper Tribunal emphasised the important of public access to environmental information. In that case the UT began by setting out the genesis of the EIRs: -

7. The EIRs implement the UK's obligations under Council Directive 2003/4/EC on Public Access to Environmental Information (the "**Directive**"). Relevant extracts from the Directive are as follows:

Recital (1) "Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment"

Recital (8) "It is necessary to ensure that any natural and legal person has a right of access to environmental information held by or for public authorities without his having to state an interest"

Recital (9) "It is also necessary that public authorities make available and disseminate environmental information to the general public to the widest extent possible, in particular by using information and communication technologies..."

Recital (16) "The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal..."

Article 1: "The objectives of this Directive are: (a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise..."

Article 3: "(1) Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest..."

(5) For the purposes of this Article, Member States shall ensure that:  
(a) officials are required to support the public in seeking access to information

Article 4:

"(1) ...

(2) The grounds for refusal ...shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal".

38. The UT explains that: -

13. The EIRs ...provide a legal basis for requesters to obtain environmental information from public authorities. The environment needs people to protect it and, if need be, challenge matters which may have an adverse impact on the environment. There has therefore been a move, internationally and nationally, to enable the public to participate in decisions about the environment in which they live.....Another aspect of public participation is that the public should have access to information, so they can be informed about matters relevant to the environment and be able to take decisions accordingly. These public participation obligations arise under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental matters ("**Aarhus**"), which led to adoption of the Directive. The EIRs are part of the UK's implementation of its obligations under the Directive. The EIRs fall to be interpreted purposively in accordance with the Directive (*Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 paragraph 8; *The A-G for the Prince of Wales v Information Commissioner and Mr Michael Bruton* [2016] UKUT 154 paragraph 15. In turn.... account is taken of Aarhus when interpreting the Directive



(*Fish Legal v Information Commissioner* C-279/12, paragraphs 35-38).

14. It is clear from the extracts from the Directive set out in the governing legislation section above that the purposes of the Directive include guaranteeing rights to access environmental information. Public authorities hold information on behalf of the public and are to support and assist the public in seeking access to information. As the Court of Justice of the European Union (“CJEU”) has said:

“The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information only in a few specific and clearly defined cases. The grounds for refusal should therefore be interpreted restrictively, in such a way that the public interest served by disclosure is weighed against the interest served by the refusal”. (*Office for Communications v Information Commissioner* Case C-71/10 at paragraph 22).

15..... There is a presumption in favour of disclosure under the EIRs (Regulation 12(2)), which does not exist under FOIA....

39. The Upper Tribunal at paragraph 16 stated that there is a ‘three stage test to be applied’. Adapted for this case the first question is whether the exemption in reg 12(5)(e) EIR applies. If it does, the second question is whether the public interest in maintaining the exception outweighs the public interest in disclosing the information, in all the circumstances of the case. The third question is, does the presumption in favour of disclosure mean that the information should be disclosed.

### **Stage One**

40. In this case we accept (and it has not been disputed) that the exemption in reg 12(5)(e) EIR applies and therefore that: -

(a) the information is commercial or industrial in nature;

(b) the information is subject to confidentiality provided by law;

(c) the confidentiality provided is required to protect a legitimate economic interest; and that the confidentiality would be adversely affected by disclosure.

## **Stage Two**

41. It is clear to the Tribunal that there is a significant public interest in non-disclosure of the documents. We accept that there can be a public interest in withholding these documents to encourage informal early private discussions with potential promoters of major projects. We can see that there is a risk that meritorious projects might not be explored if it is thought that early disclosure will mean that other individuals or organisations will seek to take advantage of the investigative studies carried out.
42. Thus, we understand the point made by Mr Leafe and LDNPA that disclosure of the studies may enable commercial competitors to take advantage of the work and report that has been carried out, and that time and space should be available to consider proposals and obtain further information on technical feasibility and financial viability of such schemes both on its own and in collaboration with other parties.
43. But, as Mr Leafe and the LDNPA accepts 'there is a great deal of public interest in any potential large scale or unusual development in the Lake District National Park' especially given the national and international importance of effective protection of the landscape of the Lake District (which is now a UNESCO World Heritage Site). The public interest in access for members of the public to information as early as possible is also significant, as the Commissioner accepted in the decision notice, and may assist the LDNPA in shaping and selecting options, as well as supporting public rights to object and air contentious matters.

44. In this case, we accept that, at the time of the request, the project had moved on somewhat beyond an early stage where initial discussions are held about a development. The withheld information consists of fairly detailed feasibility reports upon which concerned members of the public would be able to offer views and opinions if the reports are disclosed. As the Commissioner accepted, time and resources have been invested into the plans. We agree with the Appellant that the existence of a confidentiality agreement between commercial partners, indicates both that this proposal is at a more advanced stage and that the discussions are far from informal.
45. In relation to whether rival investors would take advantage of the work done if there is disclosure, as the Appellant points out, as there are land-owners involved in the project, no one else could, realistically, take advantage of these site-specific studies without the land-owner parties to the current enterprise agreeing to participate in a rival's scheme.
46. As the Commissioner notes at paragraph 21 of the decision notice, the withheld material includes studies on the financial viability of the scheme as well as the practicalities and the impact on the environment. We have considered carefully the public interest in not disclosing the financial estimates which are included in the report. However, it seems to us that the financial estimates are a key aspect to understanding the reports and the scope of the projects discussed. We note that the definition of 'environmental information' in the EIR set out above specifically refers to 'cost-benefit and other economic analyses and assumptions' used 'within the framework of the measures and activities' such as 'plans, programmes, environmental agreements' etc., and we see this as an acknowledgement that disclosure of such information can be an important factor in the ability of the public to participate in environmental debate and decision-making. In our view there is a strong public interest in the

disclosure of this part of the withheld information. In any event, any rivals would not be able to take advantage of an 'oven-ready' scheme because, as Mr Leafe notes, further work would be needed on each of the elements of the proposal, to check the technical feasibility and financial viability.

47. In relation to the confidentiality agreement we bear in mind that, as accepted by Mr Leafe, the parties to it are known as are the general ambits of the projects that the agreement covers, and we take these factors into account when considering the public interest factors for and against disclosure.

48. We also take into account the Appellant's point that disclosure of the information at this point will assist the public in responding fully to any formal planning process, if and when that takes place.

49. Our conclusion is that the public interest factors in favour of and against disclosure are finely balanced, on the particular facts of this case. There are weighty issues to consider on both sides, reflecting very strongly held views as concerns the amount of information that should be disclosed and the best timing of disclosure. The majority of the Tribunal members found that the balance tipped in favour of disclosure. The minority member thought that the interests were, in fact, equally balanced.

### **Third Stage**

50. Those conclusions would be sufficient for a finding in favour of the Appellant as the public interest in maintaining the exception must outweigh the public interest in disclosing the information, if the information is to be withheld. In addition, as the Upper Tribunal at paragraph 20 in *Vesco* stated, the presumption in favour of disclosure provides 'the default position in the event that the interests are equally balanced'.

51. Thus, whether the balance of the public interest is in favour of disclosure or is equally balanced, the result is that the withheld information must be disclosed.

52. We would note that our conclusion is reached, as it must be, on the particular points that have been raised, and does not provide any precedent as to how other cases might be considered in the future. There may well be many cases where there are commercial interests in play where the public interest is very much in favour of non-disclosure.

53. We should briefly mention a number of other factors: -

(a) LDNPA also relied on the exemption in reg 12(5)(f) EIR (set out above), but the Commissioner did not address this issue in the decision notice as she had found in favour of LDNPA in relation to the reg 12(5)(e) exemption. The exemption under reg12(5)(f) EIR has not been referred to at any length by Mr Leafe in his witness statement and it is our view that the public interest balance, and presumption in favour of disclosure, both of which need to be applied where the exemption applies (as we accept it does) would produce the same as for the exemption in reg 12(5)(e) EIR.

(b) The Appellant argues that there may be other information, not included in the closed bundle, to which LDNPA has access which should also be considered for disclosure. In his statement Mr Leafe states that that is not the case and refers specifically to 'reports from Doppelmayr (commissioned by Mr Kirkbride) and Bushell Raven Ltd (commissioned by Mr Handy), or correspondence with these organisations', and we accept his evidence on this issue.

(c) It seems to us that the individuals concerned and referred to in the closed material, including the confidentiality agreement, have all been named in the open documents available in these proceedings, and referred to in Mr Leafe's open witness statement. On that basis it does not seem that there is any issue, for the purposes of reg 13 EIR, concerning the disclosure of personal data if the entirety of the withheld information is disclosed, but we will give LDNPA the opportunity to make any submissions to us on that issue before the information is, in fact, disclosed.

### CONCLUSION

54. With that caveat, this appeal is allowed. LDNPA is directed to make any submissions concerning personal data in the withheld material by 25 January 2021, otherwise the withheld material should be disclosed by that date, unless it is intended that an application for permission to appeal is to be made.

**Stephen Cragg QC**

Judge of the First-tier Tribunal

Date: 11 January 2021