



Appeal Number: EA/2021/0339

NCN: [2022] UKFTT 00254 (GRC)

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

Heard: on Cloud Video Platform on 27th May 2022.

Decision given on: 17 June 2022

Panel: Brian Kennedy QC, Emma Yates and Marion Saunders.

Between:

Tony Mason

Appellant:

And

The Information Commissioner

First Respondent:

and

London Borough of Barnet

Second Respondent:

Representation:

For the Appellant: Tony Mason as a Litigant in person.

For the Respondent: Richard Bailey, Solicitor.

Decision: The Appeal is dismissed.

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 November 2021 (reference IC-88621-K3C1), which is a matter of public record.

Factual Background to this Appeal:

- [2] Full details of the background to this appeal, the complainant’s request for information and the Commissioner’s decision are set out in the DN. The appeal concerns a request for information relating to area regeneration proposals being considered by London Borough of Barnet (“LBB”). In response, the Commissioner held that the LLB correctly relied on regulations 13 and 12(5)(e) of the EIR 2004 to withhold some of the requested information from the complainant.
- [3] The Commissioner maintains the position as set out in her DN; namely that the LLB correctly relied on regulations 13 and 12(5)(e) of the EIR 2004 to withhold some of the requested information from the complainant. The Appellant now appeals against the DN. The Commissioner opposes the appeal and invites the Tribunal to uphold the DN.

History and Chronology:

- [4] On the 9 December 2020 the Appellant wrote to the LBB and made the following request:

Request A

“The original (signed off) Public Interest Test (PIT) document that supports the Schedule 12 A exemption decision related to Item 17 of the 8th of Dec P&RC Meeting”.

Request B

“The full ‘Outline Business Case’ (“OBC”) i.e. information that LBB claim is as exempt under Item 17 of the 8th of Dec P&RC Meeting”.

[5] In response, LBB denied holding the information requested in request A. In respect of request B, LBB disclosed some information within the scope of request (i.e. a redacted version of the OBC), refusing to disclose the remainder (‘the withheld information’), relying upon the exceptions under regulations 12(5)(e) and 12(5)(f) and 13 EIR.

[6] On 31 March 2021, the Appellant complained to the Commissioner about:-

*“i) LBB’s handling of his request in respect of request B regarding its reliance on regulations 12(5)(e) and (f) (the Appellant stating that he accepted LBB’s response concerning request A); and
ii) LBB’s reliance on regulation 13 only as it related to an author of the report and / or where it relates to senior personnel of the public authority.”*

[7] Legal Framework:

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.*

(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

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...

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

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

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.”

Grounds for refusing to disclose environmental information under the EIR should be interpreted in a restrictive way – **Vesco v Information Commissioner and GLD** [2019] UKUT 247 (AAC).

Regulation 13 EIR provides (so far as is relevant to this appeal):-

“(1) To the extent that the information requested includes personal data of which the applicant is not the data subject, a public authority must not disclose the personal data if –

(a) The first condition is satisfied

...

(2A) The first condition is that the disclosure of the information to a member of the public otherwise than under these Regulations –

(a) Would contravene any of the data protection principles

...

The first data protection principle under Article 5(1)(a) GDPR is that personal data shall be:

“processed lawfully, fairly and in a transparent manner in relation to the data subject”.

The information can therefore only be disclosed if to do so would be lawful (i.e. would meet one of the conditions of lawful processing listed in Article 6(1) UKGDPR), fair and transparent.

Article 6(1)(f) UKGDPR provides:-

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data...”

The case law on Article 6(1)(f)’s predecessor established that it required three questions to be answered, which are still appropriate if reworded as follows:-

- i) Is the data controller or a third party pursuing a legitimate interest or interests?
- ii) Is the processing involved necessary for the purposes of those interests?

iii) Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

There is an inherent tension between the objective of freedom of information and the objective of protecting personal data. There is no presumption that openness and transparency of the activities of public authorities should take primacy over personal privacy: See *Haslam v IC & Bolton Council* [2016] UKUT 139 (AAC) at [29]. The House of Lords has made clear, by reference to the equivalent Scottish regime that “*there is no presumption in favour of the release of personal data under the general obligation of FOIA*”: *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47; [2008] 1 WLR 1550 [7]. The effect of the CSA judgment is that the Tribunal must not err on the side of disclosure in a section 40 case (and similarly a case concerning regulation 13 EIR) without being sure that disclosure would be compatible with the DPA. This does not mean that disclosure cannot be justified; only that the Tribunal must be careful not to start from the position of presuming disclosure should occur.

Under the Local Government Act 1972 (LGA 1972) Part VA, council meetings are open to the public, and councils are required to make agendas, reports and minutes of council meetings available. However, a meeting may be closed to the public (and the papers not made available) if this would involve disclosing ‘confidential’ or ‘exempt’ information. For these purposes ‘confidential information’ is defined in LGA 1972 section 100A(3), and the categories of ‘exempt information’ are defined in LGA 1972 Schedule 12 A Part 1.

Section 100A (4) provides:-

“(4) A principal council may by resolution exclude the public from a meeting during an item of business whenever it is likely, in view of the nature of the business to be transacted or the nature of the proceedings, that if members of the public were present during that item there would be disclosure to them of exempt information, as defined in section 110I...”

Section 100F of the 1972 Act (additional rights of access to documents for members of principal councils), as amended by the (as amended by the Local

Government (Access to Information) (Variation) Order 2006 ('2006 Order') provides:-

“(1) Any document which is in the possession or under the control of a principal council and contains material relating to any business to be transacted at a meeting of the council or a committee or sub-committee of the council shall, subject to subsections (2) to (2C) below, to be open to inspection by any member of the council.

(2) In relation to a principal council in England, subsection (1) above does not require the document to be open to inspection if it appears to the proper officer that it discloses exempt information”.

Section 100I provides that:-

“(1) In relation to principal councils in England, the descriptions of information which are, for the purposes of this Part, exempt information are those for the time being specified in Part I of Schedule 12A, but subject to any qualifications contained in part II of that Schedule...”

Part II of Schedule 12A includes Paragraph 9 which provides:-

“Information is not exempt information if it relates to proposed development for which the local planning authority may grant itself planning permission or permission in principle pursuant to regulation 3 of the Town and Country Planning General Regulations 1992”.

Thus the LGA 1972 is different to the EIR. The LGA 1972 concerns Council meetings and documents *“relating to any business to be transacted at a meeting of the council or a committee or sub-committee of the council”* open to inspection, some of which may be exempt. By contrast the EIR is legislation giving effect to EC Directive 2003/4 which provides for a general right of access to the public of environmental information held by a public authority (subject to exceptions). Furthermore, “exemptions” under the LGA 1972 has a different meaning to “exceptions” under the EIR.

Regulation 5(6) of the EIR provides:-

“(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these regulations shall not apply”.

Commissioner’s Decision Notice:

[8] The Commissioner investigated the matter and held that the LLB correctly relied on regulations 13 and 12(5)(e) of the EIR 2004 to withhold some of the requested information from the complainant. The Commissioner reached her decision on the following grounds:

“a. Regulation 13 is engaged regarding the author of the report (the Commissioner being satisfied that the exception has not been applied to senior personnel of the public authority):

i) The information constitutes personal data [DN 24];

ii) The withheld name is not the name of senior personnel of LBB [DN 36];

iii) Disclosure of the name would not be reasonably necessary to meet a legitimate interest in any breach of regulation 19 EIR as a complaint to the Commissioner would be less intrusive [DN 38].

b. Regulation 12(5)(e) EIR is engaged with respect to the withheld information as:

i. The information is commercial in nature as it relates to the development of land, including projected building costs and revenues: DN [49];

ii. The information is subject to confidentiality provided by law: [DN 51] ;

iii. Disclosure would adversely affect the legitimate economic interests of LBB and Middlesex University: [DN 52];

iv. Disclosure would also adversely affect the legitimate economic interests of LBB and Middlesex University as such a disclosure at the time of the response to the request would be made prior to all the then ongoing

negotiations between the parties and others regarding commercial matters being concluded: DN [53].

c. The public interest balance lies in favour of withholding this information: DN [70-71].

d. Having concluded that regulations 12(5)(e) and 13 were engaged, the Commissioner did not consider it necessary to consider regulation 12(5)(f) EIR.”

Grounds of Appeal:

- [9] The Appellant’s Grounds of Appeal detailed that the Commissioner erred in concluding that regulation 12 (5)(e) was engaged due to a failure correctly interpret regulation 12(5)(e). Further, that the Commissioner erred in concluding that regulation 13 was engaged.

The Commissioner’s Response:

- [10] The Commissioner maintained her position as outlined in the DN and resisted the appeal. The Commissioner set out additional observations in respect of the Appellant’s Grounds of Appeal.
- [11] The Commissioner maintained, with reference to regulation 12(5)(e), that the information concerns commercial figures and calculations in the context of planning considerations. In addition, the Commissioner is satisfied that she interpreted the exception correctly for the reasons set out in her DN. The Commissioner raised that it is not necessary for her DN to refer to caselaw which may or may not apply to the request investigated. Notwithstanding, the Appellant’s content the Commissioner referred to *Bristol City Council v Information Commissioner & Portland and Brunswick Squares Association* EA/2010/0012 and *Lloyd v Information Commissioner & Brent London Borough Council* EA/2019/0067P (“Lloyd”) to argue that regulation 12(5)(e) is engaged with respect to the withheld information.

- [12] With reference to the Upper Tribunal authorities relied upon by the Appellant, the Commissioner reminded the Appellant that he bears the burden to demonstrate that the Commissioner's DN is not in accordance with the law. The Commissioner submitted that save for broad assertions, the Appellant has failed to show that the Commissioner's findings were not in accordance with the law. Similarly, in relation to the public interest balance test under regulation 12(5)(e), the Appellant did not detail in his Grounds of Appeal why the Commissioner erred in reaching her conclusions.
- [13] The Commissioner, with regards to regulation 13, maintained that she was correct to conclude that disclosure of the name of the junior official who authored the report would be unfair and, would further not meet the condition under Article 6(1)(f) UKGDPR on the grounds that disclosure under FOIA would not be reasonably necessary to meet a legitimate interest.

Second Respondent's Submissions :

- [14] The Second Respondent continued to direct itself to the fact that EIRs have a presumption in favour of disclosing which is a factor for disclosing. The Second Respondent further considered its commitment to transparency and the public interest in council decisions/spending being open to public scrutiny.
- [15] The Second Respondent, in respect of the outline business case ("OBC") stated as follows:

"A careful consideration was made as to whether it was appropriate to withhold these details and it was decided that, on balance, that it was appropriate to do so. This was done through governance and the legal team.

The decisions have now been made and the committee were able to discuss the development and the exempt paper, explore the options and ask questions in private session and a safe space. Since the decisions were made, we have progressed a number of key negotiations and hence do not feel that some

aspects of the papers are, on balance, quite so sensitive as they were when they went to Public and Resources Committee so the council is able to release some of the document and this is attached in a redacted form following consultation with the third party.

However, following a review of the exempted paper, it has been decided to release a redacted version following consultation with the third parties subject to the exemptions listed below.”

[16] The Second Respondent, in respect of regulation 12(5)(d) stated as follows:

“... the Council argues that there are elements of the outline business case that should be withheld to maintain ‘a safe, internal, confidential, private space (away from the public hence external scrutiny) in which it is able to discuss and determine such issues affecting it, in order to facilitate full and frank deliberation and debate and permit high quality decision making which is required for the sound performance of the Council as a whole.

The information relates to high level internal discussions where the options for the business case are under active consideration. The outputs will be published as part of the planning consultation process if it proceeds. There will be public engagement in the summer and should there be any planning applications then these will also be subject to public consultation.

The Outline Business Case and appendices were legitimately exempted from publication at the December Policy and Resources Committee under Schedule 12A of the Local Government Act (LGA) 1972. A careful consideration was made as to whether it was appropriate to withhold some of these details and it was decided that, on balance, that it was appropriate to do so.”

[17] The Second Respondent, in respect of regulation 12(5)(e) stated as follows:

“Items detailed financial plans which would compromise our negotiations in the marketplace and are commercially sensitive. These negotiations are with neighbouring landowners, tenants (including Middlesex University) and potential private financing routes.

The highly likely risk that the market competitiveness of the third party would be harmed by disclosing its commercial information.

The council is embarking on sensitive commercial discussions with a number of landowners and releasing further details on the scheme could prejudice those discussions and worsen our negotiating position.

We are embarking on sensitive commercial discussions with a number of landowners and releasing further details on the scheme would prejudice those discussions and worsen our negotiating position.

The proposal is at a very early stage and would be subject to full consultation as it develops. Public engagement consultation will commence in the next few months.”

- [18] The Second Respondent referred the Tribunal to the Commissioner’s submissions at paragraph [18] and the *dicta* from the House of Lords in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 to argue the decision note to disclose personal information under regulation 13.
- [19] The Second Respondent adopted the Commissioner’s consideration of *Lloyd* and subsequent submissions on the lack of relevance; the burden held by the Appellant; and the failure to identify why the Commissioner had erred.

Appellant’s First Skeleton Argument:

- [20] The Appellant argued that the LBB intentionally withheld that they were both the developer and statutory planning authority for the proposed Hendon Hub. The Appellant claimed that multiple officers knew for at least three years. Further, the Appellant raised that the LBB never formally announced that they were both developer and statutory planning authority. Therefore, the Appellant argued that this information was intentionally withheld.
- [21] The Appellant contends that the LBB knew that it was unlawful to withhold the information from the public. The Appellant referred to the Local Government

Access to Information Variation Order 2006 to argue the same. Furthermore, the Appellant averred that if it is unlawful for the LBB to withhold information under the Local Government Access to Information Variation Order 2006 then it must be unlawful for the LBB to withhold the same information under the EIR regulations. In addition, if the LBB knowingly breached the Local Government Access to Information Variation Order 2006 then there is a prima facie case for concluding that regulation 19 EIR is applicable.

The Commissioner's Second Submissions:

- [22] In relation to the legality under schedule 12A LGA 1972, the Commissioner argues that the Tribunal does not have jurisdiction to rule upon whether the LBB had breached the LGA. Pursuant to section 57 FOIA, the Tribunal only has jurisdiction over a DN issued by the Commissioner and is limited by section 58 FOIA. In this particular case, the Tribunal are limited to whether the Commissioner was correct to conclude in the DN that LBB correctly relied on regulations 13 and 12(5)(e) EIR to withhold the information from disclosure.
- [23] Turning to the unlawful withholding of the requested information, the Commissioner submitted that this argument is not relevant to the Tribunal's consideration of whether the exceptions under 13 and 12(5)(e) EIR are engaged. Further. The fact that some information is not exempt from disclosure under the LGA 1972 is not determinative of whether that information can or cannot be withheld pursuant to a request under EIR. Any complaint concerning the withholding of the information under the LGA should be addressed to the Local Government Ombudsman.
- [24] With regards to regulation 19 EIR, for this regulation to be engaged, it must firstly be determined that the applicant would have been entitled to that information. In addition, there is no evidence before the Tribunal that the LBB has altered, blocked or concealed the withheld information with the intention of preventing the disclosure. Furthermore, the Tribunal does not have jurisdiction concerning proceedings under regulation 19 EIR.

Appellant Core Argument Document:

[25] Below is the Appellant's Core Argument as exhibited:

APPEAL EA/2021/0039: CORE LEGAL ARGUMENT (ONE PAGER) v1.0

LGA: Para 9 of Schedule 12A (NOT ENGAGED)

LGA 1972 (SI 2006)	EIR 2004/DPA 2018 (Aarhus)	COMMENTS
Schedule 12A (<i>Exemptions</i>)	All of EIR Reg. 12(<i>Exceptions</i>)	Both LGA & DPA act with statutory intent to <u>withhold</u> information (i.e. legal intent is aligned)
Part 1: Personal (P1 & P2)	DPA 2018	ALL personal is dealt with under DPA 2018 regardless of whether LGA or EIR is considered.
Part 1: Financial (P3)	EIR Reg. 12(5)(e) – Financial	The lawfulness of withholding financial information (LGA vs EIR) operates as a siloed brick wall. The lawfulness of withholding information under LGA and EIR is considered separately within the context of its own statute.
Part 1: LPP (P5)	EIR Reg 12(5)(b), or FOI Sec. 42	LPP is subject to the FOI/EIR PIT
Public Interest Test (Context 'A')	Public Interest Test (Context 'A')	1. The overall context for the two pits is the same ('A'). However the specifics of the factors contained within the PIT will vary for each exemption/exception. 2. The LA controls the LGA PIT. The EIR PIT should be independently checked by IC and then double checked by the Tribunal

LGA: Para 9 of Schedule 12A (ENGAGED)

LGA 1972 (SI 2006)	EIR 2004/DPA 2018 (Aarhus)	COMMENTS
Schedule 12A (<i>Exemptions</i>)	All of EIR Reg. 12(<i>Exceptions</i>)	Para 9 act with statutory intent to prevent <u>withholding</u> information. EIR acts to <u>withhold</u> information (i.e. legal intent are polar opposites)
Part 1: Personal (P1 & P2)	DPA 2018	ALL personal is dealt with under DPA 2018 regardless of whether LGA or EIR is considered.
Part 1: Financial (P3)	EIR Reg. 12(5)(e) – Financial	The statutory intent of Para 9, in the context of any other UK legislation, must be assess to confirm whether Reg. 12(5)(e) is actually engaged.
Part 1: Legal (P5)	LPP	It appears that Legal advice was not part of the withheld information (the Tribunal can confirm as part of close bundle). A separate question is whether legal advice that 'relates to' unlawfully invoking Schedule 12A is impacted by Para 9 (as it was not shared with councillors) or whether Para 9 is a factor in the EIR PIT
Public Interest Test (Context 'A')	Public Interest Test (Context 'A')	1. The overall context for the two pits is the same ('A'). However the specifics of the factors contained within the PIT will vary for each exemption/exception. 2. The LA controls the LGA PIT. The EIR PIT should be independently checked by IC and then double checked by the Tribunal 3. The PIT <u>must</u> now include the statutory intent of Para 9 (as an unqualified non-exemption).

CONCLUSION

1. Para 9, Schedule 12A 9 impacts whether (i) the EIR exception is lawfully engaged and (ii) the associated PIT is balanced towards full disclosure
2. Para 9, Schedule 12A implies full under disclosure under EIR. This is because any other outcome makes Para 9 & 10 of Schedule 12A redundant. I assert that any decision (by the IC or the Tribunal) to make para 9 redundant to be 'irrational' (unless otherwise justified)

EA-2021-0039_Core Argument (LGA Schedule 12A Vs EIR exceptions) v1.0.docx

The Second Respondent's Amended Submissions:

[26] The Second Respondent agreed with the Commissioner's approach outlined at paragraph 36 of her submissions. Paragraph 36 is as follows:

"Regarding the public interest balance under regulation 12(5)(e), the Appellant does not set out in his GOA the reasons why he considers that the Commissioner erred in concluding that the public interest in maintaining the exception under regulation 12(5)(e) outweighed the public interest in disclosure of the requested

information. The Appellant simply argues that the Commissioner erred in law in "...e.g. ignoring EIR basic assumption that the PIT favours disclosure as its starting assumption". However, the Commissioner did not ignore this as she recognised the presumption in favour of disclosure under regulation 12(2) EIR in paragraph 57 of the DN."

[27] The LBB further reminded themselves of their commitment to transparency and the 'public interest in council decisions/spending etc being open to public scrutiny'.

[28] The Second Respondent, in respect of the outline business case stated as follows:

"A careful consideration was made as to whether it was appropriate to withhold these details and it was decided that, on balance, that it was appropriate to do so. This was done through governance and the legal team.

The decisions have now been made and the committee were able to discuss the development and the exempt paper, explore the options and ask questions in private session and a safe space. Since the decisions were made, we have progressed a number of key negotiations and hence do not feel that some aspects of the papers are, on balance, quite so sensitive as they were when they went to Public and Resources Committee so the council is able to release some of the document and this is attached in a redacted form following consultation with the third party.

However, following a review of the exempted paper, it has been decided to release a redacted version following consultation with the third parties subject to the exemptions listed below."

[29] The Second Respondent, in respect of regulation 12(5)(d) stated as follows:

"... the Council argues that there are elements of the outline business case that should be withheld to maintain 'a safe, internal, confidential, private space (away from the public hence external scrutiny) in which it is able to discuss and determine such issues affecting it, in order to facilitate full and frank deliberation and debate

and permit high quality decision making which is required for the sound performance of the Council as a whole.

The information relates to high level internal discussions where the options for the business case are under active consideration. The outputs will be published as part of the planning consultation process if it proceeds. There will be public engagement in the summer and should there be any planning applications then these will also be subject to public consultation.

The Outline Business Case and appendices were legitimately exempted from publication at the December Policy and Resources Committee under Schedule 12A of the Local Government Act (LGA) 1972. A careful consideration was made as to whether it was appropriate to withhold some of these details and it was decided that, on balance, that it was appropriate to do so.”

[30] The Second Respondent, in respect of regulation 12(5)(e) stated as follows:

“Items detailed financial plans which would compromise our negotiations in the marketplace and are commercially sensitive. These negotiations are with neighbouring landowners, tenants (including Middlesex University) and potential private financing routes.

The highly likely risk that the market competitiveness of the third party would be harmed by disclosing its commercial information.

The council is embarking on sensitive commercial discussions with a number of landowners and releasing further details on the scheme could prejudice those discussions and worsen our negotiating position.

We are embarking on sensitive commercial discussions with a number of landowners and releasing further details on the scheme would prejudice those discussions and worsen our negotiating position.

The proposal is at a very early stage and would be subject to full consultation as it develops. Public engagement consultation will commence in the next few months.”

- [31] The Second Respondent referred the Tribunal to the Commissioner's submissions at paragraph [18] and the *dicta* from the House of Lords in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 to argue the decision not to disclose personal information under regulation 13.
- [32] The Second Respondent adopted the Commissioner's consideration of *Lloyd* and subsequent submissions on the lack of relevance; the burden held by the Appellant; and the failure to identify why the Commissioner had erred.

Appellant's Closing Submissions:

- [33] The Appellant submitted that the reason for his EIR request was that the LBB had failed to disclose that they were both the developer and statutory planning authority for the Hendon Hub. Therefore, engaging para 9 of Schedule 12A LGA. The Appellant averred that had the residents been aware of the same judicial review proceedings would have been issued. In addition, the Appellant submitted that the Second Respondent's actions were knowingly unlawful.
- [34] The Appellant contended that the Commissioner erred in her failure to include either common law or statute in her DN. The Appellant stated that the Tribunal has jurisdiction to hear any errors of law by either the LBB or the Commissioner.
- [35] The Appellant argued that regulation 12(5)(e) EIR is not engaged in this case as where para 9 of Schedule 12A LGA is engaged, the authority is obligated to publish information as a matter of public interest. In relation to regulation 12(5)(f) EIR the Appellant stated that regardless of whether 'Muse' is subject to this exception, para 9 of Schedule 12A LGA influences regulation 12(5)(f) EIR in favour of disclosure.
- [36] The Appellant invited the Tribunal to distinguish between regulation 13 EIR and Regulation 19 EIR. The Appellant argued that the statutory intent of para 9 of Schedule 12A LGA, which is consistent with the Data Protection Act 1998 is such that para 9 of Schedule 12A LGA is engaged and it is in the public interest for personal information associated with LBB internal reports to be published.

Appellant's Second Skeleton Argument:

- [37] The Appellant submitted in relation to para 9 and 10 of Schedule 12A LGA, that both are fully compatible with the EIR regulations and the Data Protection Act 1998. Further that the statutory intent of para 9 of Schedule 12A LGA, in this instance, is that it is in the public interest to ensure transparency into how public funds are used in the development of public assets. The Appellant argued that para 9 of Schedule 12A LGA is an absolute non-exception which does not allow information to be withheld.
- [38] In response to the claim that the Tribunal does not have the jurisdiction to rule on LGA breaches, the Appellant contended that the Commissioner is misguided in this belief. Further, that the legislative nature of para 9 of Schedule 12A LGA, is that the EU Directive encourages EU countries to pass legislation that extends the scope and obligations. Therefore, para 9 of Schedule 12A LGA applies as it ensures transparency and encourages public participation. The Appellant's argument in this respect is two-fold. Firstly, para 9 of Schedule 12A LGA concerns legislation that impacts whether an EIR exception is lawfully engaged and/or legislation that impacts the EIR exception's associated with the public interest test.
- [39] The Appellant contended that the LBB's reliance on EIR exceptions are unlawful. Alternatively, the Appellant averred if regulation 12(5)(e) or regulation 12(5)(f) are lawfully engaged, para 9 of Schedule 12A LGA applies and favours disclosure of the withheld information.
- [40] The Appellant stated that in relation to regulation 12(5)(f), without para 9 of Schedule 12A LGA impacting the EIR, the Commissioner failed to consider the same in her DN. With para 9 of Schedule 12A LGA impacting the EIR, para 9 does not distinguish whether financial information was provided on a voluntary basis. Turning to regulation 13 with para 9 of Schedule 12A LGA impacting the Data

Protection Act 1998, para 9 of Schedule 12A LGA was added after the Data Protection Act was statute. Therefore, para 9 of Schedule 12A LGA is compatible with the Data Protection Act. The Appellant repeated this contention for regulation 13 without para 9 of Schedule 12A LGA impacting the Data Protection Act.

[41] The Appellant requested that regulation 19 EIR be dealt with separately from the Appellant's core argument. The Appellant posed the following questions for the Tribunal:

“Q1: Does the Tribunal have jurisdiction to assess whether EIR Reg. 19 applies? I claim that the Tribunal does have jurisdiction to assess Reg. 19 as the Tribunal has jurisdiction to reconsider any matter that the IC is lawfully able to consider. If Yes, then ...

Q2: Does the Tribunal have jurisdiction to assess whether Para 9 was engaged? And if yes, was Para 9 engaged? If Para 9 was engaged then ...

Q3: Does the Tribunal agree that, on the balance of probabilities, one or more named Barnet Officers/Councillors knowingly unlawfully invoked Schedule 12A of LGA 1972 to withhold information from the public? If Yes then ...

Q4: To what extent does a knowingly unlawful action by a Barnet employee under LGA equate to a breach of Reg. 19. For example, in law, do knowingly unlawful activities under LGA equate to intentionally “blocking” or “concealing” the same information under EIR. I claim that it does.

Q5: Where the Tribunal finds that one or more Barnet employees have, in all probability, intentionally blocked or ‘intentionally concealed’ information from the Appellant under EIR legislation, then what action is the Tribunal lawfully allowed to initiate that will trigger an investigation as to whether anyone is guilty of an offence under EIR Reg. 19?”

Second Respondent's Closing Submissions:

[42] The Second Respondent made the following submissions to encapsulate the approach by which the Tribunal has the jurisdiction to and should approach the appeal:

“(1) While this appeal is a ‘full merits appeal’, it is an appeal solely against the DN by the ICO;

(2) For reasons outlined in the ICO’s Second Submissions, the Tribunal does not have the jurisdiction to determine appeals against decisions made by Barnet under the LGA, including if there was a supposed error of law under the LGA;

(3) The ICO, in its DN, came to the reasonable fact sensitive conclusion that Barnet had not erred in law (itself a mixed question of fact and law) in determining that the documents it decided not to disclose to the Appellant (by December 2020 and thus excluding those documents or parts of documents that were disclosed during 2020) fell within the exceptions relied upon; and the Appellant has failed to show that this decision (even if it is not a decision that the Appellant liked) was wrong;

(4) The (new) suggestion by the Appellant that the exceptions can only apply where a potential developer is in ‘competition’ with another are incorrect and an over- narrow construction of exceptions that apply wherever the public interest in preserving commercial confidentiality (etc) outweighs the public interest in disclosure, including where a public body engages with only one developer;

(5) The Appellant’s novel argument (unsupported by caselaw) that reg. 19 EIR – by which ‘...any person to whom this paragraph applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to which the applicant would have been entitled’ – is engaged or that there is any evidence that it has been committed has no merit; and

(6) *To the extent that the Appellant still relies on it, his argument that reg. 13 of the EIR requires the identification of the (relatively junior) official who was the author of the report is wrong in law.”*

Final Written Submissions of the Commissioner:

- [43] The Commissioner made the following submissions considering the recent death of the Appellant. The Appellant, in this instance, was exercising his right to have environmental information communicated to him if held by LBB pursuant to regulation 5(1) EIR. The Commissioner referred to regulation 18 EIR and the enforcement and appeals provisions under regulation 18(2) EIR. The Commissioner outlined the rights exercised by the Appellant under section 50 and 57 (1) FOIA.
- [44] The Commissioner reminded the Tribunal that if the appeal were allowed the information would be available to the public without restriction. Therefore, the appeal does not cease to have any meaning or purpose on the death of the Appellant. The Commissioner referred to *Sugar (deceased) v BBC & another* [2012] UKSC 4, to argue the same.
- [45] The Commissioner was not aware of whether the Appellant’s personal representative wished to pursue the appeal nor was the Commissioner aware of the Appellant acting on the behalf of the residents of Hendon.

Conclusion:

- [46] The Tribunal does not have jurisdiction to rule upon whether the Council has breached the LGA and, as noted in S.57 FOIA the appeal of a requester or public authority is against the Decision Notice and therefore it is not an issue for the FTT.
- [47] Para 18 p 428 Authorities bundle – the reference in paragraph 18 shows that the confidentiality regulations in the LGA relate to the confidentiality of proceedings not information. (See: *Chichester DC v Information Commissioner and Friel* 2023 UKUT 491 AAC).

- [48]** An innocently mistaken application of an exemption in EIR cannot engage the criminal offence relating to the destruction/deliberate withholding of information contained in Regulation 19 – this would be disproportionate and too far reaching given the judgement necessary to be applied by individual officers working on FOIA/EIR responses within public authorities.
- [49]** There was no evidence presented by the Appellant or in the closed bundle that any wrongdoing or misconduct has taken place and, as always in the FTT, we therefore work with a presumption that the public authority acted in good faith.
- [50]** The Appellant agreed that the officer was too junior to be identified and therefore (s)he should not be named.
- [51]** The information requested is covered by s.12(5)(e), in that it is commercial in nature as land development information including financial information, it is further confidential in nature and would have an adverse impact on the commercial interests of the Council.
- [52]** We found the point raised by Mr Hoar persuasive in that the Public Authority is not a regular commercial actor and is hindered by the constraints placed upon it by virtue of its being a public authority. Accordingly, if the Borough revealed the information commercial parties would be more reluctant to deal with the Borough in future for fear of their information being released as the Council would be seen as too free to release information which could enable other commercial actors to capitalise on the situation to improve their position.
- [53]** We find that this was also a very early stage in the project which increases the sensitivity of the information. We are looking at the public interest at the time when the business case was still being worked on.

- [54] The Appellant had also been provided with a significant amount of information and therefore there has been a demonstration that LBC have sought to be as transparent as possible.
- [55] The appellant asserted that DN had to be in accordance with 'any' law which we find unsustainable.
- [56] While the Commissioner only considered 12(5)e & 13. And did not go on to consider 12(5)f – we accept and agree that the first 2 exemptions cover the information. Further we note that the Information Commissioner were thorough in their investigations and as a result significant additional information was released.
- [57] While the Appellant argues the fact that the release of the information cannot just be considered as if it 'might' cause harm. The Commissioner in the DN at A23 para says '*would likely*' cause harm.
- [58] The Tribunal have had the advantage of reading the Closed Bundel with the appendices in reaching our decision.
- [59] Finally, we have carefully considered the Appellants submissions and cannot find any further material relevant facts or arguments in favour of disclosure. We find that the Commissioners Final Submission 30/3/2022 and the closing submissions of the Second Respondent seem to us to adequately counter the appellants arguments.
- [60] For all the above reasons we have not been persuaded that there is any error of Law in the DN.
- [61] Accordingly we must dismiss this appeal.

Brian Kennedy QC

15th June 2022.