



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL  
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT  
2000**

**Appeal No. EA/2015/0276**

**BETWEEN:**

**SALFORD CITY COUNCIL**

**Appellant**

**-and-**

**INFORMATION COMMISSIONER**

**First Respondent**

**-and-**

**REDWATER DEVELOPMENTS LIMITED**

**Second Respondent**

**Before**

**Brian Kennedy QC  
Jean Nelson  
John Randall**

**Date of Hearing:**

**13 -15 September 2016 at Alexander House, Manchester &  
On 13 January and 3 July 2017 for Deliberations at Fox Court, London.**

**Appearances:**

**Robin Hopkins: - Counsel for the Appellant.  
Elizabeth Kelsey: - Counsel for the First Respondent.  
Rick Holland: - Counsel for the Second Respondent.**

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## DECISION

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**Subject matter:** Application of exceptions under regulations 12(4)(e) – internal communications, 12(5)(b) - course of justice, 12(4)(d) – unfinished documents, 12(5)(e) - commercial confidentiality, 12(5)(e) & (f) – commercial interests and 13(2) – personal data, of the Environmental Information Regulations 2004 (“EIRs”).

**Authorities considered:**

1. *Admin v IC & DECC* [2015] UKUT 0527 (ACC) – GIA/5691/2014.
2. *DEFRA v IC & PORTMAN* - EA/2012/0105.
3. *DfT b v IC* - EA/2008/0052.
4. *GW v IC & Local Government Ombudsman & Sandwell Metropolitan Borough Council* [2014] UKUT 0130 (AAC) – GIA/4279/2012.
5. *ICO Guidance - Internal Communications*.
6. *OGC v IC & Attorney General obo Speaker of the House of Commons* [2008].
7. *South Gloucestershire Council v IC & Bovis Homes Limited* - EA/2009/0032.
8. *Wirral Borough Council v IC* – EA/2013/0235.
9. *Ofcom v IC* – C-71/10, [2010] CMLR 7.
10. *Greenwich v IC & Brownlie* – EA/2014/0122.
11. *Montague v IC & Tate Gallery* – EA/2015/-89.
12. *Natural England v ICO, Badger Trust and Leston* (EA/2015/0029 & 0059)

**Decision:**

The Tribunal allows the appeal and finds the disputed information qualifies under the exceptions claimed and it is in the public interest that it is not disclosed, with one exception as set out in paragraph [40] below.

The Tribunal made minor amendments to the script of the final Judgment of 13 January 2017 by way of the slip rule and further deliberations on 3 July 2017.

## **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 dated 2 November 2015 (reference FS50565225), which is a matter of public record.

[2] The Tribunal Judge and lay members sat to consider this case on 13<sup>th</sup> - 15<sup>th</sup> September 2016 and after further post evidence submissions, deliberated on 13 January 2017 and finally on 3 July 2017. The post hearing evidence and further submissions from the Commissioner reduced the number of matters in issue between the parties, thus our decision relates to those matters still in dispute following those submissions.

### **Factual Background to this Appeal:**

[3] Full details of the background to this appeal, the request for information and the Commissioner’s decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether the requested material constitutes internal communications, and if it constitutes legally privileged and commercially confidential information, that can legitimately be withheld.

### **CHRONOLOGY:**

2009: Discussions commence between the Council and Redwater re site development.

2011 Proposal to redevelop Hill Top Moss open green belt land for housing.

Aug 2013: Provisional Heads of Terms agreed.

10 Oct 2013: Council's Deputy Mayor approved terms for the disposal of the land, related improvements to Walkden Cricket Club and an exclusivity arrangement with Redwater.

29 May 2014: Council advertises disposal and development proposals and invites objections.

26 June 2014: 15 objections and a petition containing 291 signatures are submitted to the Council regarding the development

20 Aug 2014: Hill Top Residents Group makes 2 requests:

1. Copies of correspondence relating to the disposal of the subject land, both internal and between the Council and Redwater;
2. Specific details regarding the Cricket Club redevelopment and correspondence relating thereto both internal and with Redwater, the cricket club and Lancashire County Cricket Club.

24 Sept 2014: Following several follow-up contacts, the Residents' Group request an internal review.

Sept 2014: Redwater begins a public consultation and information exercise.

15 Dec 2014: Complaint to the Commissioner re, lack of response from the Council.

17 Dec 2014: Council advises the Commissioner that it is drafting responses but requests multiple extensions as it is receiving information from Redwater and needs to take internal advice.

Feb 2015: As no substantive response from the Council is received, the Commissioner recommences his investigation.

27 Feb 2015: Response provided by Council refusing disclosure citing regs.12(5)(b),(e), (f) and 13(2). Commissioner instructs an internal review.

31 March 2015: Internal review deadline for Council passes without response.

20 May 2015: Internal review results in limited further disclosure but adds reliance on reg.12(4)(e).

2 Nov 2015: Decision notice holding that the Council breached regs.5(2), 11 and 14(2) for delay, and that regs.12(5)(e) and (f) are not applicable to any of the requested information. Regs.12(4)(e), 12(5)(b) and 13(2) are engaged for some of the withheld information and ordered specified information to be disclosed.

**RELEVANT LEGISLATION:**

***Environmental Information Regulations 2004;***

**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) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that –
  - (a) it does not hold that information when an applicant's request is received;
  - (b) the request for information is manifestly unreasonable;
  - (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
  - (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
  - (e) the request involves the disclosure of internal communications.

- (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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- (a) international relations, defence, national security or public safety; 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;
- (b) intellectual property rights;
- (c) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (d) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (e) 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; or
- (f) the protection of the environment to which the information relates

### **13 Personal data**

- (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; or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998(1) (which relate to manual data held by public authorities) were disregarded.

**[4]** It was accepted by all parties that the information constituted environmental information under Reg.2 of the EIR. The Council provided four Batches of requested information to the Commissioner and relied upon the various exceptions therein.

**[5]** Dealing with each of the exceptions as relied upon:

- *Reg.12(4)(e) Internal Communications* – the Commissioner found that some communications in Batch 3 marked by the Council as internal had been shared outwith the organisation, and therefore ceased to be internal for the purpose of this exception. Where communications had not been so shared, the Commissioner accepted reliance on this exception, it having been designed to allow an authority “space to think in private” and the public interest favouring non-disclosure while the issue remains live.
- *Reg. 12(5)(b) Legal Privilege* – the Council relied on legal professional privilege regarding legal advice in correspondence exchanged with Redwater. The Commissioner determined that this exception did not apply

to some documents in Batch 2 as claimed, as either they did not originate from a legal professional, or privilege had been waived by sharing them with external recipients. The material in Batch 4 was entirely communications between the Council and its solicitors, and so this exception was engaged regarding Batch 4 only.

- *Reg.12 (5)(e) Commercial Confidentiality* – the Council applied this exception to all four batches. The Commissioner was satisfied that the information was commercial in nature and, owing to the negotiations for purchase and development, held the legal obligation of confidence. However, much of the information to which the Council has applied this exception relates to an exclusivity agreement and associated correspondence between Redwater and the Council. This agreement was signed on 14 May 2009 and ended on 13 May 2013. The Commissioner did not consider this agreement to be commercially sensitive; it contains standard paragraphs and ended over two years ago – disclosure was ordered regarding certain parts.
- *Reg.12(5)(f) interests of the person who provided the information to the public authority* - the Council argued that as Redwater proactively initiated discussions in relation to their development proposals and were under no obligation to provide the Council with this information. As Redwater objected to its release, the same arguments as at reg.12 (5)(e) apply. The Commissioner did not find any adverse consequences for Redwater beyond a mere speculation, and so without supporting evidence of such consequences the exception did not apply.
- *Reg.13 (2) personal data* – the Council cited this in relation to some information in Batches 1 and 4. The Commissioner disagreed with this, as the withheld names and contact details for the individuals involved relate purely to them in their professional capacity. The vast majority of the information withheld under reg.13(2) is already in the public domain, including work mobile numbers. Additionally the individuals concerned are at a senior level within their respective organisations and would not expect



their details to remain private. However, the Commissioner has also determined that some of the withheld information relates to non-senior employees, and disclosure of this personal information would be unfair as those individuals would have no reasonable expectation that their information would be put into the public domain.

**[6]** The Commissioner also found that the Council breached R.5(2), 11 and 14(2) by failing to respond to the request, carry out an internal review and disclose the requested information within the statutory time limits. She was particularly scathing (and properly so in our opinion) regarding the lack of organisation by the Council despite this delay, which hampered her own investigation. She further noted that the Council purported to rely on exceptions for non-disclosure for information it had already disclosed to the requester.

**[7]** The Council accepted the determination relating to personal information, but at this stage, Redwater argued for the exclusion of this data on the grounds that it would cause unwarranted distress to those involved. The Commissioner responded by accepting that various signatures are confidential personal data, but as many telephone numbers and email addresses are already in the public domain it is for the Council and Redwater to evidence those that are not. The Council then agreed to disclose email addresses and telephone numbers, with the exception of one person's mobile number, which was a personal mobile number.

***Reg.12(4)(e) Internal Communications***

**[8]** The Council argued that Commissioner erred in finding that certain communications were not 'internal' as the Council had shared them with a company called Urban Vision. This company was formed in 2005 as a joint venture between the Council, Capita and a construction company to carry out the Council's planning, building control and highway functions amongst providing other professional services. In these particular circumstances Urban Vision was

carrying out functions on behalf of the Council, and the Council communicated with it in the same way as its internal officers, with its existence as a legally separate joint venture company as a matter of form rather than substance.

**[9]** The Commissioner in her Response pointed out that the Council provided no supporting evidence to corroborate its assertions that Urban Vision is its agent carrying out Council related functions. Furthermore it is a legally separate entity, and there is no evidence to justify the ‘substance’ of the arrangement taking precedence over this legal form to allow the characterisation of communications as internal or privileged.

**[10]** The Council subsequently provided evidence in the form of witness statements of Mr Norbury and Mr Findley:

- Urban Vision was established to be a vehicle by which local authorities commonly discharge their functions whilst also generating additional revenue, and it discharges certain core functions on behalf of the Council that the Council discharges in no other way.
- Mr Norbury describes Urban Vision as “integral to how the Council actually makes its decisions and discharges its functions”, with its staff effectively operating as Council officers. A number of Council staff members are seconded to Urban Vision.
- Urban Vision's communications are held on Council servers and intranet
- Urban Vision is subject to the Council's complaints procedures.
- The Council's lawyers take instructions from Urban Vision on the Council's behalf.

**[11]** The Council argued that ‘internal’ as a concept is not defined in the EIR or any directives, and has no technical legal meaning. It is to be determined from the facts of the situation, as *per DfT v IC* (EA/2008/0052) so there is no ‘bright-line’ rule that means that if a body is a separate legal entity the communications are necessarily external.

**[12]** The Commissioner denied taking a ‘bright-line’ approach to the separation of legal entities, but upon the receipt of the witness statements of Mr Norbury and Mr Findlay the Commissioner was satisfied that some information exchanged between Urban Vision and the Council can be considered internal. However, this is not a blanket assumption and each piece of information would need to be considered separately.

**[13]** Having listened to the evidence of Mr Norbury at the oral hearing, the Commissioner accepted that the material shared with Urban Vision constituted internal communications. The Council argued that the public interest on balance fell in favour of non-disclosure given the accepted need for a safe space and the specific sequence of events in this case.

**[14]** Conversely, the Commissioner was of the opinion that where the information was ‘high-level’ i.e. did not disclose the Council’s views on detailed aspects of the proposal, there is a public interest in disclosure. The Council disputed this, arguing that the Commissioner did not seem to appreciate that the Council needed to keep its own deliberations away from Redwater, not just the public or potential competitors. This is a commercial transaction to be negotiated, and it would patently not be in the public interest to have all the Council’s deliberations on the table from which Redwater could extrapolate details or methodology. In any event, the Council disagreed with the distinction between ‘detailed’ and ‘high-level’ communications as “artificial and unhelpful”. This Tribunal were impressed with the oral evidence given on these issues and generally accept the Council’s argument in this regard.

***Reg.12 (5)(b) Legal Privilege***

**[15]** The Council used the arguments about Urban Vision’s set-up to argue that privilege was not waived by sharing information with the company. Once the new

information was received about the relationship between Urban Vision and the Council, the Commissioner argued that each document would need to be assessed as to whether it is internal sharing of privileged information (which would not waive privilege) or, given Urban Vision's role in any particular instance (i.e. whether they were involved in the area of work to which the legal advice referred) whether it could be considered to be shared to an external party and therefore waiving privilege.

**[16]** Regarding the sharing of information with Redwater, the Council argued that the sharing of legal advice on a selective confidential basis with a third party did not constitute a waiver of privilege. The Council cited the Tribunal's decision in *Wirral MBC v IC* (EA/2013/0235) in favour of the proposition that privileged information shared with an external party can be exempt from disclosure by reason of common interest privilege.

**[17]** The Commissioner accepted that 'common interest privilege' can be maintained against disclosure, but it must still be established that disclosure would actually adversely affect the course of justice. The Commissioner considered it is not apparent in this case that documents were *in fact* shared with common interest privilege, as the common interest has not been identified and there has been no evidence that they were shared with Redwater on this limited basis.

**[18]** Again, from the evidence given at the Tribunal hearing, the Commissioner accepted that information shared with Urban Vision remained privileged by virtue of its internal nature, but also accepted that information shared with Redwater attracted common interest privilege, the common interest having been explained as the contemplated development agreement. However, the Commissioner maintained the position that, despite the privileged nature of the information, some of it still fell to be disclosed as, rather than containing or requesting legal advice, it refers in general terms to legal issues that the Council had considered.

**[19]** In the Council's response, it was argued that these general references reveal the issues that the Council and Redwater considered to be sufficiently serious or difficult to require professional legal advice, and as such could be used by opponents to ground misconceived but prejudicial challenges.

**[20]** The Council argued instead that information attracts privilege where it reveals the *types of issues* on which advice had been sought. Mr Hopkins, of Counsel, gave the example of an opponent of the transaction wishing to challenge the decision-making would be permitted to see documents which would allow it to deduce the Council's legal thinking, without permitting the Council to have a corresponding insight. The concept of a safe space extends to ensuring that the parties have sufficient space to consider whether a proposal satisfied all legal duties. Therefore, Mr Hopkins argued, the question is a matter of substance, i.e. whether the information gives an insight into legal matters that the parties intend to keep confidential, rather than a matter of strict legal analysis.

***Reg.12(5)(e) and (f) Commercial Confidentiality***

**[21]** The Council cited the Tribunal's decision in *Natural England v ICO, Badger Trust and Leston* (EA/2015/0029 & 0059) to argue that an impact on the confidentiality of the information *per se* is sufficient to engage the exception. The Commissioner rejected this analysis as being contrary to the wording and spirit of the Directive implemented by the EIR. The Directive, argued the Commissioner, established the exemption to protect legitimate economic interests safeguarded by confidentiality, not confidentiality as a stand-alone concept. Both confidentiality and an adverse effect on a legitimate economic interest must be established to engage this exemption.

**[22]** The Council stated that Commissioner ought to have found that disclosure would probably cause harm and a risk of harm to Redwater's interests by prejudicing on-going negotiations, the cost and success of envisaged projects and future negotiating positions. It would further prejudice the Council's interests if the envisaged redevelopments were delayed or made more costly. However, the Commissioner noted that in the Grounds of Appeal there was no explanation of how disclosure would, rather than could, prejudice either party.

**[23]** Redwater argued that disclosure would harm it by assisting its competitors. The interested registered housing provider is under a duty to provide housing at the best possible price, and disclosure of this information would allow Redwater's competitors to undercut Redwater. Generally, third parties would be discouraged from confiding in public authorities if confidences will not be respected, and Redwater did not consent to the disclosure. The Commissioner noted that it still had not been explained how and why disclosure of the specified information would adversely affect the interests of either party, and provided a list of questions that she wished answered.

**[24]** The Tribunal heard evidence from Mr Sebastian Heeley on behalf of Redwater regarding how their commercial interests would be adversely affected by disclosure. Disclosure would allow competitors to tailor their bids to 'just enough to win' rather than what they were actually willing to offer, and extrapolation from the documents would allow competitors to copy Redwater's 'innovative' approach to development schemes or 'run the clock' (i.e. object needlessly so that exclusivity periods lapse) to Redwater's disadvantage. He also gave evidence that Redwater would not have shared such details with the Council if it had foreseen any possibility that they might be disclosed, and confirmed that, in the event of disclosure, Redwater would not be so open in future. Mr Norbury for the Council confirmed that disclosure would most likely result in significant delay and elevated costs regarding the negotiation process.

[25] Redwater's proposal remains exempt, with public interest lying in the exemption rather than in disclosure. However, the Commissioner argued that where the information is only discursive or general financial information about the development agreement, disclosure would not adversely affect the commercial interests of Redwater and/or the Council and that the exceptions are not engaged. The Council maintained that competitors could still infer information from the release of these documents to the detriment of Redwater and, more widely, the fairness of competitive markets.

***Reg.12(4)(d) Unfinished/Incomplete Information***

[26] This exception was added by the Council in the Grounds of Appeal in relation to the draft Heads of Terms and the draft Exclusivity Agreement to allow a confidential 'safe space' to finalise the terms of their agreements. Redwater adopted the Council's call to protect a 'safe space', adding that disclosing draft documents would prevent those producing them being as candid in offering their opinions, damaging the quality of advice and information.

[27] The Commissioner accepted that some documents are incomplete, but noted that the exclusivity agreement in 2009 by that stage had come to an end and it was for the Council/Redwater to clarify the extent to which the documents referred to remained under review at the time of the request. The Council then clarified that at the time of the requests, the draft Heads of Terms had been agreed and approved by the Deputy Mayor, but no sale agreement incorporating them had been agreed or exchanged. The exclusivity agreement has been drafted but is yet to be entered into. These documents, once finalised, can be published with appropriate redactions, but as matters stand they require revision.

No decision has been made on whether to dispose of the open space. It added that even where documents are finished, the material as a whole may be unfinished and would therefore qualify as an exception from disclosure.

**[28]** The Commissioner was of the opinion that, if negotiations were on-going then the documents would engage the exception; however, she argued that the public interest weighed in favour of disclosure. All public bodies have a commitment to transparency, and potential contractors must be aware of this when they move to tender for public work. The length of time negotiations have been on going would suggest that withdrawal at this stage is unlikely.

**[29]** The Council asserted most strongly that the Heads of Terms and Exclusivity Agreement were drafts relating to a *proposed* lease and subject to on-going negotiations. Premature publication, it was argued, would jeopardise good faith re-drafting by allowing it to be characterised as ‘backing down’. The Commissioner accepted that they were unfinished documents, but contended that the public interest in disclosure outweighed the interest in maintaining the exception. She was not satisfied that disclosure would have an adverse effect on the conclusion of the agreement, and if it provoked interest from other prospective developers, then this increased competition would be to the Council’s benefit. The Council disputed this, pointing out that at the time of the request, the negotiations were very far from conclusion; with the position being finalised two years after the request was made. Furthermore, at the time of the request, the successful progress and conclusion of negotiations with Redwater were not a foregone conclusion.

**[30]** Mr Hopkins on behalf of the Council clarified some aspects of the chronology of events. He noted that the first time the proposed disposal of the lands were advertised was 29<sup>th</sup> May 2014, with objections to be received by 26 June 2014. This period for receiving objections was extended into early August, and the EIR requests came only a few weeks later on 20<sup>th</sup> August 2014. The Council was still considering objections at this stage. Matters progressed, and by the time of the Tribunal hearing in September 2016 a decision was taken to proceed with an exclusivity agreement with Redwater. However, to date a



substantive agreement has yet to be concluded; in any event, if planning permission is not in fact obtained then the property transaction will not proceed. These matters were at the time of the request and still continue to be live.

### ***Public Interest Considerations***

**[31]** The potential transaction between the Council and Redwater is that the Council would sell a leasehold interest to land at Hill Top Road to Redwater, who would develop the land into housing and also upgrade the cricket club facilities. The value of the scheme was provided on a closed basis but it is substantial. There is considerable public interest in this project, in ensuring public information about and engagement with this project, and in governmental transparency in general.

**[32]** Redwater and the Council argued that there would be ample opportunity for public engagement in the planning process and Redwater's public consultation about the plans. However, the Commissioner was concerned that the Heads of Terms and Exclusivity agreement would not necessarily become public in the course of a planning application process. The Council confirmed that as part of the arrangement with Redwater, a full public consultation would be undertaken regarding this development. Whilst the disputed information may not be published automatically in a planning process, the Council would consider any requests for this information at a later date and, depending on the circumstances, may well be content to disclose this information in future.

**[33]** Public interest arguments should be considered in aggregate and the Council argues that there is no discernible public interest in disclosure but there is vast interest in protecting the safe space of negotiations. Redwater added that disclosure of the information at this stage would not enhance the ability of the public to participate in the planning process. Conversely, premature disclosure of draft agreements threatens the ability of the parties to continue commercial

discussions by inhibiting their openness with each other, and it is plain how a withdrawal from the project by either party at this stage would result in losses to both parties.

**[34]** The Tribunal have had the advantage of two days at an oral hearing during which we heard lengthy evidence from a number of witnesses including; Mr Dave Norbury, Associate Director, Urban Vision Partnership Limited; Mr Chris Findley, Assistant Director of Planning at Salford City Council; and Mr Sebastian Heeley, Development Manager of Redwater Development Limited. We have also had the assistance of detailed and comprehensive submissions from counsel on behalf of all parties. We wish to express our sincere gratitude to all concerned.

**[35]** We remind ourselves that we must consider the evidence before us as it applied at the time of the request. The Council helpfully set this out in their closing submissions wherein they indicate that the relevant time for assessing the engagement of exceptions and the public interest balance is the time immediately following the request, which in this case is August – September 2014. The requests at issue in this appeal were for information about a potential transaction between the Council and Redwater. We found the evidence of Mr Norbury and Mr Findley comprehensive and compelling in demonstrating the need for safe space. The evidence of Mr Norbury was that at the time of the request the Council was still considering objections submitted in response to advertisements of the proposed intended disposal of the land. The issues in the negotiation between the Council and Redwater in the proposed commercial arrangements could not have been more “live” and in need of confidentiality. He explained that even at the time of his giving evidence the Council did not know if or when the substantive agreement might be concluded.

**[36]** Mr Findley, in his evidence demonstrated that at the time of this hearing there was no certainty about the disposal agreement but if this happened there

would still be the usual planning opportunities for public participation in the usual way.

From the evidence it is clear that distinction between the property and planning parts of the proposed transaction is fundamental. While the Commissioner argues there is a Public Interest, and this is accepted. Having heard the evidence we find there is also a public interest in not interfering in delicate negotiations between the Council and Redwater at critical stage in what at best would attempt to micromanage the Councils decision making process but at worst corrupt, through potential outside influence, the delicate process in which they were, and still are engaged. We are satisfied that this would not be in the public interest. Following the usual and normal objection opportunities that arise will best serve the public interest in the planning process that would be followed if the matter does progress. Having heard the evidence of the witnesses we have no doubt that disclosure of the detail in the withheld information would have been particularly harmful and the public interest will be best served by following the usual planning process in due course.

Further, we are grateful for, accept and endorse the closing submissions made on behalf of the Council dated 5 October 2016 at pages 3 – 8 under “Key aspects of the factual context”.

#### **Reg. 12(4)(e) (Internal Communications)**

**[37]** This Tribunal are acutely aware of the change in the Commissioner's position in relation to its interpretation of “internal” which we acknowledge is proper in the circumstances. We accept that the evidence at the hearing, which put this beyond doubt in our minds on the facts of this case. Having heard and considered the evidence before us find that the relevant communications between Urban Vision and the Council in respect of the Redwater matter were internal communications.

**[38]** On the evidence before us and in particular from the witnesses giving evidence to us, we are persuaded of the importance and need for “safe space”. We are satisfied on the facts of this case that the Council as a public authority needs space to think and act in private.

**[39]** Mr Norbury’s evidence described clearly how, inter-alia Urban Vision discharges “core functions” on behalf of the council with respect of its disposal of land. He described how Urban Vision are not merely an advisory service which the council bought in, but are an integral part of the council decision making process and further in discharging and implementing those decisions.

**[40]** Again having heard the evidence of the witnesses and considered the submissions of counsel we are satisfied that in relation to the discharge of statutory property functions such as those with which the Redwater transaction is concerned, it is Urban Vision (rather than any specific members of Urban Vision staff) which is operating internally with the Council. We accept that Mr Norbury would be entitled to seek the input of colleagues, who would in turn be bound by confidentiality obligations on Council matters. We accept the submission that if he did so, in this context, he would not be taking that information outside of the safe internal space which exists between the council and Urban Vision. This is an arrangement that allows the council to function in progressing complex projects, which by their nature require more and knowledge expertise than the council have within their own resources while at the same time allowing the process to remain internal for all intents and purposes. It is commercially viable and practically pragmatic and we accept it is a necessary and satisfactory *modus operandi* in the context of the project in hand in this case. Accordingly we find that the communications between the Council and Urban Vision were “internal” and Regulation 12(4)(e) is engaged and the public interest favours maintaining the exception.

[41] The Commissioner, while recognising Reg.12 (4)(e) is engaged, has argued in relation to the public interest balance, to distinguish more-high level internal discussions. It is not clear to this Tribunal what the positive advantage in the public interest this distinction would make on the facts of this case but what is clear to us on the evidence, and as the council submits, is that at the time of the EIR request there remained a compelling need for a safe space even in respect of the less detailed internal discussions and communications. Such revelations of the detail of the relevant information sought would, if disclosed, reveal to the public and to Redwater aspects of the Council's work in progress and thinking on the proposed matter in hand. The evidence before us, and in particular from the witnesses' who gave evidence, persuades us that the facts and timings at play in this case mean there was a compelling need to preserve a safe space for the council's internal thinking, as Mr Hopkins expressed it; "*whether expressed in detail or at a less granular level.*" We accept that the council needed to keep some of its internal thinking away from Redwater too at the time of the request. We accept that Redwater would have been well placed to "read between the lines" of even comparatively high level internal discussions and gain insights into the council's confidential internal thinking about the proposed transaction. We accept, and agree with the submissions made on behalf of the Council that disclosure of any of the subject detailed disputed information would weaken the Council's ability to conclude these potential transactions on the best terms in the public interest.

There is one class of documents, which the Tribunal finds does not engage Reg. 12(4)(e), and that is communications with Ward Councillors in their capacity as Ward representatives. The documents are at pages 225, 226, 227 and 247 of the bundle. The Tribunal distinguishes between these documents and communications with Councillors holding decision-making posts, such as the Deputy Mayor. Submissions by officials to the Deputy Mayor are clearly internal and, as they advise on a decision to be taken, are entitled to the protection of a 'safe space'. However, correspondence between officials and Ward Councillors,

sent to those Councillors in their capacities as representatives of the area affected by the development proposals, are clearly intended to enable Councillors to brief their interested constituents. As such, the content would be placed in the public domain, with the Councillors being the channel of external communication. The Tribunal finds these documents are not internal communications, and they should be disclosed.

**Reg. 12(4)(b) (Course of Justice).**

**[42]** The Tribunal accept that where the disputed information reveals legal advice, or requests for legal advice on specific issues, Reg. 12(5)(b) EIR is engaged. We are not clear about the distinction the Commissioner draws wherein such information and information which does not disclose any specific advice as to the Council's legal position. We are persuaded on the evidence in this case that such general disclosure would adversely affect the legal position of the Council and/or Redwater. However even if the Commissioner were correct in their submissions that there is such a distinction in this case, there is evidence that it would cause damage, in so far as it would inhibit the council from seeking general legal advice on the types of issues pertinent to the information relevant to this case, if in doing so it would be disclosed. This in our view is not in the public interest. It is not clear how it is demonstrated by the Commissioner that it would or could be in the public interest to make such disclosures. In terms of public interest, we accept that a lower threshold applies to the fact of advice having been sought, rather than the advice itself but, given the generally high threshold applicable to Legal Professional Privilege, we are of the view that the public interest balance favours the maintenance of the exception.

**[43]** We accept the submissions on behalf of the Council, that in the circumstances of this case, the Council and Redwater were entitled to share aspects of legal advice without foregoing privilege by virtue of common interest privilege. The essential rationale is that the sharing of legal advice on a selective,

confidential basis with an external party with a common interest in that advice does not constitute a waiver of privilege see: Wirral MBC v IC – EA/2013/0235.

**[44]** The evidence of Mr Norbury in this case was persuasive and compelling in the context of non-disclosure of the relevant disputed information. See paragraph 61 of his evidence; *“In the context of important, complex and evolving negotiations such as that between the Council and Redwater, it is essential that the Council can take legal advice from its professional legal advisors as and when it needs to. If that legal advice is exposed to the public, it not only allows the other party to the negotiation an insight it should not have – it also undermines the Council’s ability to seek this advice freely and without fear that conclusions would be drawn based on the questions asked, the answers given and so on.”*

**[45]** As submitted on the Council’s behalf, the Council needs to be able to communicate freely with its legal advisors in confidence. Otherwise its communications will be more guarded (with an eye to potential disclosure), less open and thus less robust: the process of lawyer-client advice will be weakened, which is contrary to the interests of justice and to the public interest.

**[46]** It is clear to us on consideration of the relevant information that even on the broadest sense of the general nature of the requests, it is not overall in the public interest that there would be disclosure.

**Reg. 12(4(d) (Unfinished Documents).)**

**[47]** There is no dispute about the engagement of this exception. The issue is in relation to the Public Interest balance. Quite simply the Tribunal accepts the

evidence of the witnesses at the hearing of this appeal. The evidence demonstrates to us that negotiations were still very far from conclusion; in fact it took two more years after the date of the request for the position to be finalised. The evidence was that at the time of the request there was a real risk that this transaction would not go ahead, as there remained a lot to be sorted out. Mr Heeley in his evidence stated there would have been circumstances in which it would no longer be worthwhile for Redwater to pursue the matter. The risk of prejudice to the progress of the project by disclosure of this disputed information at the time of the request could not, in our view possibly be said to be in the public interest. By way of note, the Tribunal placed significant weight on the evidence of Mr Heeley who impressed us comprehensively with his account of the issues at the heart of this appeal.

**Reg. 12(4)(e & (f) (Confidential and Commercial Interests).**

**[48]** The relevant disputed information is clearly commercial in nature and it was subject to confidentiality by law. The Commissioner does not dispute this, however is not satisfied that disclosure would adversely affect any economic interests. Once again the Tribunal found the evidence of the witnesses at hearing compelling and comprehensive in establishing not only the nature and extent of the commercial and confidential information at issue but the damage that would be done by disclosure. We refer to the witness statements and also to the references made in the Councils closing submissions dated 5 October 2016 at page 22 paragraph 75 wherein they set out the most salient points whereby disclosure of the relevant disputed information at the time of the requests (and indeed now at the time of the hearing) would have been very likely to prejudice Redwater's commercial interests. The Tribunal accept, on the evidence of the witnesses' before us, and the submissions before us that disclosure of the relevant information would damage, not only Redwaters commercial interests but in turn, the interests of the Council in the proposed project.



**[49]** The Commissioner considers the information withheld pursuant to these exceptions falls into three distinct categories: (i) detailed financial information about Redwater's proposal for the development; (ii) higher level financial information about the development agreement; and (iii) discursive information about the agreement. She argues that the information in her category (i) engages the exemption and the public interest is in non-disclosure but the rest she argues should be disclosed, as the exceptions are not engaged. The Council maintains the Commissioner is wrong on this. They argue that Redwater's competitors (who know this sector and this area very well) would be able to draw commercially viable insights from these higher-level financial items and from discussions, which indicated confidential aspects of Redwater's strategy and its distinctive approach to the Hill Top Road site. In the light of the evidence heard at the hearing, in her closing submissions of 11<sup>th</sup> November 2016 the Commissioner maintained her view that disclosure of higher level financial information and discursive information about the agreement would not adversely affect the commercial interests of Redwater and/or the Council.

**[50]** The Tribunal weighed these competing arguments with care. We accepted, in particular, the argument made in this case by Redwater that a knowledgeable competitor would be able to gain, from the higher level and discursive information, insights in to the commercial strategy of Redwater that might not be apparent to the lay reader, and we were persuaded, on the evidence before us, that this could disadvantage Redwater in future tendering exercises.

**[51]** The Tribunal finds a significant public interest in maintaining the competitiveness of public sector tendering, and considers that such competitiveness, on the evidence before us in this appeal, could be undermined by the disclosure sought, to the detriment of the public purse.

**[52]** The public interest in disclosure is, in essence, the general public interest in transparency in the conduct of public business, especially in circumstances in which there is an element of controversy in relation to a proposed development.

**[53]** In its balancing of these competing public interests, the Tribunal finds there is significant weight in the evidence before us to support maintaining the exception. In particular, the Tribunal accepts the evidence of Mr Heeley of Redwater and Mr Norbury of the Council (at paragraph 24 above) that disclosure would, rather than merely could, prejudice the interests of their organisations.

**[54]** The Tribunal concludes that, for the above reasons, the balance of public interest favours maintenance of the exception.

**Reg, 13(2) EIR.**

**[55]** There is no dispute between the parties as to disclosure of personal data.

Accordingly we allow the appeal, with the exception of the communications with Ward Councillors, as specified in paragraph **[41]** above.

Brian Kennedy QC

4 July 2017.