Neutral citation number: [2025] UKFTT 00004 (GRC)
Case Reference: EA/2023/0217

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Part heard by CVP on: 17 April 2024
Consideration on the papers on: 3 July 2024
Further consideration on: 24 September 2024
Further consideration on: 13 December 2024
Decision given on: 8 January 2025

Before

TRIBUNAL JUDGE HEALD,
MEMBER GRIMLEY EVANS
MEMBER TATAM

Between

CLIVE DAVID CARTER

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:
The Appellant appeared in person.
For the Respondent there was no representation.

Decision: the Appeal is allowed in part and dismissed in part
The Substituted Decision Notice:

1st request
In it's response to the Appellant's request for information of the 22 March 2021 the London Borough of Haringey ("the Council") was not entitled to withhold commercial

information in the Carter Jonas LLP Report by section 43(2) FOIA because it's disclosure would not be likely to prejudice the Council's commercial interests. An appropriately unredacted version of the Carter Jonas LLP report shall be disclosed within 35 days of this Decision being sent to the Council.

2nd request
As regards the Appellant's 2nd request of the 19 April 2021 the qualified person's opinion of the 27 May 2021 was not reasonable. Accordingly an appropriately unredacted version of the relevant information shall disclosed within 35 days of this Decision being sent to the Council.

3rd request
As regards the Appellant's 3rd request of the 11 May 2021 the Appeal is dismissed.

4th request
As regards the Appellant's 4th request of 12 August 2021 while the exemptions at sections 43(2) and 36(2) FOIA were in part engaged (and the QPO was reasonable) the public interest balancing test favoured disclosure. Accordingly an appropriately unredacted version of the relevant information shall disclosed within 35 days of this Decision being sent to the Council.

REASONS

1. The Appellant brings this Appeal by section 57 Freedom of Information Act 2000. It is in respect of a decision notice dated 23 March 2023 issued by the Information Commissioner and concerns four requests for information made by the Appellant to The London Borough of Haringey dated 22 March 2021, 19 April 2021, 11 May 2021 and 22 August 2021. What follows is a summary only of the submissions, evidence and our view of the law. It does not seek to provide every step of our reasoning.

2. References to page numbers in this Decision are to the open bundle produced for the Appeal and in this Decision the following definitions are adopted

Freedom of Information Act 2000	FOIA
The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009	2009 Rules
Decision Notice dated 23 March 2023 ref IC-156466-X0B2	the DN
the public interest balancing test	the PIBT
qualified person and qualified person's opinion	QP and QPO
report prepared by Carter Jonas LLP as at 3 February 2020	the CJ Report
Clive David Carter	the Appellant
the Information Commissioner	the IC

the London Borough of Haringey	the Council
Alexandra House Station Road Wood Green London	Alex House
Alexandra House Wood Green Limited	AHWGL

Parties to the Appeal

3. The Council was not a party to the Appeal and did not attend the CVP hearing on 17 April 2024. On 20 May 2024 the Council made an application to be joined after the Appeal had been heard. For the reasons given with the Directions of the 24 May 2024, that application was not granted. This question was raised again and considered as appears in the Directions of 14 June 2024 and the Reasons given. The question continued to be kept under review as can be seen for example at paragraph 9 of the Reasons to the Directions of 3 July 2024. In our view (having considered the overriding objective at each stage) while not formally a party and having not attended the CVP the Council were not prejudiced by the Decisions not to add them as a party after the Appeal hearing.

FOIA

4. FOIA provides that any person making a request for information to a public authority is entitled to be informed in writing if that information is held (section 1(1)(a) FOIA) and if that is the case to be provided with that information (section 1(1)(b) FOIA). These entitlements are subject to exemptions which can be absolute by section 2(2)(a) FOIA or qualified by the PIBT set out in section 2(2)(b) FOIA which is that *"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."*

5. In this Appeal two specific exemptions are relevant being those provided for by sections 43(2) and 36(2)(b) FOIA. If engaged the PIBT applies to both. The Council also relied in part on section 40(2) FOIA and that some information requested was not held. At the Appeal the Appellant indicated he did not challenge either of these responses. This Decision therefore does not refer to them.

6. By section 43(2) FOIA:-

"information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

7. We agree with the Council when it says (para 9 of its submissions of 25 June 2024):-

"For this exemption to be engaged, the envisaged prejudice must be "real, actual or of substance", and there must be "more than a hypothetical or remote possibility … a real

and significant risk of prejudice": Hogan v IC [2011] 1 Info LR 588 at [29]-[35]; endorsed by the Court of Appeal in DWP v IC and Zola [2016] EWCA Civ 758; [2017] 1 WLR 1 at [27]."

8. Section 36(2)(b) FOIA provides:-

(2)Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act...
(b)would, or would be likely to, inhibit –
(i) the free and frank provision of advice, or
(ii)the free and frank exchange of views for the purposes of deliberation, or
(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

9. A concise explanation for the process for section 36(2)(b) is to ask as follows:-

(a) who was the QP?

(b) what was the QPO?

(c) was the QPO reasonable?

(d) if it was reasonable then in all the circumstances of the case does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

10. When considering the reasonableness of the QPO we had regard to *Information Commissioner v Malnick & ACOBA [2018] UKUT 72)* and *Guardian Newspapers Ltd & Brooke v IC & BBC (EA/2006/0011)* and *Department for Work and Pensions v Information Commissioner [2016] EWCA Civ 758*.

11. For the consideration of the PIBT we had regard to authorities such as *Christopher Martin Hogan and Oxford City Council v the Information Commissioner EA/2005/0026&0030)* and *All Party Group on Extraordinary Rendition v IC [2013] UKUT 560.* The correct time for determining the PIBT is the date the public authority makes its decision on the relevant request (*Montague v ICO and Department for Business and Trade* [*2022] UKUT 104).* Later material can be relevant when it assist with an understanding of the position as at the date of response (*Rob Evans -v- Information Commissioner [2012] UKUT 313 AAC para 58).*

Role of the Tribunal

12. *S*ection 58 FOIA provides that:-

(1) If on an appeal under section 57 the Tribunal considers –
(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

13. It is not part of the Tribunal's role to look into the way in which the complaint was investigated as opposed to the outcome. *(see for example William Stevenson -v- Information Commissioner (EA/2015/0117). W*e also had regard to *Peter Wilson -v- The Information Commissioner [2022] UKFTT 0149:-*

"30...the Tribunal's statutory role is to consider whether there is an error of law or inappropriate exercise of discretion in the Decision Notice. The Tribunal may not allow an appeal simply because it disagrees with the Information Commissioner's Decision. It is also not the Tribunal's role to conduct a procedural review of the Information Commissioner's decision making process or to correct the drafting of the Decision Notice."

14. As can be seen when reviewing the 4th request (that of 22 August 2021) we also considered the UT Decision in *NHS England v Information Commissioner and Dean [2019] UKUT 145 (AAC)* in particular at paras 10-12 where it was said:-

"10. The First-tier Tribunal 'exercises a full merits appellate jurisdiction and so stands in the shoes of the IC and decides which (if any) exemptions apply (paragraph 90). That follows from section 58(2) and Birkett. As does this crystal clear statement of the tribunal's powers and duties at paragraph 102:

… the tribunal must consider everything necessary to answer the core question whether the authority has complied with the law, and so includes consideration of exemptions not previously relied on but which come into focus because the exemption relied upon has fallen away. It cannot be open to the FTT to remit consideration of new exemptions to the Commissioner …

11. It follows that once the public authority has given its response to the request, it has no further role save for compliance with a decision notice of the IC or a decision of the FTT (paragraph 76). And, as I have shown, both the Commissioner and the tribunal are under a duty to consider any exemption that might apply, regardless of whether it has been raised. Once the case is before them, that is their role, not the authority's.

12. So the tribunal was right to be concerned that there could be exemptions that had not been considered by either NHS England or the Information Commissioner. But it was wrong to deal with that issue by remitting the case back to the authority. What it should have done was to give directions to the authority to identify any other exemptions that might apply, to consider whether or not any did, and then to make a decision accordingly."

<u>The four requests</u>

request 1 (22 March 2021)(B124)

15. The Appellant asked for a copy of the valuation for Alex House. On 1 June 2021 (B126) the Council refused to provide this information on the basis of the exemption provided by section 43(2) FOIA. He asked for an internal review on 15 June 2021 (B129). The outcome of that review was not provided to him until 10 November 2021 (B141). The Council did then provide the CJ Report but with some financial information redacted again in reliance on section 43(2) FOIA. The review went on to explain the exercise carried out to determine the PIBT (B142).

request 2 (19 April 2021)(C175)

16. The Appellant (C175) asked for information about the Strategic Property Board meeting of the 11 December 2021. He said:-

"Please provide full details of the above meeting, to include:

Agenda
Attendees
Minutes
Reports

The council holds a Report by the accountancy firm Mazars, about the decision not to buy Alexandra House. Please also provide a copy of that Report."

17. The Council responded on 24 June 2021 (177-179). It confirmed it held the information and provided the Mazars report. As regards the request for the details of the meetings and associated papers the Council indicated (page 177/178) that it considered the exemptions at section 36(2)(b)(i) and (ii) FOIA applied. The Appellant sought an internal review on 28 June 2021 (C194). The outcome of this was notified to him (C196-199). In it (in summary) the Council said that it maintained its view on the use of the exemption in section 36(2)(b)(i) or (ii) FOIA save as regards the Agenda and list of attendees – which were then provided (198ff).

request 3 (11 May 2021) (D201)

18. The Appellant asked for information about the Corporate Property Board (C201) as follows:-

"Please supply a list of dates of meetings of the Council Corporate Property Board» since May 2018. Please include the Agendas, Attendees and Minutes of those meetings."

19. The Council responded on 14 June 2023 (D203). They said that they did hold the information requested but would not be providing it due to the exemption provided by section 36 FOIA. The Council addressed the PIBT stating their conclusion that (D203):-

"In this case, we have concluded that the public interest favours withholding the information in order to protect the forum for open discussion between the officers concerned"

20. On 15 June 2021 (D206) an internal review was requested. On 23 July 2021 (from D210) the Appellant was told that the outcome of the review was that (a) the Council would now release agendas and lists of attendees with some redactions by section 36 FOIA and (b) Minutes were not disclosed in reliance on section 36 FOIA.

request 4 (12 August 2021)

21. This request said(E226):-

In respect of each of,
the Haringey Council Capital Board; and
the Strategic Property Board (AKA the CAB Strategic Property Board),
please supply
(i) Meeting dates
(ii) Attendees
(iii) Agendas
(iv) Minutes
for the following periods:
for the following periods:
since May 2018 to date in respect of Capital Board and
since 11 December 2018 in respect of Strategic Property
For that Board, you have already supplied some details for the meeting of that date, but Refused to supply the Minutes for that meeting (those Minutes may become the subject of further enquiries, elsewhere)

22. On 12 October 2021 the Council responded (E229) and agreed to provide the agendas (which have the dates) and lists of attendees with some redaction for section 36 and as regards the minutes it said, in a reference to section 36(2)(b)(i) & (ii) and section 36(2)(c) FOIA:-

"Our 'qualified person' –the Monitoring Officer – has considered this request and is satisfied that elements of the minutes meet the requirement of the exemption as full disclosure of the minutes would 'inhibit free and frank provision of advice or exchange of views; or (c) otherwise prejudice the effective conduct of public affairs." The release of the agendas and lists of the attendees does not contravene this principle, however some redaction of the minutes will be made where s36 is applicable"

23. An internal review was requested. The outcome (E420/421) was that the Council said:-

"It is our view that the Strategic Property Board meetings (and its subsequent reincarnations) are held within the space which allows a free and frank discussion about matters in the respective responsibilities of senior officers of the Council. It does

consider, and advise and make delegated decisions on issues and capital finance requests and therefore requires senior officers to engage in free and frank exchanges on a range of commercially sensitive subjects. Good advice for Member decision-making relies on senior officers being able to engage in these discussions unencumbered by the prospect of their comments being disclosed. Therefore, I have attached the minutes and Terms of reference for the Strategic Property Board (and its reincarnations) that we hold which details the dates they met and the attendees and any financial decisions made which are not commercially sensitive"

The Complaint (F494- F497), DN (1- 11) and Appeal (A12)

24. The Appellant complained to the IC on 16 February 2022. The IC issued the DN on 23 March 2023. The conclusion (page 1) was that the Council had correctly applied the exemptions at section 36(2)(b)(i) and (ii) FOIA and section 43(2) FOIA. On 12 April 2023 the Appellant commenced this Appeal. The outcome sought by him was that the Council release all the information he sought (A17). He said (A16):-

"I believe the ICO Decision is wrong because, (a) given the background known to the ICO at the time, the ICO made a misplaced assessment of where the balance of public interest should lie and therefore (b) it should not have accepted the exemptions the council claimed."

25. His Appeal was supported by Grounds of Appeal ("GoA") (A21-23) and supporting documents (A24-A69) namely a report commissioned by the Council ("the Buss Report") entitled "*An independent review of the London Borough of Haringey Council's arrangements for property"* dated December 2022 by Chris Buss of Darenace Limited. This itself comes with four appendices (35- 69). Prior to the hearing of the Appeal the IC provided a Response (A77- A92) on 14 September 2023 and the Appellant Replied (A93- A105) on 1 October 2023.

Evidence

26. For the Appeal the Tribunal had the benefit of hearing from the Appellant in person. We had an open bundle of 521 pages and a closed bundle of 152 pages provided in accordance with rule 14(6) 2009 Rules 2009. As set out above the Council was not a party at the time of the Appeal but we noted its position as set out in various documents in the Bundle.

27. The information contained in the closed material is described in a gist provided by the IC on 7 June 2024 as follows:-

"*The withheld information is described, at high level, at paragraphs 18 and 44 of the decision notice under appeal and is also referenced elsewhere in that notice.*

The Closed Bundle itself contains an unredacted copy of the final valuation report of Alexandra House by Carter Jonas in response to request one. The redacted copy of the same can be found at pages B143-B168 of the open bundle.

The bundle also contains unredacted copies of the requested/withheld information in response to requests two, three and four albeit that, due to the volume of material in response to request four, the Council only provided a sample of documents. The redacted copies of this sample can be found at the following pages of the open bundle – E230-238, E251-E253, E257, E429-E431 and E436-E446."

28. Subsequently after the Appeal was part heard and in response to Directions we also received and considered in particular:-

(a) a video clip provided by the Appellant of a meeting with a representative of BDO (an accountancy and professional services advisory business) acting as advisers to and/or auditors of the Council

(b) the Appellant 's written submissions prepared for the Appeal

(c) a letter from the Council of 7 June 2024 (as closed material)

(d) the Appellant 's written submission of the 19 June 2024

(e) a written submission from the Council dated 25 June 2024

(f) a witness statement of Mr Kirby dated 25 June 2024

(g) the Appellant's comments on the Council's submissions together with various documents

(h) BDO's audit completion report to the Council for the year ended 31 March 2020 dated 10 March 2021

29. After further consideration on 3 July 2024 Directions were given for the Council to provide to the Tribunal (to be held pursuant to rule 14(6) 2009 Rules) copies of all the disputed material from request 4. On 16 August 2024 this was subsequently provided. The Tribunal also considered this material and a closed Supplementary Note also sent on 16 August 2024.

30. Following deliberations on 24 September 2024 and having considered the decision of the UT in *NHS England* further Directions were again given dated 10 October 2024. These provided the Council with an opportunity to indicate whether it considered certain material relating to request 4 also engaged section 43(2) and if it did then it was to:-

"(a) provide written submissions to the Tribunal and all parties in which its open case on section 43(2) FOIA and request 4 is set out including as regards the public interest balance test at the relevant date.

(b) provide to the Tribunal only a version of the Minutes in which the precise words only that are said to be relevant to such exemption are clearly identified together with a closed submission if needed.

(c) provide to the Tribunal and all parties a gist of the material relevant to paragraph 3(b) of this Order."

31. On 5 November 2024 the Council indicated it did wish to apply section 43(2) and subsequently provided its submissions on why it considered parts of the relevant minutes were subject to section 43, a gist and a marked up version showing the exemption as applied. The Appellant provided his comments on 25 November 2024 together with a copy of a report for the Council's cabinet dated 11 February 2020.

32. On the 9 December 2024 further information was provided to the Tribunal by the Appellant. This was sent to the panel on 12 December (the day before our deliberations). We concluded on the basis of the overriding objective that we would not have regard to it apart from noting its date and that it consisted of an email and note from the Appellant plus a number of attachments because:-

(a) the Appeal hearing itself had been in April 2024 and the issues related to a request made in 2021. A consideration of the new material might have resulted in further delay in particular if it was appropriate to give the Council an opportunity to make submissions on it.

(b) while rule 2 2009 Rules refers to avoiding unnecessary formality and seeking flexibility in the proceedings there had been no request to provide further evidence and no Direction given to allow or ask for it.

(c) of the requirement to deal cases proportionately.

request 1 of 22 March 2021

33. This relates to a valuation report on Alex House. The Council says that:-

"*Alexandra house is a 10-storey purpose built 54,800 sq ft office with ground floor and basement car parking providing office accommodation on Station Road, Haringey. It has for some years been used as office space by the Council. The Council took the decision to acquire the freehold of Alexandra House in February 2020. At the time of that acquisition, the Council already had a leasehold interest in the property, running until February 2021. The transaction to acquire the freehold was completed by March 2020.*"

34. According to the Buss Report (A49):-

"*The Council was given the option of purchasing the freehold of the property which it occupied as a leaseholder, in January 2019 for £14.5m, this was not taken up and subsequently the Council purchased the property just over a year later for over £21m*"

35. By way of background only and from information provided by the parties and having viewed the video clip and BDO's audit completion report it appears that Alex House was leased to the Council by Workspace PLC who had also granted an option to AHWGL. It also appears from this information that the Council

acquired the shares in AHWGL and then provided funds to AHWGL to enable the purchase to be achieved. This enabled the Council to continue to use the building for its office accommodation. The relevant chronology is as follows:-

CJ Report dated	3 February 2020
the Council acquires Alex House	March 2020
the Appellant ' s request	23 March 2021
the Council's Response	1 June 2021
the Council Response after review	10 November 2021

36. On 23 March 2021 (B124) the Appellant asked for disclosure of the valuation of Alex House. In its final response to this request on 10 November 2021 (B141) the Council disclosed the CJ Report with some redacted information by section 43(2) FOIA.

37. We reviewed the closed unredacted version of the CJ Report at A2CB to A27CB in the closed Bundle and B144- B169 in the open bundle. We also reviewed the submissions and evidence provided to us both before and after the Appeal was part heard (including the report for Cabinet of 11 February 2020) and noted what was said by the Appellant at the Appeal.

38. Prior to the hearing of the Appeal and specifically as regards the question of whether disclosure would cause prejudice there was little said overtly by either party but we noted for example the following.

39. When the Council responded to the request, initially refusing to provide any part of the CJ Report (B126), it said that a number of valuations had been carried out for Alex House and that:-

"*these are commercially sensitive and therefore confidential under the FoI Act i.e. section 43(2)...This is because such information may prejudice or be likely to prejudice the commercial interests of the Council and/or another entity therefore it is not in the public interest to disclose this information.*"

40. After the internal review on 10 November 2021 (B141) the Council, when providing a redacted version of the CJ Report, said:

"*As such, we can withhold information that would or would likely harm the commercial interests of any party should it be released, and also if it is in the public interest to withhold the information. The exemption recognises the possibility that it may be in the public interest to disclose such information even though it would prejudice someone's commercial interests to make it public. However, information that amounts to the disclosure of trade secrets, involves details of precise costings or working methods that would clearly affect a company's commercial interests may be withheld.*"

Having considered the information you have requested, I have reviewed the decision and agree that we can release parts of the valuation to you. Please find attached parts of the valuation report from February 2020 which we can disclose.

However, you will notice that some sections of the report have been redacted. I maintain that the financial information contained in the report is commercially sensitive, on the grounds that release would likely harm the Council's commercial interests. The financial details of the Council are sensitive by definition, and release of these specific figures would likely negatively impact future commercial ventures.

41. The Council in this letter (141) referred to the CJ Report but also that:

"*An annual valuation of a number of Council properties is undertaken each year as part of the Council's accounting process which included the Council's interest in Alexandra House.*"

42. In the DN the IC said that it accepted that the Council was entitled to apply section 43(2) FOIA and (A9/10):

"*The Council stated that its financial details are sensitive by definition, and release of such figures would likely negatively impact future commercial ventures.*

The Commissioner is satisfied that the prejudice being envisaged by the Council relates to its commercial interests. His guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity in this case, the commercial rental market.

Next, having examined the withheld information, the Commissioner accepts that a causal link exists between the disclosure of information about rent being paid on commercial units and prejudice to the Council's ability to obtain the best rent. Disclosure of the withheld information could negatively impact any future negotiations with external parties, such as in seeking new tenants should the office space be let out in future.

The Council states that, if this information were to be placed in the public domain this would be likely to affect the ability of the Council to carry out any future procurement exercises as the Council's financial information would be available to the other party.

The Commissioner considers that the envisaged prejudice would be "likely to occur" Would be likely to means that the risk of prejudice occurring is real and significant, and more than hypothetical or remote. The Commissioner considers that this lower threshold has been met."

43. At the Appeal we gained the impression from the Appellant that he took the view that the Council's motivation for not releasing the information was about the possible embarrassment of those involved in property matters for the Council rather than any concern that the Council's commercial interest would be prejudiced.

44. In the GoA the Appellant said (A22):-

"*Again huge sums of public money were lost. The dry language of the Buss report is unsatisfying if not inaccessible for the ordinary public who deserve to know in more simple terms how their money, allegedly spent on their behalf has been used.*"

45. He referred to the Buss Report (published after the Response to this request) annexed to the GoA which amongst other things states for example (see A49 or page 26 of the Buss report):-

"*The concern was that the Council effectively overpaid for the property compared to what it could have purchased the property for a year earlier.*"

46. For the Appeal the Appellant had prepared a presentation of his case and he later provided us with a copy. On Alex House specifically he said:-

"*I have focused attention, on the deal that generated by far the biggest loss of public funds that we know of. That involved Alexandra House, a 10 storey office block, then occupied by the council as leaseholder. The council first declined an offer from the Freeholder to buy the Freehold and later, paid much more than a fair market price If it will help the Tribunal, I have available a Time Line of Milestones in the wheeling and dealings for Alex House, from the chance to buy it in December 2018, through to May 2021, when the council released the Mazars report – I may be able to answer some time-related questions from it.*"

47. The Appellant at the Appeal also referred to what he called the Council's "*culture – if not obsession with secrecy in general...*". He said:-

"*These blanket exemptions are unlikely to be the real reasons why the council refused to supply the information. In my view, these exemptions are attempts to cloud the issue. The likely reason for the refusals, are to try to maintain the council's reputation as a competent local authority, not remotely in need of Special Measures*"

"*Unfortunately, the general culture of secrecy continues. At any point before today, Haringey could have changed their minds and supplied the information I requested in full. The secrecy culture helped to enable the losses and the Tribunal now has an opportunity to send a message to the council and cause a re-think. If this opportunity is not taken up, we can be confident that there will be more financial disasters of the kind I have outlined*"

48. The BDO audit completion report of 10 March 2021 was provided to the Tribunal and we also noted that on 17 March 2021 the Council's corporate committee was joined by a representative of BDO. In the video clip of part of this meeting supplied by the Appellant (which he told us is publicly available) that representative was asked a question about the acquisition of Alex House and his answer included the following:-

"*What's slightly unusual in this case is that* [unclear] *who sold it were valuing it at £10M... there was planning gain by changing the consents and that so he was agreeing*

at £15.5m...you've had to pay more than that again..you have paid more than perhaps a true arms length would have been with two willing buyers. Its just unfortunate that you have found yourselves as a council in the position where because of the issue you've got on [other property] you desperately needed to maintain that accommodation there was no alternate out there. You did have to pay extra over market as a bit of a ransom how much ransom is open to debate but you over paid market value so you've had to write down effectively the £22m you've paid back down to £16m market value"

49. We noted what the Council has said about this for example in its letter of the 7 June 2024 after the Appeal was part heard and in response to Directions.

50. Mr Kirby, who joined the Council in July 2021 and is employed by the Council as Assistant Director of Capital Projects and Property, provided a helpful witness statement supported by a statement of truth dated 25 June 2024 which set out his assessment of the prejudicial impact of disclosure of the CJ Report at the relevant time. The Council also made written submissions dated 25 June 2024. In summary they said:-

"*10. At the time of Mr Carter's requests, the Council was considering options including putting Alexandra House to the market for sale or lease. That was a realistic prospect at that time (and it remains a realistic prospect). It involved the Council's commercial interests as a party buying, selling and leasing property assets in its area.*

11. The Council would seek – and would be obliged to seek – the most lucrative terms for itself and the public if it did so. Taking Alexandra House to the market would entail negotiations about the terms, including the financial terms, for that transaction.

12. If those with whom the Council was negotiating were to learn of a relatively recent valuation for Alexandra House – i.e. what the Council and its advisors considered to be a realistic market value (as opposed to the historic price the Council paid) – that would inevitably affect those negotiations. The other party would use that as a highly material benchmark, pressing the Council to use that valuation as an upper limit, and then seeking to push terms down (in terms of favourability to the *Council). This would make it much more difficult for the Council to secure the best terms, and would risk the Council emerging with lower sums than would otherwise have been the case*

13. This disclosure would thus have caused a real and significant risk of prejudicing the Council's ability to secure the best financial outcome, to a real, actual and substantial extent. Even a risk (as opposed to a certainty) of any material degree of 4 reduction in financial outcome is sufficient to secure the engagement of section 43(2) FOIA.

14. That is what would have been likely to have happened here, if this information had been disclosed in 2021. The Council's negotiating position regarding Alexandra House, and thus its ability to secure the best financial outcome, would have been prejudiced. That is the clear evidence of Jonathan Kirby, and it makes perfect sense in these circumstances. There is no basis on which the Tribunal should reject that evidence."

51. The Appellant provided his response in the form of comments on the Council's submission and this evidence. He said on 27 June 2024 for example:-

"*I earlier supplied a time-line that shows that the purchase of Alexandra House was about a year before than my first FoI request and the valuation report was a little older.*"

I have already discussed how remote was any likelihood of the council selling the building around the time of my first request, a step that would have crystallized a massive capital loss.

The suggestion that Alex House might be resold after just a year, and rekindling huge adverse publicity, would have been politically untenable, even if a few council officers might claim this was a real possibility. A supposed resale fully meets the definition of a hypothetical situation and a remote possibility. "

"*The council guards the Valuation Report figure with a fervour that is hard to justify by its real importance or significance. It is generally appreciated that all property transactions, including commercial property for sale, can and does sell above or below a formal valuation figure. This depends more on supply and demand and on a building's current condition. A final agreed price depends much more on prevailing general market conditions, rather than on any valuation.*

The CJ Report is dated 3 February 2020 and the date of my request was 22 March, 2021. In the space of 13 months, the market background can change dramatically."

Tribunal's review – request 1

52. In summary the information redacted and in dispute is:-

(a) page 17 of the CJ Report at para 18.1 (B160) where Carter Jonas state:-

We understand that London Borough of Haringey are purchasing the Property for £[redacted].

(b) advice in a number of places in the CJ Report on the potential sale and/or rental value (eg B147,B160,B166) for Alex House and associated assumptions (eg B149).

53. Having seen the CJ Report in the closed bundle we concluded that this material did relate to the Council's commercial interests. While disclosure of this information in response to the request did have the possibility of being prejudicial we did not conclude that the risk of prejudice was more than hypothetical or a remote possibility because:-

(a) we did not conclude that the information on its own was "*...sensitive by definition...*" or that "sensitivity" is necessarily synonymous with "prejudice"

(b) we did not conclude that in fact Alex House was actively being considered for sale or lease.

(c) even if wrong about the Council's intentions to sell or lease Alex House in our view the disclosure would not have been prejudicial at all or to the degree required.

54. One part of the Council's argument was that at the time of the request and the response the disclosure of this information would have been prejudicial because the Council had not decided what to do with Alex House and (in the words of the Council's submission at para 10) a realistic prospect at the time was that the Council:-

"...was considering options including putting Alexandra House to the market for sale or lease."

55. Their submission says:-

"If those with whom the Council was negotiating were to learn of a relatively recent valuation for Alexandra House – i.e. what the Council and its advisors considered to be a realistic market value (as opposed to the historic price the Council paid) – that would inevitably affect those negotiations."

56. The Council's witness Mr Kirby at para 10 says:-

"The key point I make based on the above is that, at the time of these FOIA requests, the Council's decisions about Alexandra House were not settled – they were live and unresolved, and there was a real prospect of the Council deciding in the relatively near future to sell or lease Alexandra House. It was vital that the Council did not prejudice its ability to secure the best terms if it decided to put Alexandra House to the market in one of the ways touched on above."

57. He also says:-

13. If (which was realistic) the Council decided to put this site to the market for sale or lease, there would then be negotiations and offers in the usual way. It would be *crucial that, in any such negotiations, the other side does not know what your own valuation is – if it does, it will inevitably use that info to drive you down and it will be much harder to secure the best outcome for the Council and thus the public purse. The Council's own valuation assessment would be an absolutely critical piece of information that would have been used in those prejudicial ways, with a real likelihood of the Council emerging with a lower market price if this valuation had been in the public domain and thus available to those with whom the Council may have been negotiating. I base that view on my own commercial experience of such matters and on my knowledge of the Alexandra House circumstances in particular.*

14. *The Council is therefore confident that the public disclosure of this information in 2021 would have entailed a high risk of substantially prejudicing the Council's prospective negotiations and thus ability to secure the best financial terms. Section 43(2) of FOIA was engaged and there was very strong public interest in ensuring that those prejudicial consequences did not materialise."*

58. The Appellant told us that he doubted that the Council was really actively considering the sale or lease of Alex House in March 2021 and as regards this issue we noted these points:-

(a) while the Council's witness Mr Kirby was not employed by the Council until after the request was made he does say at para 5:-

"*I am also well placed to assist the Tribunal because of my current detailed understanding of matters relating to Alexandra House based on my direct experience (which enables me to understand how matters stood at the time of Mr Carter's requests in 2021) and because I have reviewed the relevant documents (including the withheld information) and have discussed with colleagues who support the conclusions I reach in giving this evidence.*"

(b) the Council made no overt reference to prejudice due to the prospect for sale or lease when responding to the request in June 2021 or November 2021.

(c) the Council's evidence on prejudice prior to the Appeal being part heard did not say much more than assert that the information is "*sensitive by definition*" which is not in any event a FOIA exemption.

(d) while it was useful to see the witness evidence we would have expected to see some clear documentary evidence to support his statement such as redacted extracts from Minutes showing active consideration for the disposal or lease of Alex House at that time.

(e) the Council did say:-

"*However, you will notice that some sections of the report have been redacted. I maintain that the financial information contained in the report is commercially sensitive, on the grounds that release would likely harm the Council's commercial interests. The financial details of the Council are sensitive by definition, and release of these specific figures would likely negatively impact future commercial ventures.*"

(f) following Directions on 3 July 2024 further minutes were provided and these were also considered. Without undermining the rule 14 2009 Rules Direction we did not see in this material anything that overtly supported the contention that the Council was actively seeking the sale or lease of Alex House. In fact in our view the evidence (for example of the minutes of the Strategic Property CAB Sub Group of 7 July 2020 at para 3 where "Accommodation" was discussed) indicates it was not being actively considered.

(g) a report for the Council's Cabinet of 11 February 2020 which dealt with the acquisition of Alex House provided by the Appellant opens by saying:-

"*1.1 This report sets out the rationale for the acquisition of the freehold interest in Alexandra House, Wood Green for use by the Council as office accommodation for an initial period (c7 years) and for longer term strategic purposes*"

1.2. There is an opportunity for the Council to step in to acquire the freehold from the current purchaser, which would enable the Council to use the building as office accommodation in the medium term or longer if required, plus also control its future use alongside other development plans for the Wood Green area in due course.

(h) again and without undermining the rule 14 2009 Direction in our view the content of the closed supplementary note from the Council on 16 August 2024 did not satisfy us that there was adequate evidence to support the contention that the Council was actively considering the sale or tenancy of Alex House.

59. Accordingly our conclusion from the evidence is that people at the Council were thinking about the future of Alex House but the Council was not formally and/or actively planning for the sale or lease of it and in fact were thinking of it as being accommodation for the Council for the medium or long term.

60. However even if we had concluded that the Council was activity considering the sale or lease of Alex House at this time then we would have reached the same conclusion both as regards the sale price and advice on sale and leasing.

61. As regards the sale price at para 18.1 of the CJ Report this is because:-

(a) the BDO auditor had already, prior to the request, stated as recorded on video that he thought the price paid was £22m

(b) BDO's audit completion report dated 10 March 2021 stated on page 27 of that report that Alex House was a £22.6m acquisition and that the sum of £6m was paid for the shares in AHWGL and a further £16.6m to enable that entity to acquire the freehold.

(c) the BDO advice had already revealed there was a gap between what they called open market value and what the Council paid – and why and page 27 of the BDO audit completion reports contains detailed commercial information on value and price

(d) a newspaper article referred to us by the Appellant in *Ham & High* on 1 April 2021 stated:-

"*According to council papers the authority paid £6m for the company in March 2020. Later that month the now council owned company purchased the building for the freeholder, a company called Workspace for £15.5m. In the end the acquisition cost Haringey Council £22.6m.*

(e) on 16 February 2022 the Appellant, when writing to the IC said "*Later again, the council did buy the building, at a total cost of £22,600,000, a sum that included £6,000,000 that went to the shell company.*"

(f) the Councils own submission to the Tribunal states (emphasis added):-

"*If those with whom the Council was negotiating were to learn of a relatively recent valuation for Alexandra House – i.e. what the Council and its advisors considered to be a realistic market value (***as opposed to the historic price the Council paid***) – that would inevitably affect those negotiations.*"

(g) the Council referred to a number of valuations including annual valuations

(h) different values were in the public domain. Paragraph 18.1 of the CJ Report simply reports what they had been told. It may or may not have been the price actually paid by the Council.

(i) there was considerable information in the public domain about the price the Council is said to have actually paid and the structure of the deal.

(j) BDO in March 2021 at the meeting the subject of the Video clip when explaining why the Council had to pay over market value said "*you desperately needed to maintain that accommodation.. there was no alternate out there.*"

62. As regards the sale and rental value and associated assumptions this is because:-

(a) of the points raised above and because in our view the CJ Report was not "recent" as said by the Council in its 25 June 2024 submission

(b) the information is one opinion based on the precise assumptions set and in the changeable market conditions described by them

(c) of the potentially more dramatic changes to market conditions for office space due to the changes in working patterns caused by Covid 19.

(d) Carter Jonas themselves said (B149 para 7):-

"*It should be noted that values change over time and a valuation given on a particular date may not be valid on an earlier or later date.*"

(e) any entity in negotiations for the acquisition of Alex House may have had different assumptions relevant to them and would very likely have-

- carried out their own detailed inspection
- obtained their own valuation advice
- been aware of the same comparable evidence
- known what BDO had said in writing and in the video clip.
- known what the local media reports had said
- known that BDO had said that due to particular circumstances the Council had to pay "*extra over market as a bit of a ransom*"

(f) any prospective tenant of Alex House may not have sought a lease of the whole but even if they did they would very likely have:-

- taken their own advice
- carried out their own inspection
- been aware or made aware of local market conditions and comparables
- considered for themselves the size and condition of Alex House.

Tribunal's conclusion – request 1

63. We conclude (as set out in the report to Cabinet of 11 February 2020) that the Council was not actively considering the sale or lease of Alex House at the relevant point. Even if they had been our view is that knowledge of the redacted commercial information would not have helped any theoretical potential acquirer /tenant or at best would only have provided that party with a very slight commercial advantage. Thus any prejudice to the Council would, in our view, have not amounted to enough (see para 9 of the Council's submission of 25 June 2024) to engage the exemption.

64. Accordingly in our view the exemption at section 43(2) FOIA is not engaged in respect of the commercial information in the CJ Report because its disclosure would not have been prejudicial to the Council to the degree required or at all. On this basis we did not go on to consider the PIBT and this part of the Appeal is allowed.

request 2 -19 April 2021 (C175)

The QP

65. As regards withheld minutes and reports from the 11 December 2018 Strategic Property Board meeting the Appellant raised an issue about the identity of the QP. He said in the GoA (A22 para 12)

*"**Qualified person- not present**- the ico Commissioner is satisfied that the council's monitoring officer is a "qualified person". However this elides into the lawfulness of the MO Opinion. Case Law has held that a Qualified Person needs to be present at such meetings and yet the MO was appointed well after the secret boards met. The Opinion- that the exception was engaged- was issued by the qualified person retrospectively."*

66. We agree with the IC in the DN when he says says:-

"The Commissioner is satisfied that the Council's Monitoring Officer is authorised as the qualified person under section 36(5)(l) of FOIA and that they gave the opinion that the exemption was engaged."

In our view it is clear that a QP does not need to be in the actual relevant meetings that they go on to consider in a QPO. Further in our view the QP would not need even to be in post as at the date of such meetings. We are satisfied that Fiona Alderman the Head of Legal & Governance and the Monitoring Officer for the Council is the QP for the Council by section 36(5)(1)(o) FOIA. This applies to requests 2, 3 and 4.

What was the QPO?

67. The QPO for request 2 is in an email from the QP to various people at the Council timed at 3.12 PM. As a result of previous Directions this email (but not those that preceded it) is part of the open evidence. The QPO for request 2 was:-

"*I'm comfortable that the CAB papers are within the exemption of s36(2). Could someone confirm the status of the audit report? F*"

Was it a reasonable QPO?

68. In our view (based on *Malnick)* it was not. We see no issue about the QPO not being on a form or that it is short or that it was done quickly or that it has a degree of informality. Even the fact that it ends with a question mark is not an issue as the audit report (ie the Mazars report) was in fact disclosed.

69. We reached this conclusion having considered the emails leading up to the QPO in the closed bundle (for which legal professional privilege is claimed), the letter to the Tribunal from the Council of the 7 June 2024, the Council's submissions of the 25 June 2024, Mr Kirby's statement and the other evidence in the Bundles received before and after the Appeal hearing.

70. We also noted that in the DN the IC says that the Council has applied sections 36(2)(b)(i) and (ii) to this request 2 but also stated(A7) (our emphasis):-

"*The QP gave consideration to the recommendations in favour of the exemption being engaged in relation to requests 2 and 3, however they were not provided with any submissions in favour of disclosure.*"

71. The DN also says (A8)

"*It is clear that the QP was provided with the information in question in relation to requests 2 and 4, and a description of the information in relation to request 3. There were arguments put to the QP at least in favour of maintaining the exemption in relation to requests 2 and 4, the Council states none are on record in relation to request 3. The Commissioner, having examined the withheld information, is satisfied that the opinion of the QP is reasonable.*"

72. Our issues about the reasonableness of the QPO, based on the evidence from the time of the QPO itself and shown to us in the open and closed bundles, are these:-

(a) we do not know if arguments were put forward as to why the prejudice or inhibition would apply or would be likely to apply for this request specifically or what they were

(b) we concluded that no counter arguments were put and considered

(c) we do not know from the QPO if the QP considered that the inhibition "would" or "would be likely" to apply

(d) while the emails show that the relevant papers were sent to the QP and were available to be considered it is not clear to us that the QP read them – but we accept she may have done so.

(e) from reading the closed emails that led to the QPO we gained a sense that the exemption was to be applied to the information sought as a matter of routine or by the adoption of a blanket approach rather than as a result of a specific consideration of the request

(f) the first the QP appears to have known of the issue at all was at 18.42 on the 26 May 2021 and the last element of advice was delivered at 14.53 the next day with the QPO emailed just 19 minutes later.

(g) when staff at the Council were thinking about the exemptions there appears to have been a disproportionate focus on whether the QP would be available rather than a consideration of the specifics of the actual request.

(h) we do not know from this contemporary evidence what limb of section 36(2) was envisaged or if this detail was considered at the time.

73. We do note that in the course of the investigation of the Appellant's Complaint the IC asked the Council to explain how it had reached the decision on the request. Page F510 and following is the Council's reply of 24 November 2022 which was about 18 months after the QPO was issued. As regards the reasonableness of the QPO for request 2 the Council said to the IC:-

"Initial response applied Section 36 to the details of the meeting and associated documents. We released the Mazars report with redaction of name of officer. At internal review we determined the use of s36 was legitimate, in part, relating to the minutes and reports associated with the meeting as disclosure of these would 'inhibit free and frank provision of advice or exchange of views; or (c) otherwise prejudice the effective conduct of public affairs." We released the agenda and list of the attendees but maintained the S36 exemption for the minutes held. "

and

- *The Qualified Person's opinion was sought on 26 May 2021 and provided on 27 May 2021. Decision was that s36(2) was applicable.*

- *The QP had access to the request and the information being considered.*

- that the QP had access to submissions supporting the recommendation but was provided with no contrary arguments supporting the position that the exemption was not engaged.

74. We reviewed the letter sent to the Appellant in response to this request (C178). We note that, unlike in the QPO itself, the Council then referred specifically to sections 36(2)(b)(i) or (ii) FOIA. We also noted that contrary to the Council's position after review the IC concluded (A8) that the Council had not determined that the inhibition "would occur" only that it "would "likely" occur.

75. Finally we also had regard to the IC's own guidance. While the IC does cite M*alnick* as follows "*we conclude that "reasonable" in section 36(2) means substantively reasonable and not procedurally reasonable"* we also noted this guidance which we consider relevant to request 2:-

"*However, the submission made to support the opinion may be relevant to the ICO's assessment of whether it is reasonable. Therefore, it is in your interest to provide all the evidence and arguments that led to the opinion in order to show that it was reasonable. If the qualified person makes an assertion that appears on the face of it to be an unreasonable opinion, we are likely to find the exemption is not engaged. But if you have supported it by argument and evidence that relevant factors have been taken into account, it may be evident that it is at least a reasonable opinion. Section 36(2) is expressed in broad terms, and for the opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise.* "

76. As a result of the above we concluded that the QPO was not reasonable and we therefore did not go on to consider the PIBT. This part of the Appeal is allowed.

request 3 (11 May 2021) (D201)

Who was the QP and what was the QPO?

77. As regards the withheld information in Minutes from the Corporate Property Board, from the form provided to us we can see that the QPO dated 8 June 2021 was that the inhibition/prejudice envisaged was by section 36(2)(b)(ii) FOIA and was said to "be likely to occur". We are satisfied that Fiona Alderman the Head of Legal & Governance and the Monitoring Officer for the Council was the QP for the Council by section 36(5)(1)(o) FOIA.

Was the QPO Reasonable

78. The QPO was sought on the 26 May 2021 and although the relevant information was not apparently shown to the QP it appears to have been described to her. There is clarity as to which part of section 36(2)(b) is relied upon and that the prejudice /inhibition would be "likely" to occur. The arguments were recorded and were:-

"*The meeting allows officers to discuss and debate proposals relating to the Council's corporate property and includes commercially sensitive information.*"

"*That disclosure of the information would not have the effect contended for, because officers should not feel inhibited by the prospect of disclosure of their discussions*"

79. The QP also said in the QPO:-

"*There must be a safe space to allow free and frank discussions between the organisations to ensure that all relevant policy options can be explored; if such exchanges are to be disclosed, they will have an inhibiting effect on those discussions. I do not accept that officers can be expected to ignore the prospect of disclosure of discussions of this nature.*"

80. There were a number of issues with what we saw in the evidence as regards request 3 and the QPO. These are:-

(a) when answering the IC's questions about this QPO the Council said (F513) in November 2022 that there was no record that the QP was provided with any information supporting a recommendation that the exemption was engaged nor any counter arguments- where as in fact the QPO form boxes 9 and 10 suggests that there were.

(b) when the Council responded to the Appellant after the internal review they added a reference to section 36(2)(c) FOIA (D213) which had not been asserted in the QPO

(c) in the DN the IC said that they concluded that the inhibition would only be likely to occur and not "would occur" - but that is what the QPO asserted

(d) in the DN the IC says "*...It follows that his decision is that the Council was entitled to rely on sections 36(2)(b)(i) and (ii) of FOIA to refuse the request*." but subsection (i) had not been claimed in the QPO.

81. Despite these issues we were satisfied on the basis of *Malnick* that the QPO was reasonable.

The PIBT (request 3)

82. As the exemption is engaged we considered the question of whether the public interest (at the relevant date) was in favour of maintaining the exemption or in favour of disclosure. The parties had set out their positions on this in the Appeal papers and submissions received both before and after the Appeal hearing. We also had the benefit of hearing from the Appellant at the Appeal. We were also able to review the disputed material in its full form in the closed bundle. In summary the arguments put forward as to why the PIBT favoured disclosure, the weight and balance were:-

(a) because it would serve the public interest in terms of there being transparency in various areas of decision making (A9)

(b) to ensure the Council was open "*to enquiry...*" (A21)

(c) because of the alleged large sums of public money involved which the Appellant says (A21) was "*misused and abused*"

(d) because the ICO should (says the Appellant) have recognised that the background was "*far from normal indeed, exceptional and should have enabled a light to shine*"(A23)

(e) to assist with public trust and confidence in the Council (A99)

(f) to enable lessons to be learnt and to be seen to have been learnt (A99)

(g) to ensure question are not swept under the carpet (A99)

(h) to avoid it happening again

83. The arguments put forward as to why the PIBT favoured maintaining the exemption included:-

(a) because significant weight should be placed on the view that "t*hese Board meetings are an opportunity at an early stage for senior officers to have their views heard and openly discuss options regarding a wide range of subjects, before they are put forward into the Council s formal decision-making process."(A9)*

*(b) t*o enable there to be a safe space for officers "*to be heard and to discuss frankly each and every aspect of the relevant subject. This is likely to include what the Council describes as sensitive information.*"

(c) to avoid a "chilling effect" referred to. Although the IC gave little weight in the DN (A9) to this the Council in its submissions at para 18 reiterates this point and refers to *Department of Health and Social Care v IC [2020] UKUT 299 (AAC) (27 October 2020*) which in paragraph 28 said:-

"28. The case law refers to the "chilling effect" on candour among officials that would be caused if internal discussions on the formulation and development of policy were not exempt from publication. In any particular case, the chilling effect need not be proved by evidence (Department of Work and Pensions v Information Commissioner, JS and TC [2015] UKUT 0535 (AAC), para 13). The phrase "chilling effect" helps to express (in shorthand form) the objective of the exemption– which is to avoid inhibitions on imagination and innovation in thinking about public policy issues.

(d) because the public interest in protecting the Council's ability to decide on "*effective policy options without external interference, outweighs the public interest in transparency (which would be served, to some extent, by the information already disclosed to the complainant*."

(e) that the QP considered that this was the right approach *(DWP v IC and Zola [2016] EWCA Civ 758 (see [55])*

84. We agreed with much said in favour of and against disclosure. Having seen the closed material our conclusion was that on balance the PIBT was in favour of maintaining the exemption. This was principally because of what we saw, its context and because although we agreed with the IC on the chilling effect we gave more weight to the fact that the material recorded the interaction between officials. Accordingly as regards request 3 the Appeal was dismissed.

request 4 (12 August 2021) (E226)

Who was the QP, what was the QPO and was it reasonable?

85. As regards the information redacted from minutes of the Capital Boards and the Strategic Property Boards (and the CAB board), from the form provided to us we were satisfied that Fiona Alderman the Head of Legal & Governance and the Monitoring Officer for the Council was the QP for the Council by section 36(5)(1)(o) FOIA. We noted that the QPO was dated 12 October 2021 and was again that the inhibition/prejudice envisaged by section 36(2)(b)(ii) FOIA was said to "be likely to occur". As regards this QPO we had these concerns:-

(a) on the QPO form it states that the QPO was requested on the 26 May 2021 which was before the Appellant 's request 4 was made and the identical date as for the form for request 3.

(b) apart from the date at the foot of the form it is identical to request 3.

(c) the refusal (page E228) and internal review (E420) referred to section 36(2)(c) FOIA but that was not something stated in the QPO

86. We could not conclude with certainty why the Council referred to a different limb of section 36(2) FOIA to that in the QPO. We did conclude the most likely explanation for the date issue was that there was something akin to a generic approach to these FOIA requests and that the error was caused by the use of the QPO for request 3 as a precedent for request 4. Despite these issues, for the reasons set out above relating to request 3, we concluded it was a (*Malnick)* reasonable QPO.

The PIBT

87. To assist with our review of the PIBT the Council were asked to provide all relevant Minutes to be held as closed material (62 pages). We were able to review these in their redacted and unredacted form. We also considered a supplemental note. We concluded that far more had been redacted than needed on any basis to support the exemption claimed. We gained an impression that there had been a blanket approach taken. To illustrate this only (without undermining the rule 14 protection in place) we noted for example:-

(a) in the 10 March 2020 Minutes redacted material included unnamed staff being thanked and arrangements for Members.

(b) in the 12 May 2020 Minutes redacted material included a comment about the need to work with finance on a project.

(c) in the 7 July 2020 Minutes redacted material included the statement about items from the previous meeting being the agenda and that one councillor had no questions.

(d) in the 29 September 2020 Minutes redacted material included that an item was introduced and that a councillor delivered a presentation and that councillors asked to be kept updated.

(e) in the 27 October 2020 Minutes redacted material included an apology for late papers.

(f) in the 12 January 2021 Minutes redacted material included questions being asked by councillors and that details would appear on the Council's website.

(g) in the 16 February 2021 Minutes redacted material included a question about the timing of reports.

(h) in the 20 April 2021 Minutes redacted material included a comment for example that messaging needs to be right.

88. As regards these elements in our view section 36 was not engaged but we went on to consider the PIBT for all elements of the disputed material. We noted paragraph 45 of the relevant part of the ICO's Guidance which states:-

"Note that these exemptions are about the processes that may be inhibited, rather than what is in the information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views. To engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views.'

89. As regards the PIBT arguments in favour of disclosure and maintenance of the exemption are largely the same as for request 3 and are therefore not repeated. In summary also:-

(a) in our view the Council had not done enough to illustrate that it had considered the potential public interest grounds for disclosure when carrying out the consideration of the PIBT and we formed the view that it had not been adequately considered if at all.

(b) we could not see that the Council had considered the timing of the consideration for the PIBT being October 2021 despite Direction 3(b) of the 3 July 2024.

(c) we noted in particular the involvement of elected Members in these relevant meetings which in our view can shift the balance towards disclosure subject to all other circumstances and did so in this Appeal.

(d) the Appellant, told us that these Boards involved Cabinet Members and other Senior Councillors, and the case for disclosure was thus stronger.

(e) we had regard to the significance of the property transactions and for example, the matters raised in the Buss Report and by Mazars.

90. As well as concern about the approach to redactions in any event having considered the content of the disputed material, the attendees, the purpose of each meeting and the supplemental note in our view on balance the public interest favoured disclosure principally because the material involved elected Members of the Council.

Request 4 and section 43

91. Following Directions given (based on the UT in *NHS England)* the Council added section 43(2) as an exemption that it said applied to parts of the disputed material for this request. This had not been their position previously where the section 43 argument was confined to request 1. The Directions specifically required the Council if it wished to add this exemption to provide in its open case its position as regards the PIBT at the relevant date.

92. We considered the submissions of the parties including the open supplementary note from the Council and the closed information. For example at paragraph 5 of its note the Council listed (at a-n) the categories of information in the disputed material which it says engages section 43. This sort of information could be commercial information where its disclosure would be or would be likely to be prejudicial. However, we were not satisfied that when making the list of categories the Council had done enough to identify the information that was already publicly available for example in published Minutes, Reports to Cabinet or held by HM Land Registry or at Companies House. Some of the redacted material itself (by reference to the 62 page bundle) in our view did engage section 43 but some not. By way of example only and for illustration:-

(a) on page B1 (or 34 of 62) while we could see that the 1st redacted part would engage section 43 the corporate information available at companies house did not

(b) on the same page the date of a workshop would not

(c) the 1st line of B2 (35 out of 62) would not but the information under the heading Munro Works would.

(d) on B3 the sentence about covid would not

(e) the redactions on B9 would not

(f) the material under the heading Property Governance Review would not

(g) on B18 the Cloud Garden update would (51 of 62) but the information about the Minutes would not

(h) on 57 of 62 B24 the two bullet points under the heading Cllr Adje seems to have nothing that would engage section 43

(i) none of the redactions on page B25 or B26 contain commercial information

93. Additionally in our view the Council had not complied adequately with the Directions of 12 November 2024 by which they were (emphasis added) to:-

(b) provide to the Tribunal only a version of the Minutes in which the precise words only that are said to be relevant to such exemption are clearly identified together with a closed submission if needed.

94. Although we concluded that section 43 was only engaged for part of the disputed material we considered the PIBT for it all. When originally responding to the request in October 2021 the Council had not relied on this section but what the Tribunal asked for and needed to see was clarity as to what the Council says would have been in its corporate mind in October 2021 supported by evidence. In its submissions at para 7 (page 4) the Council set out its case on the PIBT and section 43 for request 4. In summary they say:-

(a) " *In relation to prejudice-based exemptions there is always an inherent public interest in maintaining the exemption which should be considered when the public interest test is applied*"

(b) "*That public interest will be particularly weighty where, as here, the commercial interests being prejudiced relate to public finances.*"

(c) "*If the Council's commercial position were to be undermined by disclosure of this kind of information, it would affect public services and, by extension, the residents who rely on them.*"

(d) T*he Council is duty-bound to secure value for money in all of its commercial dealings, on behalf of ratepayers and as a matter of good public administration. If the Council's commercial position were to be undermined by disclosure of this kind of information, it would affect public services and, by extension, the residents who rely on them. This is particularly pressing given the financial and economic situation at the time of the response to the Request (and indeed continuing).*

(e) "*Conversely, there is little public interest in releasing the information.*"

(f) "*In view of the information which is made public via alternative channels and at the appropriate time, the marginal increase in accountability and transparency as a result*

of disclosing the withheld information is slight, and amply outweighed by the public interest in avoiding the prejudice identified above."

95. The Appellant's focus on section 43 was in relation to Alex House because he indicated that this was where he perceived the most amount of money was involved. However in our view his section 43 submissions on request 1 were meant by him also to apply to this request 4. In our view we needed to have more from the Council setting out its case on why as at the date of the response the PIBT (in this case) would have been on balance in favour of the maintenance of the exemption. We accept that it might be difficult in 2024 to produce the evidence of or reconstruct a public interest test review that was not considered in 2021. However of the grounds cited only that of "*the financial and economic situation at the time of the response*" appeared to be specifically directed to the question of the PIBT at the time as opposed to generally.

96. In conclusion in our view the Council has sought to over redact this material in reliance on section 43. Even where the exemption was engaged, this was marginal and the Council has not made out its case on the PIBT (based on the relevant date) sufficiently to persuade us of its position. The Council was aware of the importance of considering the PIBT as at the relevant date not least because of because the Directions of 12 November 2024 which said (emphasis added):-

"*the Council shall by 12 noon on 19 November 2024:- (a) provide written submissions to the Tribunal and all parties in which its open case on section 43(2) FOIA and request 4 is set out including as regards the public interest balance test <u>at the relevant date</u>.*"

<u>Aggregation of the PIBT</u>

97. Counsel at para 9 referred to *Department for Business and Trade v IC [2023] EWCA Civ 1378; [2024] 1 WLR 2185* at [56] and said:-

"*Where more than one qualified exemption applies to any information, the Tribunal should consider the combined or aggregated public interest in maintaining the exemptions against the public interest in disclosure, as the public interest "must logically encompass all the prejudicial consequences of the envisaged disclosure of the (provisionally) exempt information that arise in all the circumstances of the case … In principle, all the public interest considerations for and against disclosure should be weighed in the balance together"*

98. We concluded separately for section 36 and 43 that the public interest favours disclosure. Having considered the submissions and weighed all the arguments together in our view the position on the PIBT does not change in a material way to alter our conclusion.

<u>Decision</u>

99. The was no Appeal relating to the Council's reliance in part on section 40(2) FOIA and that some information requested was not held. Apart from that in conclusion:-

request 1: the exemption at section 43(2) FOIA was not engaged because the release of the confidential information would not be prejudicial.

request 2: the QPO was not reasonable

request 3: the QPO was reasonable, the exemption engaged and the PIBT favoured maintaining the exemption

request 4: (a) the QPO was reasonable and the exemption engaged in part however the PIBT favoured disclosure and (b) section 43(2) FOIA was engaged in part but the PIBT favoured disclosure.

100. Accordingly the DN was partly in accordance with the law and partly not and thus the Appeal is allowed in part and dismissed in part.

Signed: Tribunal Judge Heald Dated 6 January 2025