



Neutral citation number: [2023] UKFTT 00999 (GRC)

Case Reference: EA-2023-0123P

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

**Heard in GRC Remote Hearing Rooms, Leicester**

Heard on: 30 October 2023

**Decision given on: 28 November 2023**

**Before**

**TRIBUNAL JUDGE A. MARKS CBE  
TRIBUNAL MEMBER K. GRIMLEY-EVANS  
TRIBUNAL MEMBER N. MATTHEWS**

**Between**

**GARY SALTER**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**Representation:**

The Appellant: represented himself

The Respondent: Christian Davies of Counsel

**Decision:** The appeal is **dismissed**.

## REASONS

### ***Introduction***

1. This is an appeal against the Information Commissioner's decision notice IC-160446-W4Z2 dated 22 December 2022.
2. The Appellant (Mr Salter) had requested from Barnsley Metropolitan Council (the Council) information about the development of a link road as part of a wider housing and infrastructure project in the area. The Council provided some information but redacted certain details.
3. The Commissioner decided that the Council did not have to disclose all the requested information as it had correctly applied Regulation 12(5)(e) of the Environmental Information Regulations 2004 (EIR).
4. The parties agree to the Tribunal making its decision based on all the papers in the case rather than requiring an oral hearing. The Tribunal is satisfied, in accordance with Rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended) (the GRC Rules), that it can properly determine the issues in this case without a hearing.

### ***The request for information, internal review and response***

5. On 3 November 2021, Mr Salter completed the Council's Application for Information form. His request for information was:

*“Please supply me with details and copies of the funding agreement between [the Council] and the South Yorkshire Mayoral Combined Authority, together with details and copies of the back to back developer agreement(s) between [the Council] and the Barnsley West Consortium and/or any other agreements or undertakings, which now exist between [the Council] and the Barnsley West Consortium in relation to the funding of the proposed Site MUI link road, or any other matter which is part of the above-mentioned planning applications.”*

6. The Council responded on 29 November 2021, disclosing redacted versions of (i) the Grant Agreement between Barnsley, Doncaster, Rotherham and Sheffield Combined Authority (SCA) and the Council, and (ii) the Development Agreement between the Council and Strata Sterling Barnsley West Limited (the Developer). These two agreements are together referred to in this decision as '*the Agreements*'.
7. On 26 March 2022, Mr Salter wrote to the Council expressing dissatisfaction with the Council's redactions and requesting an internal review. Mr Salter also argued that there was '*exceptional*' public interest in certain aspects of the development and that these outweighed the legitimate economic interests which the Council claimed.
8. The Council replied on 18 May 2022, stating that it had conducted an internal review. It disclosed further information - in the form of the same Agreements with fewer redactions - having applied EIR 12(5)(e) to withhold the still redacted information.
9. Further information was disclosed to Mr Salter - again in the form of the same Agreements with even fewer redactions - at the latest in February 2023 with the Commissioner's response to Mr Salter's separate FOIA request.

10. The Council explained that, since the request was made, the sensitivity of some information had reduced, hence the reduced redactions.

### ***Complaint to the Commissioner***

11. On 6 March 2023, Mr Salter complained to the Commissioner about the Council's handling of his request.

12. Mr Salter expressed his belief that some of the data (including financial) in the Agreements were now out of date or in need of review and that some key milestones had passed or been overtaken by events.

13. Mr Salter sought an acknowledgment of his concern that the 'exceptional' public interest in knowing the amount, key target dates and benchmarking of the spending of public money and objections to Site MU1 outweighs the public interest in withholding the information. In particular Mr Salter questioned the statement in the Decision Notice that the information sought could undermine the ability of the Council to achieve best value or even threaten the viability of the project.

### ***The Decision Notice***

14. On 22 December 2022, the Commissioner issued Decision Notice IC-160446-W4Z2 (the DN) which in summary concluded that:

- (a) the Council was entitled to rely on EIR 12(5)(e) to redact information from the Agreements provided in response to the request; and
- (b) the balance of the public interest favoured withholding the information rather than disclosing it; however
- (c) the Commissioner would have expected the Council to provide a fuller description of the public interest test which it has carried out in responding to future requests; and
- (d) no further steps were required in this case.

### ***FOIA request made of the Commissioner***

15. On 23 December 2022, the day after receipt of the DN, Mr Salter complained to the Commissioner that he had not been given access to information which the Commissioner clearly had when reaching his decision.

16. On 3 January 2023, the Commissioner replied that Mr Salter could make a FOIA request for a copy of the Council's response if he wished but, given the 20 working days allowed to respond to FOIA requests, Mr Salter would need to submit his appeal to the Tribunal '*as soon as possible... rather than waiting for the outcome of the request...*'.

17. On 5 January 2023, Mr Salter sent a lengthy reply to the Commissioner and included a FOIA request.

18. On 14 January 2023, Mr Salter wrote to the Tribunal, explaining that he had submitted a FOIA request to the Commissioner, the deadline for the response to that request being 6 February 2023. He asked the Tribunal for an extension of '*not less than 14 days*' after that date in which to file his appeal against the DN.

19. On 31 January 2023, an administrative officer of the Tribunal apologised for the delay in replying to Mr Salter's email and said: '*I have attached the Notice of Appeal form (T98) and Guidance (T97). When you are ready to submit your appeal, kindly complete the form and state your reasons on...the form why the appeal has been submitted late... We will then need to forward your notice of appeal and any documents you submit to the Court's Registrar for directions.*'

20. On 6 February 2023, the Commissioner replied to Mr Salter's FOIA request, and provided a copy of the Council's response letter together with redacted copies of the attachments the Council had provided to the Commissioner.

### ***Appeal to the Tribunal***

21. On 6 March 2023, Mr Salter sent a Notice of Appeal to the Tribunal challenging the DN.

22. In his Notice of Appeal, Mr Salter explained that it had taken him time to digest information sent to him by the Commissioner in response to his FOIA request.

23. Mr Salter went on to say that he is interested in:

- (a) whether it is the Council or the Developer who is involved in procurement and land acquisition;
- (b) if control of the site is dependent on public funding;
- (c) whether there are any financial implications if there is any public procurement involved in land or infrastructure works at cost to the public purse;
- (d) whether the Developer's proposals are not viable without public funding which, if so, must be deemed of public interest outweighing commercial confidentiality;
- (e) the Developer's forecast of job creation numbers, timing thereof etc. which have been the subject of much speculation;
- (f) whether the Council will be taking steps to update or replace the documents;
- (g) the nature of the relationship between the Council and the Developer which has never been clear and transparent; and
- (h) not the names of individuals involved or the commercial interests of the Developer but in public scrutiny and governance issues, including openness, transparency, accountability and lack of inclusivity by the Council on Site MU1 issues because of the long background and objections raised and still held by the local community on this proposal to develop the site, and the fact that public money is involved.

24. Mr Salter expressed concern about the length of time it took the Council to respond to his original FOIA request and provide the final versions of the redacted Agreements; the way in which the balance of the public interest was weighed; and delays to the development programme.

### ***The Law***

#### ***Section 1(1) FOIA: general right of access to information held by public authorities***

25. Public authorities' duty to disclose information is set out in section 1(1) FOIA:

*'Any person making a request to a public authority is entitled –*

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if this is the case, to have that information communicated to him.’

**EIR 2: definition of ‘environmental information’**

26. EIR 2(1) defines ‘environmental information’ as including information on ‘*the state of the elements of the environment such as ...soil, land, landscape...and factors... such as energy, noise... affecting or likely to affect the elements of the environment... ’* and ‘*measures...such as activities affecting or likely to affect the [above] elements and factors... ’*

**EIR 5: access to environmental information held by public authorities**

27. EIR 5(1) sets out a specific duty by public authorities to make environmental information available on request and EIR 5(2) provides this shall be ‘*as soon as possible and no later than 20 working days after...receipt of the request ’*.

**EIR 12: exceptions to the duty to disclose environmental information**

28. There are exceptions to public authorities’ duty to make environmental information available. Pertinent to this appeal is EIR 12, the relevant parts of which provide:

*‘12 (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –*

*(a) an exception to disclosure applies under paragraphs (4) or (5); and*

*(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

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

...

*(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –*

...

*(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law;... ’*

29. In assessing ‘*commercial confidentiality*’ under EIR 12(5)(e), the Tribunal in *Bristol City Council v. Information Commissioner and Portland and Brunswick Squares Association (EA/2010/0012)*, said that the exception can be broken down into four parts:

- (1) The information is commercial or industrial in nature;
- (2) Confidentiality is provided by law;
- (3) The confidentiality is protecting a legitimate economic interest; and
- (4) The confidentiality would be adversely affected by disclosure.

30. This decision is not binding on us but is persuasive and has been consistently applied by this Tribunal for many years.

31. Under EIR 12(1)(b) a public authority is permitted to withhold the requested information under the exceptions in EIR 12(4) and 12(5) **only** if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

### ***The role of the Tribunal***

32. The powers of the Tribunal in determining appeals against the Commissioner's decisions for the purposes of EIR are set out in FOIA, as follows:

#### ***s.57 Appeal against notices...***

*'(a) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice...*

#### ***s.58 Determination of appeals***

*(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.'*

### ***Evidence***

33. Before the hearing, the parties had submitted written evidence. This comprised an Open Bundle of 336 pages (including an Index). The panel also had access to a Closed Bundle.

### ***Submissions***

#### ***Submissions on behalf of the Commissioner dated 19 June 2023***

34. In summary, the Commissioner invites the Tribunal to dismiss the appeal for the following reasons:

#### **A. Time Limit**

<sup>(a)</sup> The DN in this case was issued on 22 December 2022. The deadline for filing the Notice of Appeal was 28 days later, namely 19 January 2023.

<sup>(b)</sup> However, Mr Salter did not file his Notice of Appeal until 6 March 2023, more than 10 weeks after the DN and more than six weeks after the deadline.

- (c) Though Mr Salter suggests he was granted an extension by the Tribunal on 31 January 2023 in fact he was merely informed of the possibility of applying for an extension.
- (d) This appeal can therefore only proceed if the Tribunal grants an extension under GRC Rule 5(3)(a).
- (e) The Commissioner submits that none of Mr Salter’s explanations in the Notice of Appeal amount to a good reason for the delay in this case because:
  - (i) he clearly recognised the 28 day time limit for appealing;
  - (ii) he has given no real explanation why he was able to correspond with the Tribunal and the Commissioner before the deadline but not lodge an appeal in accordance with the GRC Rules;
  - (iii) Mr Salter’s submission of a separate FOIA request to the Commissioner to which he was awaiting a response does not justify the delay because the DN itself clearly set out the Commissioner’s reasoning.
  - (iv) Mr Salter was expressly told by the Commissioner on 3 January 2023 that he should not await the outcome of his FOIA request before filing his appeal.
  - (v) Mr Salter delayed a further month after receiving the Commissioner’s response to his FOIA request before appealing.
  - (vi) the fact the DN was issued shortly before Christmas is not a good reason for delaying filing an appeal – certainly not until March the following year.
  - (vii) the personal issues referred to in the Notice of Appeal are not specified sufficiently for the Tribunal to judge whether they provide a good reason for the delay.
- (f) Overall, the Commissioner submits that the Tribunal should refuse Mr Salter’s application for an extension of time and dismiss the appeal for being out of time.

## **B. The substantive appeal**

### **(1) Does EIR or FOIA apply?**

- (a) The agreements requested fall with limb (c) of the definition of ‘*environmental information*’ in EIR 2.
- (b) It is apparently not disputed that the Council correctly considered the information request under the EIR rather than FOIA.

### **(2) Is Regulation 12(5)(e) engaged?**

- (a) The focus of the appeal appears to be whether the public interest in maintaining the ‘*commercial confidentiality*’ exception in EIR 12(5)(e) is outweighed by the public interest in disclosing the information.
- (b) It is unclear whether Mr Salter disputes that EIR 12(5)(e) is engaged at all and, if so, which part(s) of the four stage test in the *Bristol City* case (set out in paragraph 29 above) are claimed not to be satisfied.
- (c) The Commissioner submits that all four parts of the Bristol City test are satisfied because:

- (i) the redacted information was plainly '*commercial*' in nature. The Agreements are for the funding and delivering of a major development project involving the services of private sector organisations operating in a competitive environment. The redacted information includes funding arrangements and payment terms, delivery dates and details of land to be acquired;
- (ii) the information was subject to confidentiality provided by law because the Development Agreement contains express confidentiality provisions. These provisions acknowledge that the terms of the agreement are '*commercially sensitive*', that disclosure would prejudice the parties' commercial interests and that they '*shall be kept confidential*';
- (iii) the confidentiality of the redacted information is provided to protect the parties' legitimate economic interests including: the risk of prejudice to the Council's ongoing procurement exercises, land acquisitions and the ability to secure private funding (all legitimate economic interests); and the ability of the Council and the Developer to secure services at best value; and
- (iv) in light of the above, the confidentiality of the redacted information would be adversely affected if the Council were required to disclose it.

**(3) Where does the balance of the public interest lie?**

- (a) In the DN, the Commissioner recognised the public interest in disclosing the redacted information including: the general presumption in favour of disclosure; the specific public interest in the disclosure of information relating to a controversial development that will have a substantial impact on the environment; and the specific public interest in the Council being transparent about the costs involved in a project requiring a substantial amount of public money.
- (b) However, the Commissioner also recognised the factors in favour of maintaining the exception including: the development had already been approved by the Council following public consultation; the redacted information relates to implementation of the development, not the wider question whether it should go ahead at all; the Council had disclosed the majority of the Agreements and redacted only information it considered would affect ongoing negotiations, its ability to obtain best value or the Developer's ability to obtain private funding for the development; the redacted information related to uncompleted work where disclosure would undermine the parties' ability to do the work at best value or at all.
- (c) On the basis of the evidence and arguments by both parties, the Commissioner concluded that the balance of the public interest weighed in favour of the exception being maintained rather than the information being disclosed. The Commissioner maintains that stance.
- (d) None of Mr Salter's arguments disclose any error in the Commissioner's analysis of the public interest test.
- (e) Mr Salter seems to suggest that the mere fact public funding is being used for the development means there is '*exceptional*' public interest in disclosure of the redacted information. However, EIR specifically apply to public authorities and very often commercial information held by public authorities relates to the expenditure of public funds. Yet the legislation specifically provides an exception for commercially



confidential information held by public authorities. The involvement of public funds is therefore insufficient to establish an overriding public interest in disclosure.

(f) In this case, as the DN sets out, there is a strong public interest in protecting the commercially sensitive information of public authorities where necessary to enable them to use public funds efficiently and procure projects and services at best value to the taxpayer.

***Submissions by Mr Salter dated 1 July 2023***

35. Mr Salter says in his lengthy point by point response to the Commissioner's submissions, in brief summary:

- (a) He is a private individual working without access to full-time legal and administrative staffing resources which the Commissioner has. It is therefore an onerous task for him to devote the time and energy to this process.
- (b) It is ironic that the Commissioner had to seek an extension of time to prepare its response to his appeal yet is critical of his own application for extension of time to appeal.
- (c) There are questions whether the intentions of the Development Agreement were ever in the public domain at the time of the initial consultation on the draft Local plan, the Local Plan Inquiry or the Council's adoption of the Local Plan.
- (d) The original FOIA request was also to test the non-financial information in the Development Agreement such as the delivery timeline and the forecast number of jobs to be created compared to the forecasts on which the development was included in the Local Plan.
- (e) Whatever information was not disclosed will now be out-of-date because of the passage of time. The information received was lengthy and complex; much of the information supplied was duplicated.
- (f) The Commissioner has not accurately summarised the reasons for Mr Salter's delay in submitting his Notice of Appeal: he was at pains to ensure that he followed the GRC Rules by entering into detailed email correspondence with the GRC, including seeking an extension of time.
- (g) There is a clear public interest in view of the long history of the Council and Developer's promotion of the site since 2013, resulting in its later inclusion as Site MU1 in the Council's adopted Local Plan in 2019.
- (h) Further, there are development constraints on this former Green Belt land which, together with the impact on the existing local community and the objections submitted throughout the Local Plan consultation and Public Inquiry, which amount to a clear public interest which should be tested more vigorously.
- (i) The Developer previously stated that it had control of the site when the Council included it in the adopted Local Plan. However, it appears that this was not in fact the case.
- (j) The Developer's forecast job creation numbers, and timing thereof are unclear.
- (k) He has no interest in the Developer's borrowing arrangements but use of the phrase '*to secure services at best value*' is interesting because of the Council's long involvement with the Developer and the fact that the site, which is not in Council

ownership, has not been the subject of open competition against which to judge this claim.

- (b) In other cases where there has been a public interest, potentially arguable challenges have been abandoned because the legislation seems determined to minimise scrutiny.
- (m) There have been delays to the development programme.
- (n) He asks the Tribunal to allow the appeal in accordance with the basic principles of good governance.

## ***Discussion***

### ***Time limit***

36. The panel first considered whether Mr Salter's application for an extension of time should be refused and his appeal ruled out of time.

37. The panel decided that, in all the circumstances, it is in the interests of justice to exercise its power under GRC Rule 5(3) to grant the necessary extension of time for Mr Salter to file his appeal. The panel's reasons are:

- (a) While an appeal by a legally represented appellant in similar circumstances might well be ruled out of time, in this case Mr Salter has been unrepresented throughout.
- (b) Though Mr Salter was clearly aware of the 28-day time limit for filing his appeal, he could not reasonably be expected to have been aware of caselaw about the Tribunals' general approach to compliance with such rules.
- (c) Mr Salter communicated with both the Commissioner and the Tribunal from an early stage, making clear his reasons for likely missing the time limit and asking for an extension. In the panel's view, he might reasonably have concluded that he had done what was required to obtain such an extension as he was given no indication that any further steps were required.
- (d) Mr Salter's impression that there was no particular urgency in appealing the DN might well have been reinforced by the relatively long duration of the Commissioner's investigation (almost eight months) before issuing the DN.
- (e) Crucially, when Mr Salter approached the Tribunal:
  - (i) the Tribunal's email response was dated nearly two weeks **after** the appeal deadline yet did not say that Mr Salter's entitlement to appeal was already time expired. This might reasonably have conveyed the impression to Mr Salter that the deadline was indicative rather than necessarily strictly enforced.
  - (ii) the Tribunal said that Mr Salter should submit his appeal when he was '*ready*' and give reasons on '*the notice of appeal form why the appeal has been submitted late*'. Mr Salter duly did so.
  - (iii) that the notice of appeal would be sent to the Registrar for directions fell far short of suggesting that the time limit was liable to strict enforcement or that any other steps were required formally to apply for an extension; nor indicate the limited length of any extension likely to be granted; nor list the various considerations which the Tribunal would take into account in deciding whether to grant an extension.

6 Finally, the panel notes that refusal to grant an extension of time would terminate Mr Salter's appeal. Were the extension to be granted, on the other hand, it has not been suggested nor does the panel perceive that there is any material prejudice to the Commissioner or the interests of justice by the appeal having been filed some 10 weeks after the DN rather than four.

### ***Possible unfairness of information being withheld from Mr Salter***

38. Having granted an extension of time, the panel went on to consider the possible unfairness of withholding certain information from Mr Salter.

39. Mr Salter has been provided with only redacted versions of the Agreements: these redactions were permitted by the Tribunal pursuant to GRC Rule 14. The redactions effectively withhold certain information from Mr Salter and the public. For the purposes of the hearing, however, the panel was provided with a Closed Bundle containing the unredacted pages of the Agreements.

40. The panel takes account of the Tribunal's Practice Note on Closed Material. This explains that, where disclosure of the disputed information would defeat the object of the exercise, the law permits the Tribunal to deviate from the normal rule about all material seen by the Tribunal being available to all parties. However, such deviation is permissible only so far as is necessary to ensure that the purpose of the proceedings is not defeated.

41. The panel accepts that there is inevitably *some* prejudice in material being withheld from a party requesting it, but considers that this prejudice is mitigated by:

(a) the Tribunal's expertise, and exercise of an investigatory rather than adversarial function;

(b) the Commissioner being an independent, expert regulator who does not take sides. On the contrary, the Commissioner's role is to point out the strengths and weaknesses of both parties' cases in assessing the correct application of the law and regulations;

(c) informing parties excluded from 'closed' information as much as possible with maximum possible candour in the written reasoned decision; and

(d) in this case, virtually the whole of the requested Agreements – between them comprising around 97 pages (in three successively decreasingly redacted forms) – has been disclosed. The final and least redacted versions of the Agreements redact individuals' names and signatures (personal data which Mr Salter says he does not seek); certain financial amounts; certain Registered Title numbers relating to parts of the site; and one formula for financial claw-back of SCA funding. Together, the redacted information consists of considerably less than one page of text, less than 1% of the Agreements.

42. Having considered all these matters, the panel is satisfied that the withholding of the requested information by means of redaction was and remains necessary to ensure the purpose of the proceedings is not defeated. Moreover, the prejudice to Mr Salter's case – mitigated as described above – is justified in the interests of justice overall.

### ***The facts***

45. The panel went on to consider the relevant facts of this case. The panel's findings of fact are emboldened below. Where a fact is disputed, the reasons for the panel's findings are set out in unemboldened text:

**(a) The Agreements provided in response to Mr Salter’s original request comprise the information sought, albeit with some redactions.**

(i) Mr Salter does not suggest that there are any other agreements though he suggests that the Agreements may need to be ‘*reviewed*’ as some key milestones have passed or been overtaken by events, and certain data will now be out of date. Mr Salter acknowledged that he would likely have to submit a further FOIA request to obtain this information.

**(b) Since making his original request, Mr Salter has been provided with three versions of the redacted Agreements, the most recent (and most limited) redactions being in the version dated 3 November 2022 (pre-dating the DN). This version was supplied to Mr Salter by the latest on 6 February 2023 in response to his FOIA request of the Commissioner dated 5 January 2023.**

**(c) The in-principle decision to carry out the development and related infrastructure works was made by the Council in 2019, following public consultation. The Agreements, both dated 31 March 2021, partly implement that decision.**

### ***Error of law or wrongful exercise of discretion?***

#### ***Error of law?***

57. Having made the above findings of fact, the remaining issues for the panel in this case are (a) whether the Commissioner made any error of law in the DN and (b) whether the Commissioner wrongly exercised his discretion.

58. In the panel’s view, the first issue of law is that EIR rather than FOIA is the applicable regime for the request. Indeed, this issue is not disputed. Given the definition of ‘*environmental information*’ in EIR 2(1), an extract of which is set out in paragraph 26 above, the panel is satisfied that the information sought by the request falls within that definition. The panel is satisfied the Commissioner made no error of law in this respect.

59. The second issue of law is whether the exception in EIR 12(5)(e) is engaged in this case. Again, this issue appears not to be disputed. The panel notes that Mr Salter in neither his Grounds of Appeal nor his subsequent submissions gives any reasons for challenging the engagement of EIR 12(5)(e). On the contrary he says in his submissions that he is ‘*conversant with EIR 12 and as such I was not surprised by the decision in the DN*’.

60. The Commissioner considered EIR 12(5)(e) and in paragraphs 11-18 of the DN applied the four-stage test set out in paragraph 29 above. He concluded that the four-part test was satisfied and that EIR 12(5)(e) was engaged. The panel agrees with the Commissioner’s analysis and concludes that the Commissioner made no error of law in concluding that EIR 12(5)(e) is engaged.

61. However, as regards the redactions made to the Agreements in reliance on EIR 12(5)(e):

(a) Mr Salter contests these redactions;

(b) Mr Salter wrote to the Council in January 2022 saying that the Agreements were ‘*heavily redacted*’. Since then, however, Mr Salter has been provided with two further versions of the Agreements, the most recent version of which were redacted in November 2022. The latter redactions are, in the panel’s view, for the reasons given in

paragraph 41(d) above, now very limited in the context of those documents overall and the evidential bundle as a whole.

(c) The panel acknowledges that EIR 5(1) imposes a duty to disclose and that EIR 12(2) provides a presumption in favour of disclosure. Further, EIR unlike FOIA imposes no specific limit on the amount which a public authority must do to respond to a request. Accordingly public authorities may be required to accept a greater burden to provide environmental information under EIR than other information under FOIA.

(d) However, the panel acknowledges that this exception under EIR, once engaged, is nevertheless subject to the public interest test in EIR 12(1)(b). Mr Salter argues that the public interest in disclosing the withheld information outweighs the public interest in continuing to withhold it. The panel's judgment on the balance of the public interest is set out below.

### ***Wrongful exercise of discretion in balancing the public interest?***

62. The panel acknowledges that there is a public interest in disclosing the environmental activities of local authorities, including the development of highways and other infrastructure works. We also recognise that there is a public interest in understanding how public authorities make their decisions as well as the terms on which public authorities agree to procure others to carry out works and obtain public funding. We consider that this can contribute to improved trust in public authorities and may also enhance public understanding of environmental matters.

63. The Commissioner's own guidance acknowledges that respect for confidentiality in favour of public authorities themselves is likely to carry little weight because they should expect such information may need to be disclosed under EIR, even if they would prefer to keep it confidential.

64. On the other hand, the panel notes that the **principle** of the proposed development in this case – although controversial and attracting objections from the local community – had already been approved by cabinet members of the Council following public consultation. The Agreements – and the redacted information – relate to the detailed implementation of the development, not whether it should go ahead at all.

65. The Council when negotiating the development of land and infrastructure works has a duty to achieve best value. To ensure *'best value'* in this case, the Council obtained grant funding from SCA and negotiated the terms on which it was prepared to procure the services of the Developer.

66. The Council has explained that - at the time of Mr Salter's request – the procurement of external contractors to deliver the works had not been completed; third-party land acquisition deals were not finalised; and the Developer had not secured the necessary external funding. The Council also explained that the redactions comprised information that could potentially prejudice any procurement exercises; land title numbers and information in relation to their acquisition which might enable other developers to outbid on the land; and terms that could prejudice the Developer's ability to access borrowing to complete the development.

67. To the extent that Mr Salter suggests that the prior public consultation was based on the Developer already controlling - in the sense of owning - the land, we have seen no evidence to support this. The Agreements themselves refer to works *'on land owned or controlled by the developer'* (emphasis added) and the Developer having *'the benefit of a number of option agreements to acquire the site'*. Were the precise parts of the site and the prices at which the Developer intended to acquire such land to become public, we consider that a third party could seek to acquire that land, thus jeopardising the site assembly as well as the planned financing and timing of the proposed works. Should that occur, the Grant

Agreement described in paragraph 6(i) provides for clawback of the public money grant, thus undermining the viability of the whole scheme.

68. Further, to the extent that Mr Salter suggests that there is an ‘*exceptional*’ public interest involved in this case because of the expenditure of public money, we accept the Commissioner’s submission (summarised at paragraph 34B(3)(d) above) that the mere involvement of public funding is insufficient to create an overriding public interest in disclosure under EIR.

69. The panel also considers that breaching the confidence of the Developer under the Development Agreement in this case would have a long-term detrimental impact on the Council. This is because any obligation to disclose even the most sensitive commercial terms of a contract - despite express confidentiality and FOIA provisions such as those in the Development Agreement - would hinder the Council’s ability to negotiate with commercial entities in future. This is because the Council’s credibility would be undermined in terms of its ability to keep certain details of such deals confidential. This, in turn, would directly and adversely affect the Council’s ability to reduce the financial burden on its taxpayers by entering into commercial arrangements such as those for delivering future infrastructure projects. This would not be in the public interest.

70. We have considered carefully the weight to attribute to Mr Salter’s statements about the possible nature of the redacted information, including the amount, key target dates and benchmarking of the spending of public money. Having seen and been able to judge for ourselves the redacted information, the panel concludes that disclosing that redacted information would have only very limited if any bearing on these matters.

71. We also considered whether other points raised by Mr Salter (summarised in paragraphs 23 and 35 above) add weight to what he says is the ‘*exceptional*’ public interest in disclosing further information. For the purposes of this Tribunal’s remit, we conclude that issues such as continuing local objections to the development, the accuracy of material provided as part of the public consultation and reported delay to the development programme cannot and do not influence the balance of the public interest in this case. This is again because, having seen the unredacted information, the panel concludes that disclosing that information would have only very limited if any bearing on these matters.

72. Overall, it appears to us that Mr Salter’s public interest arguments relate to the Council’s earlier decision to carry out the development, rather than the disclosure of confidential commercial information in the Agreements. Having seen the redacted information, the panel is not persuaded that any of it would have a bearing on the various questions to which Mr Salter seeks answers, including whether the original public consultation was flawed.

73. Having carefully considered the public interest test for itself, the panel is not satisfied that the Commissioner should have exercised his discretion differently. We agree with the Commissioner’s view that in this case, on balance the public interest favours maintaining the confidentiality of commercial information of the Developer and the Council which would be adversely affected by disclosure.

74. We therefore find that the Commissioner correctly decided that the public interest favours withholding the information sought and maintaining the exception in EIR 12(5)(e).

### ***Closing observations***

75. The panel feels it fair to record that the Council made some errors in its handling of Mr Salter’s request - for example initially responding under FOIA rather than EIR. Further, the Tribunal would have expected the Council to have provided direct rather than reported evidence from the Developer of its reasons for claiming confidentiality of the redacted commercial information. Finally, as the DN points out, the Council’s description of the public interest test it carried out was rather less full than would be

expected. However, there was ample material in the hearing bundles for the panel to conduct its own exercise of balancing the respective public interests to reach its conclusions.

76. Overall, the panel agrees with the Commissioner's DN that the Council otherwise complied with its duties under FOIA and EIR so no further steps need be taken.

### ***Conclusions***

77. For the reasons set out above, the panel finds that the Commissioner's DN was neither wrong in law nor did he wrongly exercise his discretion. Accordingly, the DN is confirmed.

78. The appeal is dismissed.

Signed:

Date: 27 November 2023

A handwritten signature in black ink that reads "Alexandra Marks". The signature is written in a cursive, slightly slanted style.

Alexandra Marks CBE  
(sitting as a First-tier Tribunal Judge)