Tribunals Service
Information Tribunal

Appeal Number: EA/2006/0014

FREEDOM OF INFORMATION ACT 2000

Heard at The Court House, Derry, N.Ireland
On 17 and 18 October 2006

Decision Promulgated

11th December 2006

Before

Chris Ryan – Deputy Chairman
Jenni Thomson – Lay Member
Steve Shaw – Lay Member

Between

DERRY CITY COUNCIL

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Mr Jason Coppel
For the Respondent: Mr Timothy Pitt-Payne

DECISION

We have decided to dismiss the Appeal and uphold the Decision Notice dated 21 February 2006. The Ryanair Financial Information (as defined below) should be provided to the Complainant within 30 days from the date of this Decision.

We direct that the Confidential Schedule to our Reasons for Decision should remain confidential until the expiration of the time limit for making an appeal from our decision or, if an appeal is made, the disposal of that appeal.

Reasons for Decision

Background to the Appeal

1 Derry City Council ("the Council") is the owner and operator of Derry City Airport ("the Airport")

2 On 25 March 1999 Ryanair sent a fax to the Council setting out a number of terms for the operation of a scheduled service between London and Derry. Although the fax carries the heading "heads of agreement letter" it appears that no formal agreement was drawn up and that the parties have conducted their business since 1999 on the basis of the terms set out in the fax. The fax was marked "private and confidential" and, having recorded the Airport's commitment to complete a runway extension by 1 June 1999, contained the following introduction:

> " …we are now pleased to confirm the "heads of agreement" upon which Ryanair will operate on the London - Derry route, subject to the operational suitability of the airport …".

It then describes the proposed flight schedule. This is followed by three paragraphs under the following headings -- "Airport Charges", "Ground Handling Charges" and "Marketing Support". The fax then sets out, under a heading "Operational Requirements", the requirement that an extension to the runway be completed by 1 June 1999 (the "Infrastructure Investment Commitment") and a commitment by the Council to cover any additional costs incurred by Ryanair should it be necessary to divert flights to Aldergrove Airport as a result of further infrastructure work not having been completed in time (the "Infrastructure Guarantee"). Finally, the fax states

> "Disclosure - Until announced publicly by Ryanair, the service must remain private and confidential, and must not be disclosed under any circumstances."

We will refer to the fax in this decision as "the Ryanair Agreement"

3 On 5 January 2005 an employee of the Belfast Telegraph, a Mr Brian Hutton, ("the Complainant") wrote to the Council requesting details under section 1 of the Freedom of Information Act 2000 ("the Act") about its "agreement with Ryanair, regarding the use of Derry City Airport" and, more specifically "how much Ryanair pay Derry City Council for the use of the facility".

4 The Council refused to disclose the information requested and the Complainant made a complaint to the Information Commissioner under section 50 of the Act on 7 March 2005.

5 In the course of the Information Commissioner's investigation of the complaint the Council provided the Complainant with a copy of the fax but with the detail under the headings "Airport Charges", "Ground handling charges" and "Marketing Support" redacted. (We will refer to the redacted information as "the Ryanair Financial Information"). The Complainant was not satisfied with this limited disclosure and persisted with his complaint.

The Decision Notice

6 On 21 February 2006 the Information Commissioner issued a Decision Notice under which he upheld the Complainant's complaint and ordered the Council to disclose the information sought in the original request.

7 The Decision Notice recorded that the Council had refused to disclose the requested information because it contended that it was exempt information under sections 29, 41 and 43 of the Act and that, in respect of sections 29 and 43, the public interest in maintaining the exemption outweighed the public interest in disclosure. The Council continued to rely on those statutory provisions in respect of the Ryanair Financial Information after the rest of the Ryanair Agreement had been released to the Complainant during the course of the Information Commissioner's investigation. However, the Information Commissioner rejected the Council's arguments and we will mention his reasons for doing so in the course of dealing with the issues that arise in this Appeal.

8 On 16 March 2006 the Council issued a Notice of Appeal to this Tribunal. Neither the Complainant nor Ryanair has been joined as a party to the Appeal. The Appeal was heard on 17 and 18 October 2006 in The Court House, Derry. The Council was represented by Mr Jason Coppel and the Information Commissioner by Mr Timothy Pitt-Payne. Witness statements had been submitted by Mr Anthony McGurk the Town Clerk/Chief Executive of the Council and Mr Seamus Devine the manager of the Airport. The hearing took a full two days with both Mr McGurk and Mr Devine being cross-examined. Because the time available to the advocates towards the end of the hearing was limited they were both invited to lodge written submissions on any points which they felt they had not had time to do justice to during the hearing and both accepted the invitation. Because the appeal turned on the question of whether the redacted information should be disclosed it was necessary for certain parts of the cross-examination and oral submissions to take place in private session. We are grateful to the two advocates for their assistance in the management of this process and for their clear and detailed submissions (both oral and written) on the issues at stake.

9 The issue of confidentiality has also led us to summarise in a separate Confidential Schedule some of the material on which we have relied in reaching our decision on this Appeal. We have directed that the contents of that schedule are to remain confidential until either an appeal from this decision has been disposed of (in which event our direction on the point may be replaced by an appropriate direction by the High Court) or the time for bringing an appeal shall have expired without an appeal having been filed.

The Relevant Sections of the Act in outline.

10 Section 1 of the Act creates a general right of access to information held by a public authority. That right is qualified by a number of exemptions set out in part II of the Act. In its Appeal the Council continued to rely upon the exemptions provided for in sections 29, 41 and 43. For convenience we will deal with these provisions in a different order in this decision and will start by setting out the main terms of each one.

11 Section 43. The relevant sub-section is section 43 (2). This provides that information is exempt if its disclosure *"would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)".*

12 Section 29. The section reads:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(a) *the economic interests of the United Kingdom or of any part of the United Kingdom..."*

.

13 Section 2. Sections 43 and 29 are both categorised under section 2 as creating qualified exemptions and section 2(2) states that, in relation to any qualified exemption, the general right of access to the relevant information:

"...does not apply if or to the extent that –

(a)...

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

We will refer to this provision as "the public interest test".

14 Section 41. Section 41(1) provides:

"Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) *the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

In this case the exemption is categorised in section 2(3)(g) of the Act as an absolute exemption. The public interest test provided for under section 2(2)(b) does not therefore apply. However, it is common ground between the parties that there is a public interest defence to an action for breach of confidence under common law and equity. The scope of that defence, (and in particular whether it requires the same test to be applied as under section 2(2)(b), or a different one), is not agreed.

15 In the course of discussing with both the advocates and the witnesses the balancing exercise that these provisions require us to undertake, one or two wider issues crept into the debate. Given that part of the argument we heard concerned whether or not the disclosure of the information in question was or was not necessary to enable a fully informed public debate to take place it was perhaps inevitable that the issues which that debate might cover were commented on. However, we are not concerned with the detail of the debate which may result if we order disclosure of the Ryanair Financial Information. Still less are we concerned with any question as to what issues ought to be covered by it. The only legitimate concern (on this point) is the balance to be struck between the public interest in disclosing information that may illuminate that debate, on the one hand, and the public interest in maintaining the relevant exemption, on the other.

16 We will deal with each of the exemptions in the order in which we have set them out above.

Section 43 – Commercial Interest

17 In considering this provision we have first to consider the relevant commercial interests of each of the Council and Ryanair. If we are satisfied that there is a commercial interest we then have to consider if disclosure of the Ryanair Financial Information would be likely to prejudice that commercial interest. If we find in favour of the Council on those questions then we have to consider the public interest test. We stress that in making these judgments we are not making any general statement as to whether agreements between publicly owned airports and airlines require to be disclosed. Still less are we expressing any general view as to what public authorities should disclose about commercial detail from contracts into which they enter. We are simply attempting to apply the law contained in the Act, as we see it, to the

particular facts of the 1999 Ryanair Agreement as at the date when the Complainant's request for information was rejected in February 2005.

18 For these purposes it is necessary to set out some facts about the history of the Airport, its finances and the scrutiny to which the Ryanair Agreement, (and agreements between publicly owned airports and low cost airlines generally), have been exposed.

19 History of the Airport.

(a) The Airport was originally a military base and was then used for very limited commercial services up until 1989. During the period 1989 - 1994 a total of £10.5 million was spent upgrading all of the facilities at the airport including runways, taxiways, access roads, navigation equipment, runway lighting and a new purpose-built terminal and a fire station. The cost of these works was provided, as to 75% from EU grant aid and as to the balance from the Council. Although, following the redevelopment, there was some expansion in services operated from the Airport, increasing competition in the second half of the 1990s caused a reduction in its business and by 1998 it was experiencing financial difficulties.

(b) Its management evidently considered that its best hope for the future lay in seeking to attract low cost operators, such as Ryanair and easyJet, as well as tour operators. Following successful negotiations with Ryanair, which led to the Ryanair Agreement, a twice daily service to London, Stansted started in July 1999. Before that date annual passenger numbers at the airport were approximately 54,000. They rose to 106, 600 in 1999, 172, 500 in 2000 (the first full year of operation by Ryanair) and by the time that the Complainant made his request for the Ryanair Financial Information in January 2005 they amounted to approximately 239, 000 each year. Of that figure Ryanair accounted for 143, 380, or 60% of the total.

(c) It was a condition of Ryanair's agreement to start operating from the Airport that improvement works should be carried out at the ends of the runway in order to accommodate its aircraft, which were larger than those previously using the Airport. These works were costed at approximately £4 million, with the Dublin and Westminster governments together contributing 75% and the Council providing the balance of 25%. A planning dispute has delayed the work, but the airport has continued to operate under a dispensation granted by the Civil Aviation Authority.

20 The Airport's finances.

(a) Despite the very substantial increase in passenger numbers at the Airport it has never made a profit. We were told that a regional airport would need annual passenger

numbers in excess of one million before it could be expected to break even and Mr Devine suggested in the course of giving evidence that the break even figure may be increasing. The airport has therefore required financial support from the Council throughout its history. In its 2003/2004 financial year its operating costs exceeded its income by £1.1 million, rising to £4.5 million when interest payments and depreciation have been taken into account. In the 2004/2005 financial year the equivalent figures were £1 million and £4.4 million respectively.

(b) The Airport is directly owned by the Council and there is no dispute that the commercial interests of the business of the Airport coincide with those of the Council. The Council's view is that the financial support which it gives the Airport, both by way of grants for capital projects and an annual subvention in respect of operating losses, is justified by the direct and indirect financial benefits which the Airport brings for both the Council and the region in which the City of Derry is located. It is, nevertheless, the view of both Mr Devine and Mr McGurk that efforts should continue to be made to attract more business to the Airport, on the best financial terms available, and to develop profitable business activities there. These should include both new airline services and other business activity, dependent on, and benefiting from, those services, such as retail services within the Airport and a proposed business Park adjacent to it.

21 Public scrutiny by the local government auditor.

(a) The Council's finances, including its investment in the Airport, are subject to scrutiny by the local government auditor. No evidence was placed before us to indicate that he had raised any questions about the financial wisdom of the Council continuing to provide assistance to the Airport in the face of its continuing looses. However, there was evidence that in about 2000 the local government auditor raised with the Council his concerns that the terms of the Ryanair Agreement might have an impact on EU Competition Law and State aid. The Council took legal advice from Mr. John Swift QC on the laws governing anti-competitive conduct when engaged in by a public body, including one controlling a commercial enterprise. A copy of two opinions given by Mr Swift were made available to us as part of an agreed bundle of documents. It was agreed that those parts of the opinions that summarised the Ryanair Financial Information, should not be disclosed, but that the opinions as a whole were to be treated as non - confidential documents. The advice covered several of the provisions of the Ryanair Agreement summarised in paragraph 2 above, namely, the Infrastructure Investment Commitment and the Infrastructure Guarantee (details of which have been

disclosed) as well as the, currently undisclosed, provisions covered by the headings "Airport Charges", "Ground Handling charges" and "Marketing Support". It concluded that the Infrastructure Investment Commitment, although made to one airline, would lead to improved facilities that would be available to any airline operating from the Airport. It therefore fell outside the categories of assistance or intervention that are treated as State aid requiring pre-notification to the European Commission under Article 87 of the EC Treaty. As to the other provisions of the Ryanair agreement, Mr Swift advised that the test to be applied was the "market economy investor principle" (which others in this appeal have referred to as the "private investor principle"), by which he meant that an agreement will not constitute State aid requiring notification to the Commission if a private investor would have entered into exactly the same arrangement. Accordingly, he advised that the Council should ask itself whether it would have given the Infrastructure Guarantee and entered into the arrangements in respect of Airport Charges, Ground Handling Charges and Marketing Support had it been a private sector body operating under normal commercial conditions. He explained that in that respect it was not necessary to show that the airport could reasonably have expected the assistance granted to have resulted in increased profits in the short run – it would be enough for the assistance to have formed part of a sensible longer-term commercial strategy. Applying that test Mr Swift concluded that it was "quite likely" that the provisions for Airport Charges and Ground Handling Charges could be justified, subject to a careful business appraisal of the extent to which (as viewed from March 1999) commercial benefits could have been expected to flow from the new services to be provided by Ryanair. However, as regards the Infrastructure Guarantee and the provisions for Marketing Support he considered the position to be "potentially more problematic". He also said that all the arrangements under consideration had to be viewed as a package - the fact that any one of them might be justified under the private investor principle would not assist the Council if no private investor would have offered all of them together. Mr Swift concluded that a detailed business appraisal should be carried out, judged from the perspective of March 1999, before firm advice could be given.

(b) Based on that advice the Council engaged Price Waterhouse Coopers ("PWC") to undertake a retrospective business appraisal of the arrangements with Ryanair, as at March 1999, without the benefit of hindsight, and to conclude whether a private investor would have reasonably entered into such an arrangement. A copy of the

financial appraisal submitted to the Council by PWC in January 2001 was made available to us during the course of the hearing. It contains some information on the Ryanair Financial Information which we have treated as confidential. One conclusion was that the financial implications of the Marketing Support provision in the Ryanair Agreement did not need to be taken into account in the cost benefit analysis which PWC carried out, (for reasons which we summarise in the Confidential Schedule to this decision, as to do so in the main body of the decision would disclose part of the Ryanair Financial Information). On that basis PWC concluded that, on a commercial basis, a private investor would have reasonably entered into the Ryanair Agreement in March 1999.

(c) In the local government auditor's report for the 1999/2000 financial year the auditor concluded, on the basis of the legal advice and business appraisal, that he did not need to take his concerns on State aid any further, although he recommended that the matter be kept under review.

22 Scrutiny of airport financial arrangements by the European Commission.

(a) On 14 June 1999 the European Commission published a decision regarding certain incentives that Manchester Airport (which is also publicly owned) had offered to certain airlines. In summary the decision provided that:

(i) Reduced airport charges provided to Continental Airlines for the first two years of a new service to Newark, New Jersey did not amount to State aid because of the relatively short duration of the incentive and the fact that it was available to any airline opening a new route from the airport or operating in competition on the Newark route;

(ii) A commitment to refund any losses suffered by Continental Airlines on the route during the start up period did amount to unnotified State aid (although no action was taken because the airline did not suffer any loss and so no call had been made under the indemnity).

(b) This provided a first signal to the airline industry as to the approach which the European Commission would be likely to take in considering arrangements between publicly owned airports and airlines, as well as the factors that it was likely to take into account in making any judgment with regard to them.

(c) In February 2004 the European Commission published a decision on the advantages granted by the Walloon Region and Brussels South Charleroi Airport to Ryanair in connection with its establishment at Charleroi (the "Charleroi decision"). The facts

behind the Charleroi decision were as follows. In November 2001 the Walloon region of Belgium entered into a confidential, long-term agreement with Ryanair in relation to services to be operated from Charleroi airport. The airport is owned by the Walloon region and is operated by Brussels South Charleroi Airport (BSCA), a public sector company controlled by the Walloon region, under terms which permitted it to retain 65% of fees in relation to air traffic control and other services provided at the airport. The remaining 35% was paid to an environment fund. The Commission reviewed a number of provisions in the Charleroi agreement as follows:

(i) the Walloon region:

    (A) granted a 50% reduction against the normal handling charges applying at Charleroi airport - this was found to be incompatible with Article 87 (1);

    (B) undertook to compensate Ryanair for any losses that it might incur as a result of any change in the level of airport taxes or airport opening hours during the years 2001-2016 – this too was found to be incompatible with Article 87(1);

(ii) BSCA:

    (A) applied some of its income derived from the 65% fee referred to above to assist Ryanair with certain costs incurred in respect of its new base at the airport (including hotel costs and staff subsistence, recruitment and training costs, office equipment purchase and the provision of office and hangar space) as well as a fixed fee for each new route opened - these were found to be compatible with the common market only to the extent that they represented genuine start-up aid for new routes, to last for no more than five years and provided they contributed no more than 50% of the relevant costs;

    (B) fixed ground handling charges at 10% of its published price level - this was found to be incompatible with article 87 (1);

    (C) contributed half of the cost of Ryanair's publicity and marketing in relation to its activities at the airport, plus a contribution of €4 per passenger - these were again found to be compatible with the common market only to the extent that payments were fully validated against promotional expenditure relating to one of the route's in question and had the aim of making it viable within five years of start up.

(d) In reaching its decision the Commission applied the private investor principle to the provisions summarised under c) (ii) above and concluded that BSCA had not acted as a

private investor in a market economy would have done at the time when it entered into the agreement in November 2001

(e) The Charleroi decision included a commitment by the Commission to publish guidance on the extent to which airport fee reductions may be offered by public bodies and those that must be borne by the organisation operating the airport out of its own resources. Those guidelines were ultimately published in September 2005, some months after the Complainant's request was refused. We were told that no draft of the guidelines was circulated for consultation in advance but that the clarification they provided as to what incentives would be treated as State aid has changed the environment in which agreements between publicly owned airports and airlines are negotiated.

23 It is against that background that we have to assess the likelihood of prejudice to the commercial interests of both Ryanair and the Council if the Ryanair Financial Information had been disclosed in February 2005, after the Manchester and Charleroi decisions, but before publication of the Commission's guidance.

24 <u>Commercial Interests of Ryanair.</u>

(a) Ryanair did not place before us any evidence of its commercial interests, let alone the likely prejudice which it might suffer as a result of disclosure. In the course of correspondence between the Council and the Information Commissioner some arguments were put forward as to the damage which might be suffered by Ryanair, but it was readily accepted by Mr McGurk during his cross-examination that those reflected the Council's thoughts on the point, not any representations made to it by Ryanair.

(b) As we have already said Ryanair, did not participate in the appeal and was not represented before us. Although, therefore, we can imagine that an airline might well have good reasons to fear that the disclosure of its commercial contracts might prejudice its commercial interests, we are not prepared to speculate whether those fears may have any justification in relation to the specific facts of this case. In the absence of any evidence on the point, therefore, we are unable to conclude that Ryanair's commercial interests would be likely to be prejudiced.

25 <u>Commercial Interests of the Council.</u>

(a) The Council has said that, with regard to its own commercial interests, disclosure of the Ryanair Financial Information in February 2005 would have:

(i) Weakened its bargaining position with airlines;

(ii) Assisted competitor airports in pitching offers to Ryanair to the detriment of the business of the Airport; and

(iii) Damaged the commercial reputation of the Airport with those doing business with it.

(b) We are not convinced that the last of these factors carries any great weight. As we have already stressed, this decision is limited to its particular facts. We do not accept that, in the context of those facts, disclosure, in February 2005, of the redacted detail from a contract entered into in March 1999, would have caused the Airport to gain a reputation as an untrustworthy counterparty in commercial transactions; one that would disclose, or be forced to disclose, the contents of agreements in which it enters. Any person or organisation contracting with it would already know that it was publicly owned and that its commercial dealings would therefore be subjected to greater public scrutiny than those of a private company. Moreover, the disclosure that the Council was asked to make was limited to the release of limited information in respect of a single contract entered into almost six years previously in circumstances where the industry would have been well aware of the interest of both the public and the regulators in agreements with low cost airlines. We therefore intend to concentrate on the other two elements of perceived commercial risk i.e. (a)(i) and (a)(ii) above.

(c) Both Mr McGurk and Mr Devine gave evidence on these issues. Mr Devine's witness statement described the competition which the Airport faces from other airports in the island of Ireland, all of which, he said, concentrate on seeking to attract low-cost airlines and are capable, if successful in those attempts, of undermining the business of the Airport, to a greater or lesser extent. He said that this competition focuses in particular on offering airlines the best deal on charges for aviation and ground services. He said that the low margins on which a low-cost airline operates means that even a small adjustment to the fees paid to an airport can make the difference between profit and loss on a particular route. None of this was seriously challenged.

(d) Mr Devine went on to say that the Airport is continually in dialogue with airlines about the possibility of introducing new services, or expanding existing ones, that all of those discussions are regarded by both sides as being confidential and that it would have seriously undermined his negotiating position if the Ryanair Financial Information had been disclosed at the relevant time. He said that all of the competitor airports are privately owned and could not be required to disclose equivalent information about their own contracts.

(e) Mr Devine was cross-examined on whether there were active negotiations at the time when the Complainant made his request in January 2005, or in the weeks or months

either side of that date. However, we do not think that our decision on the likelihood of prejudice to the Council's commercial interest should turn on whether or not there were, around the time of the Complainant's request, active negotiations or discussions with airlines. We accept the evidence of Mr Devine when he said that discussions between the Airport’s management and airlines are going on, at some level or another, at all times. We do not believe, in any event, that commercial damage would be suffered only if disclosure occurred at a time when active negotiations were in hand.

(f) Mr Devine was also cross-examined on whether he would be as hampered as he claimed if airlines and the management of competitor airports were to become aware of the Ryanair Financial Information. It was suggested to him that if another airline tried to use the financial terms of the Ryanair Agreement as a benchmark for its own negotiations, he would have found no difficulty in dismissing it due to the fact that the Ryanair Agreement was over five years old at the time of the Complainant's request and that the commercial and regulatory environment had changed in the meantime. However, we accept Mr Devine's general statement that his negotiating position would have been prejudiced by disclosure of the Ryanair Financial Information and we do not think that it is appropriate to attempt to envisage particular circumstances in which the prejudice might be greater or less. It is a significant element of any negotiation that each side has some sense of uncertainty about the counterparty's commercial situation and expectations. It is for this reason that commercial negotiators generally are keen to keep their negotiating position a closely guarded secret and to disclose to the counterparty only those parts of it that are necessary in order to stimulate corresponding movement in the negotiations. We accept that by January 2005 the Ryanair Financial Information was quite old and that it was by then fairly well-known (as a result of the Charleroi decision, if nothing else) that agreements of this nature between airports and low-cost airlines were likely to include incentives in the airline's favour. But we believe that disclosure of the detail would still have had the effect, as Mr Devine said in cross-examination, of giving any counterparty in negotiations some indication as to what the Airport's bottom line was likely to be and that this would have tied his hands and put him at a disadvantage in any subsequent negotiations.

(g) In his Decision Notice the Information Commissioner stated that the Airport had entered into arrangements with other airlines since 1999 with the result that Ryanair was no longer the only carrier using the airport. He therefore formed the view that the Airport was less dependent on Ryanair by 2005 and that the disclosure requested would

no longer have the same impact on its overall commercial situation at that date. However, as we have stated in paragraph 19 (b) above, Ryanair still contributed over 60% of the total passenger numbers for the Airport in January 2005 and we do not think that it can be said that its relationship with the Airport had become less important by then or that the harm that might be done to that relationship by disclosure may be ignored.

(h) In his closing submission Mr Pitt-Payne for the Information Commissioner drew attention to the local government auditor's report for 1999/2000 referred to above and suggested that this had put into the public domain some of the information over which the council wished to maintain confidentiality. We have examined the report more closely in the Confidential Schedule to this decision. We believe that sufficient detail on the Ryanair Financial Information remained confidential after publication of the report that the Council's commercial interests would have been prejudiced by the disclosure, in February 2005, of the remainder. We will return, later in this decision, to consider the significance of the disclosure made in the auditor's report to the application of the public interest test.

(i) We heard arguments during the hearing about how we should apply the likelihood of prejudice test to the facts and on where the threshold should be fixed in order to determine whether the section 43 exemption applies. On behalf of the Council Mr Coppel argued that the threshold was a modest one; that the likelihood of prejudice had to be more than insignificant or fanciful and that the prejudice anticipated had to be more than merely trivial or frivolous. He urged us to resist the temptation of importing from other areas of law a higher test such as "very significant and weighty chance of prejudice" or a "real and significant risk" (if by this more than "not insignificant" was meant). Mr Pitt-Payne, on the other hand, argued that we should simply follow the guidance provided by the Tribunal's own decision in *John Connor Press Associates Ltd v The Information Commissioner*. However, we do not think that the facts of this case call for an overly detailed analysis of the language of the section. We are satisfied that the evidence we have summarised above is sufficient to support a finding that the Council would have been likely to have suffered prejudice to its commercial interests had the Ryanair Financial Information been disclosed in February 2005.

(j) We therefore conclude that the section 43 exemption is engaged and that we should proceed to consider the public interest test - whether the public interest in maintaining

the exemption outweighs the public interest in disclosing the Ryanair Financial Information.

26 Public Interest Test – factors in favour of disclosure.

(a) In its Grounds of Appeal (as amended during the course of the Appeal) the Council summarised the factors in favour of disclosure, which it said that it had taken into account before deciding to reject the Complainant's request for information. It said that they were:

(i) the desirability of furthering the understanding of, and participation in, public debate on the topic;

(ii) facilitating accountability and transparency of public authorities for their decisions:

(iii) facilitating accountability and transparency in the spending of public money;

(iv) allowing individuals to understand decisions made by public authorities affecting their lives.

(b) The Information Commissioner adopted that identification of the relevant issues and urged us to conclude that they were more than sufficient to overcome any competing factors in favour of maintaining the exemption. Through his counsel he argued that the manner in which the Airport was operated and financed was a matter of significant public interest and the disclosure of the Ryanair Financial Information would enable any public debate to take place on the basis of facts rather than speculation or guesswork. He drew attention, in particular, to the following two specific issues, over and above the general desirability of openness and candour, on which, he said, a public debate was particularly desirable:

(i) The Airport was an item of publicly subsidised infrastructure, which had never succeeded in covering its costs There were, therefore, legitimate questions to be asked as to whether ratepayer's money had been well spent over the years; and

(ii) There had been concerns raised in the past as to whether the effect of the Ryanair Agreement was to give State aid to Ryanair contrary to EC Treaty Article 87, an issue that acquired particular significance when the Manchester and Charleroi decisions were published.

(c) These are the same issues that the Complainant focused on at the outset of the matter. On 2nd February 2005, in seeking a formal review of the Council's earlier refusal to provide the information requested, he justified his request in the following terms:

"there is considerable public debate about the City of Derry Airport, and whether it is being best managed. There are also widely held concerns about the value for money it is offering to ratepayers, who fund it. Recent figures show the facility to be running at a loss of £1.3 million a year, which is having a significant impact on the city's rates. I would also bring to your attention that Government subventions currently being sought for upgrading the facility is taxpayers money.

"Of course, there is a wider debate about Ryanair's access to public money. The European Commission ruled that the airline was in receipt of "illegal state aid" by availing of incentives, such as cut-price landing fees, to establish a hub at Charleroi Airport in Belgium. The Commission clearly stated that this was a bad use of taxpayers money."

(d) The nub of the Council's response to the first of those issues was that, while public interest on the subject was understandable and public discussion entirely appropriate, it did not agree that publication of the Ryanair Financial Information would make a significant contribution to any such debate, and certainly not as to outweigh the commercial risks inherent in its disclosure. The public was already aware that the airport was funded by the Council, that it had a contract with Ryanair and that it was likely that the airport would have had to offer competitive terms in order to attract the airline's business. It did not need to see the minute detail of the Ryanair Agreement in order to participate in the debate. Indeed, it was suggested that a well-intentioned desire to make the additional information available to ratepayers could in fact work to their detriment, because the business of the Airport might be damaged as a result and greater public support therefore became necessary in order to maintain it.

(e) Mr McGurk and Mr Devine provided evidence on the financial support provided by the Council and Mr McGurk dealt with the degree of scrutiny that was applied to this and the business of the airport generally. He described the finance that had been raised for improvement works and explained that, while the Council and the management of the Airport were keen to see the annual trading deficit reduce, (or at least balanced by income derived from related activities, such as a proposed business park near the airport), the Council expected to continue subsidising the Airport's operations at some level for the foreseeable future. He fully accepted that the business of the Airport had been the subject of public debate and that this was entirely appropriate. He nevertheless

expressed the strong view, which he said was supported by the evidence of indirect commercial benefits, that the level of financial support was necessary, even for a relatively high rate council, because of the role that a successful airport may play in helping a disadvantaged area to improve its overall economic situation.

(f) As to the issue of scrutiny and review Mr McGurk told us that the Council was firmly committed to the principles of open government in this area. He explained that the trading accounts of the Airport are drawn up and audited each year before being consolidated into those of the Council. A summary of the Airport's financial results is then attached to the Council's accounts. Following cross examination and a number of questions put to Mr McGurk by the panel, an example of such a summary sheet was provided to us and Mr McGurk's evidence on this was supplemented by additional information provided by counsel, on instructions, (and accepted by counsel for the Information Commissioner without being formally put to any witness). This was to the effect that each year the Council operates what is called "audit week", prior to the completion of its formal audit, during which any member of the public may inspect the Council's annual financial statements and ask to see any of the underlying documentation, including detailed ledgers and evidence, such as invoices. However, it was accepted by the Council that the process would not provide for inspection of the contracts under which particular invoices may have been raised.

(g) The Council also relied on the fact that the management of the Airport was subject to the supervision of the Council's Airport Committee and that at one stage Mr Devine and one of the Council's elected representatives had been examined as witnesses on the subject before the Select Committee on Northern Ireland Affairs.

(h) As regards State aid, we have set out above the sequence of events that led to this issue being investigated, first within the Council and, later, by the European Commission. Mr Pitt-Payne for the Information Commissioner argued that, although the possibility of unlawful State aid had been raised and had been thought to be sufficiently great to justify instructing a specialist leading Council and PWC, the public was not able to form its own view. In particular, it could not assess the basis on which PWC had reached its conclusion that the private investor principle had been satisfied. He said that the publication of the Charleroi decision in February 2004 reinforced the desirability of a public debate on the State aid issue. We have set out in the Confidential Schedule to this decision a number of points of similarity, (and some of contrast), as between the Charleroi Agreement and the Ryanair Agreement. We were not told whether or not the

Council revisited the earlier advice which it had received in order to consider whether the European Commission's reasoning required the earlier advice to be reconsidered. However, Mr Devine confirmed under cross-examination that those with whom he had dealings in the industry were indeed aware of the Charleroi decision and were conscious, both that the European Commission was interested in contracts between publicly owned airports and low-cost airlines, and that particular care was needed in order to comply with the rules on State aid.

(i) In this respect it should be noted that the Charleroi decision included the following statement:

> "…Transparency, non-discrimination and proportionality in relation to finance offered to airports, together with the presence of a common interest in relation to State aid granted to airlines, should allow airport activity to develop in accordance with the rules of the treaty."

Mr Pitt-Payne drew particular attention to the words "transparency, non-discrimination and proportionality". However, Mr Coppel said that the requirement of transparency only arose once it had been established that State aid had been granted to an airline. It was not appropriate, he said, for the Information Commissioner to take the benefit of the State aid rules (transparency) without first addressing the underlying issue of whether those rules had been engaged. In the present case, he said, it had been established, to the satisfaction of the local government auditor, that the Ryanair Agreement did not involve the granting of State aid. As to the EU-wide debate that the Charleroi decision was said to have stimulated, Mr Coppel conceded that, whether or not the Council had acted lawfully, was a legitimate matter of public concern. However, he said that it was not the case that the only way in which public concern could be allayed was by means of a public debate, illuminated by full disclosure of the Ryanair Financial Information. He argued that the Judicial Review procedure, under domestic law, or a complaint to the Commission, at Community level, provided appropriate means by which the public could challenge the Council's decision to enter into the Ryanair Agreement. He explained that in both cases procedures existed which were capable of protecting confidential commercial information while the matter was being investigated. The result, he said, was that the information would only be disclosed if it was decided that State aid had been granted. Mr Coppel said that the effect of a decision in favour of the Information Commissioner in the present case would be that the mere wish of a member of the public to ventilate a legal argument on whether the Ryanair Agreement did or did

not involve State aid would lead to the immediate disclosure of all the commercial details. It may be noted, in this respect, that in cases such as *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892 and *Re A Company's Application* [1989] Ch 477 (both of which are summarised in extracts from Toulson & Phipps on Confidentiality, to which we were referred) the Courts have prevented the release of information to the public but permitted it to be disclosed to the appropriate regulator.

27 <u>Public Interest Test – factors favouring maintenance of the exemption.</u>

(a) We have set out the relevant commercial interests in paragraph 25 above and need not repeat them here. We have found that the likelihood of them being prejudiced is sufficient to bring section 43 into play. We now have to consider what weight to give those risks in order to strike the correct balance with the public interest in disclosure

28 <u>The balance of the public interests.</u>

(a) Mr Pitt-Payne urged us to conclude that the evidence on the prejudice to commercial interests was weak and that we should give it little weight when balancing the competing public interest in disclosure. Mr Coppel argued that public debate would receive little illumination from the disclosure sought, because the big issues were already in the public domain and material relating to the Airport's "micro management" would not add that much, if anything. In particular, he said, the Ryanair Financial Information would only contribute if the public were able to compare the detailed figures with those in other contracts between airlines and competitor airports - information which, for reasons given previously, would not be available. Accordingly, he argued, we should decide that there was little if any weight to be placed in the balance against the public interest in the Airport's commercial interests being protected.

(b) We have summarised, in the Confidential Schedule, material which has relevance to both the extent to which the Ryanair Financial Information had passed into the public domain at the relevant time (so as to dilute the level of risk involved in disclosure of the balance) and the degree of public scrutiny to which the Ryanair Agreement might properly to be exposed. We have considered our findings, as set out in that schedule, alongside the other facts and arguments set out above and have concluded that, on balance, the risk of prejudice to the Council's commercial interests by the time the Complainant made his request were not sufficient to outweigh the public interest in having the Ryanair Financial Information disclosed.

Section 29 – Economic Interests

29 The Council accepted that if we were to find that section 43 was not engaged then it could not succeed under section 29 because, on the facts of this case, the economic interests of the region depend on the commercial interests of the Council's Airport. Conversely, if we concluded that those commercial interests were likely to be prejudiced then, it was argued, this would have a detrimental impact on the economic interests of the region also. We were satisfied, on the basis of the persuasive evidence on the point given by Mr McGurk (on which he was not cross examined), that any prejudice to the Council's commercial interests in relation to the Airport would prejudice the economic interests of the region and that on this issue, also, the exemption was engaged and we would therefore have to consider the public interest test. However, it was agreed that the public interest arguments are the same under section 29 as under section 43 and accordingly we reach the same conclusion as in paragraph 0 above.

Section 41 – Actionable Breach of Confidence

30 It was agreed by the parties that the issues to be determined under section 41 were as follows:
   (a) was the Ryanair Financial Information obtained by the Council from a third party, for the purposes of section 41 (1) (a)?; and, if so
   (b) would its disclosure constitute actionable breach of confidence, that is:
      (i) did the information have the necessary quality of confidence to justify the imposition of a contractual or equitable obligation of confidence?; if so
      (ii) was the information communicated in circumstances that created such an obligation?; and, if so
      (iii) would disclosure be a breach of that obligation?;
      and, if this part of the test was satisfied:
   (c) would the Council nevertheless have had a defence to a claim for breach of confidence based on the public interest in disclosure of information?.

31 The Information Commissioner concluded in the Decision Notice that the Ryanair Financial Information had not been obtained by the Council from any other person and that, in any event, no obligation of confidence arose. Before us, he argued that his decision on both of those points had been correct. He also argued that, if he had been wrong on those points, so that an obligation of confidence had arisen, the Council would, in any event, have had a

public interest defence. . We will therefore deal with each of the points set out in paragraph 30in the order in which we have listed them.

32 Information obtained from a third party.

(a) Mr Coppel for the Council drew attention to the fact that the information was contained in a fax from Ryanair to the Council and that it conveyed to the Council information as to the terms to which Ryanair (the "other person") agreed. He drew our attention to a guidance note published by the Information Commissioner ("Freedom of Information Act Awareness Guidance No2") in which it is stated that "The exception does not cover information which the public authority has generated itself...", and argued that the subsection was clearly intended to prevent public authorities determining that their own internal communications should be exempt from disclosure by, for example, simply designating them as confidential. It was not intended to apply to contracts or documents created in the course of contractual negotiations.

(b) Mr Pitt-Payne for the Information Commissioner adopted a line of argument, which was arguably not consistent with his clients own guidance note. He was, of course, fully entitled to do so - such guidance notes should reflect decisions made by the Tribunal or Courts, not inform them. He argued that a written agreement between two parties did not constitute information provided by one of them to the other and that it was not the purpose of section 41 to protect the confidentiality of contracts to which the public authority is a party.

(c) It might be said that the effect of any contract is that each contracting party informs the other of the obligations which it will undertake and of its agreement to accept the counterparty's obligations in return. Such a two-way flow might be characterised as a process by which the public authority obtained information from the other party. However, we think that this imposes too great a strain on the language of the Act and that the correct position is that a concluded contract between a public authority and a third party does not fall within section 41(1)(a) of the Act.

(d) The facts of this appeal do not, of course, involve a formal contract signed by the public authority and a third party, but a communication from such a third party setting out the terms which it considered acceptable. It was suggested to us by Mr Pitt-Payne that the fax did not form part of the negotiations between the parties and that it did not convey to the Council information as to Ryanair's terms, which the Council did not already possess. Rather, it was said, the terms were effectively already agreed and the fax was generated simply as a means of recording those terms for the benefit of one of the

parties that was to contribute to the cost of the runway extension. Mr Devine said in evidence that he understood that the party in question did indeed require some degree of comfort that Ryanair would use the facilities for which funding was being sought and he confirmed that, but for this requirement, no documentation would have been created at all. He also informed us that when the local government auditor sought information on the arrangements entered into with Ryanair he was supplied with a copy of the fax. It is apparent, quite apart from that evidence, that the two parties conducted their business arrangement by reference to the terms set out in the fax. On that basis we believe that the fax must be treated in the same way as a formal contract signed on behalf of each party – it falls outside the exemption. It follows that we are not deciding that information regarding the pre-contractual negotiating position of a public authority or its counter party, whether or not a contract is concluded, falls outside section 41 – that will have to be determined on the particular facts of any case in which the issue arises.

(e) We are aware that the effect of our conclusion is that the whole of any contract with a public authority may be available to the public, no matter how confidential the content or how clearly expressed the confidentiality provisions incorporated in it, unless another exemption applies (most probably, that one or both parties to the contract could show that its disclosure would be likely to prejudice its commercial interests, so as to bring section 43 into play). We are also conscious of the fact that contracts will sometimes record more than just the mutual obligations of the contracting parties. They will also include technical information, either in the body of the contract or, more probably, in separate schedules. Depending, again, on the particular circumstances in which the point arises, it may be that material of that nature could still be characterised as confidential information "obtained" by the public authority from the other party to the contract, (or perhaps a "trade secret" under section 43 (1) of the Act) in which event it may be redacted in any disclosed version.

(f) Although our decision on this point effectively disposes of the section 41 exemption this matter may be the subject of a further appeal. We will therefore go on to consider the other issues, which we have identified in paragraph 30 above.

33 <u>Confidentiality of the Information.</u>

(a) We have set out in the Confidential Schedule an analysis of how much of the Ryanair Financial Information may be said to have been in the public domain at the relevant time and have concluded that this did not undermine the claim to confidentiality (in fact

the Information Commissioner conceded as much), although it may have a bearing on the operation of the public interest test.

34 <u>Obligation of confidence.</u>

(a) Mr Pitt-Payne on behalf of the Information Commissioner pointed out that the only reference to confidentiality in the Ryanair Agreement is a separate provision requiring that no information about the proposed new route should be published until announced by Ryanair. He argued that it was clearly only that information over which any obligation of confidence had been imposed, and that a temporary one. However, Mr Coppel drew our attention to the fact that the fax was headed "Private and Confidential". More significantly, Mr Coppel argued that even without an express obligation of confidentiality the circumstances in which the fax came into existence, namely commercial negotiations, gave rise to an obligation of confidence. Our attention was also drawn to an e-mail from Ryanair to the Council dated 2 January 2005, in which it asserted that the Ryanair Agreement was confidential, and to minutes of evidence from a Select Committee on Northern Ireland dated 30 November 2004, recording a comment by an elected member of the Council which seemed to indicate that detailed terms of the "business arrangement" with Ryanair should not be debated in public. We do not think that either of those documents, which came into existence after the date of the Ryanair Agreement, help us very much in determining whether the circumstances surrounding the creation of the document require it to be treated as confidential. The fact that the document imposes an express obligation of confidence only in respect of one piece of information could be said to indicate that no general obligation of confidence was intended to be created. On the other hand, it is not unusual to include a provision governing when and how the existence of an agreement should be publicised. The provision in question (it is headed "disclosure") has that limited effect, in our view. It seems to us that there is no reason for us to conclude that it should have the further effect of negating any obligation of confidentiality regarding the detailed terms of the agreement. Equally, the heading to the fax could have significance other than that for which Mr Coppel contends. It could be a notification and warning to any third party into whose hands the fax might have fallen, or a reinforcement of the "disclosure" provision referred to.

(b) We must therefore make our decision on this part of the appeal by deciding whether the circumstances give rise to an equitable obligation of confidence (if the fax is to be treated as the communication of a negotiating position) or an implied term to the same

effect (if it is treated as a record of a concluded agreement). In that regard our attention was drawn to a number of the leading authorities on the point, including the judgment of Megarry J. in *Coco v Clark* [1969] RPC 41, in which he said, at page 48:

> "it seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this would suffice to impose upon him the equitable obligation of confidence. In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint-venture... I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence".

(c) In his evidence to us Mr Devine said that there is common acceptance in his field of business that commercial terms are treated as confidential, even if the requirement is not always articulated in the course of discussion. We find little difficulty in accepting that an airline would expect detail about its negotiations and contracts with airports to be kept confidential and that the expectation is a reasonable one. Accordingly, we conclude that an obligation of confidence did come into existence in March 1999.

(d) In the course of argument Mr Pitt-Payne suggested that if, contrary to his primary contention, an obligation of confidence did exist, then it did not have the effect of continuing beyond a certain time, and that it had certainly expired by January 2005. The basis of his argument appeared to be that if the obligation arose by implication, and not express contractual provision, then it was harder to say that the parties would have anticipated it lasting for a long time, and certainly not long enough for the obligation to have remained in existence by the time that the Complainant made his request for information in January 2005. We are not convinced that Mr Pitt-Payne's analysis of the obligation of confidence being dependent on the term being implied into the Ryanair Agreement is correct. In our view the effect of the obligation, however created, would last until the information in question had either passed into the public domain or had ceased to have commercial significance. In the present case the Ryanair Agreement was still in force in January 2005, when the request was made, and in February 2005, when it was refused. For that reason, and because of the evidence we have been given as to the harm likely to be suffered if the Ryanair Financial Information were to be disclosed, we would conclude that the obligation of confidence was still in effect at the relevant time.

(e) It follows that, absent any defence, the Council would in our view be vulnerable to a claim for breach of confidence if it were to have disclosed the Ryanair Financial Information other than under the Act.

35 Defence of public interest.

(a) The parties agreed that a defence of public interest exists and that we must decide whether its effect in the present case would be that the disclosure of the Ryanair Financial Information would not be "actionable", even if all other elements of the tort of breach of confidence were in place. However, they did not agree on the scope of the applicable public interest. Mr Pitt-Payne said that it requires a similar balance of competing interests as applies under section 2 (2) (b) of the Act, whereas Mr Coppel says that the test to be applied is fundamentally different. He drew attention to the fact that, whereas section 2 (2) (b) proceeds from the presumption that information should be disclosed unless one of the exemptions applies, the public interest defence has as its starting point the presumption that confidences should be preserved. He said that in striking a balance we should regard one side of the notional scales as already weighted in favour of preserving confidentiality and that something substantial had therefore to be applied to the other side if the defence was to be made out. In this respect he relied on the speech of Lord Goff in the Spycatcher case - *Attorney General v Guardian Newspapers (No 2)*[1990] 1 AC 109 at 282, in which he said:

> "... although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure."

(b) Mr Coppel provided a reminder of the history of the public interest defence. He said that it had its origins in the perception that there may on occasions be a duty to the public to disclose information, in breach of a private obligation to maintain its confidentiality, in particular for the purpose of preventing crime. He conceded that the effect of cases such as *Initial Services Limited v Putterill* [1968]1 QB was to extend the scope of the defence to permit disclosure relating to the commission of civil wrongs or misdeeds. However, he challenged Mr Pitt-Payne to produce any examples of a public interest being held to justify the disclosure of confidential information in the absence of some serious wrongdoing or risk of harm to the public. Mr Pitt-Payne's response to that challenge was to rely on the Court of Appeal decision in the LRT case - *London Regional Transport v The Mayor of London* [2001] EWCA Civ 1491.

(c) The LRT case concerned the political controversy regarding the future operation of the London Underground system in which the Mayor of London preferred a different solution to the public private partnership that had been proposed by central government. A report criticising the government's proposals had been prepared, based on commercially sensitive and confidential information disclosed by the claimant under a confidentiality agreement that required it to be held in the strictest confidence and not to be used for any purpose other than certain specified ones. The Mayor proposed to publish the report and an emergency injunction was granted to prevent him doing so. This injunction was subsequently discharged against an undertaking not to publish any part of the report except in a particular redacted version. On appeal from that decision the Court of Appeal considered whether public interest considerations justified the disclosure of the redacted version of the report in breach of the agreement entered into when the material on which the report was based had been disclosed. The argument in favour of disclosure was that there was a strong public interest in publication as a contribution to the important debate about the public private partnership proposals. The judge at first instance, Mr Justice Sullivan, had stated that an exceptional case had to be shown for breaching an express contractual provision as to confidentiality, but he decided that such a case existed in the matter before him. The facts that he took into account in finding that to be the case included the following:

(i) the whole question of the merits and demerits of proceeding with a public private partnership structure was of very considerable public interest;

(ii) a " hotly fought political debate " on the issue was under way at the time and "the democratic process, if it is to be effective, must be informed by freedom of information"; and

(iii) the document to be published was not the original report, including commercial detail and sensitive statistics, but a redacted version from which the information had been removed.

(d) The Court of Appeal left open the question of whether the Judge's "exceptional case" requirement imposed too stringent a test for the proposed discloser of information to overcome but agreed with his approach to the balancing exercise he undertook. Lord Justice Robert Walker said that:

> "the guiding principle is to preserve legitimate commercial confidentiality while enabling the general public... to be informed of serious criticism, from a responsible source, of the value for money evaluation which is a crucial part of the [public

private partnership] for the London Underground. That is a very important public interest which… must go into the scales on proportionality."

(e) In agreeing with that judgment Lord Justice Sedley said that the discharge of the injunction had been justified:

"on the straightforward ground that there is nothing of genuine commercial sensitivity in the redacted version of the [report in question] and nothing therefore to justify the stifling of public information and debate by the enforcement of a bare contractual obligation of silence."

(f) Lord Justice Sedley went on to say that the right to freedom of expression, set out in Article 10 of the European Convention on Human Rights, and given a direct applicability in our law by the Human Rights Act 1998, reinforced the principles to be found in equity and the common law on which Lord Justice Robert Walker had relied. He explained that Article 10 extended to cover the right to receive and impart information (a right which he said had been described as "the lifeblood of democracy") and that it recognised the legitimacy of disclosing information, even in breach of a contractual undertaking not to do so, "if the public interest in the free flow of information and ideas will be served by it." He said that the approach to be adopted in addressing the task of balancing the right to privacy and confidentiality, on the one hand, and freedom of expression, on the other, was the test of proportionality developed by the European Court of Human Rights. He summarised the "structured enquiry" which this requires, by reference to the following questions:

“Does the measure [namely, in this case, the disclosure of the Ryanair Financial Information] meet a recognised and pressing social need? Does it negate the primary right [in our case the right of confidentiality] or restrict it more than is necessary? Are the reasons given for it logical?"

(g) Lord Justice Sedley concluded by expressing the hope that "the human rights highway leads to exactly the same outcome as the older road of equity and common law."

(h) Mr Pitt-Payne argued that the LRT case established that the defence of public interest was applicable, not just when there was some specific harm involved, but also where it was necessary to inform public debate. This, he said, was compatible with what Lord Goff had said in Spycatcher (quoted above) and that a decision by the tribunal in favour of the Council would amount to a disproportionate interference with the right to receive information under Article 10. He suggested that it was not necessary to impose on him the obligation of establishing an "exceptional case " for disclosure (although he added

that his client’s case was, in any event, exceptional) - as the law now stood he only needed to establish that there was a public interest in disclosure which outweighed the public interest in maintaining confidence. He said that the public interest factors summarised at paragraph 26 above in respect of the application of section 43 served equally to provide a section 41 defence.

(i) Mr Coppel sought to persuade us that there was a crucial difference in the facts of the LRT case and the present one. First, he said that in LRT the Mayor of London had wished to disclose a redacted form of report from which commercially sensitive material had been removed, whereas the Information Commissioner seeks an order in this Appeal for disclosure of the key financial information in a contract, a redacted version of which has already been disclosed. Secondly, the debate in relation to the London Underground was concerned, he said, with the "macro" issue as to whether a public private partnership should be entered into at all, whereas in the present case the information sought was the "micro" detail of a contract which was already in force at the time when the Complainant made his request. Mr Coppel also relied on the finding of the judge at first instance in LRT that an exceptional case for disclosure had to be made out (which he said remained authoritative on the point even though the Court of Appeal did not itself rule on it). He also relied on the contention that the European Convention on Human Rights ought not to be taken into account because the Council does not have any rights under the Convention. However, we have to make a decision against a background of a fictional scenario in which we have to assume that the Council wished to impart the Ryanair Financial Information to the complainant and the issue to be decided was whether Ryanair would be entitled to succeed in a claim for breach of confidence in order to prevent this, before the event, or to claim compensation, after it. In that context we do not believe that any Convention rights the Council may have would be determinative. The test would be whether the public, which does have a Convention right to receive information, had a legitimate interest in seeing the Ryanair Financial Information and whether that interest outweighed the Council’s right to maintain confidentiality.

(j) Finally Mr Pitt-Payne acknowledged the differences between the facts of this Appeal and those in LRT but drew attention to a difference which pointed the other way. This was that in the LRT case the information in question had been contemporaneous, whereas the Ryanair Agreement had been entered into almost 6 years before the request was made.

(k) Against that background we have to decide whether the LRT case has the effect, either by the common law/equity route, or the human rights route, of extending fundamentally the scope of the public interest defence to include matter required to inform public debate, even if no question of wrongdoing or public harm arises. If we decide that it does then we have to decide whether, applying either the test proposed by Lord Goff in Spycatcher, or the proportionality enquiry suggested by Lord Justice Sedley in LRT, the Council's right to confidentiality should be overruled.

(l) As to the first question we believe that, despite the differences between the two factual scenarios, the LRT decision does require us to move away from the concept of precisely defined categories of public interests that may be said to justify disclosure. We should not therefore dismiss, on that basis, the public interest in having the Ryanair Financial Information introduced into the debate on funding the Airport. It should be included as a factor in the balancing exercise we are required to undertake. However, turning to the second question, we consider that the weight that it should be given in that exercise will depend on our perception of its nature and importance – it should be "proportional". Clearly, considerable weight should be attributed to an issue on which the public is justifiably exercised at the time, regardless of whether it falls within a category that has previously been approved by the courts. Conversely, less weight should be attributed if, for example, the public interest extends only as far as a half hearted wish to be more fully informed in the context of a desultory public debate on a matter of relatively low significance.

(m) We think that this balancing exercise should subsume any consideration of whether or not the case for disclosure was, in the words of Mr Justice Sullivan in LRT "exceptional". We have already set out the factors which we believe we were required to consider under sections 43 and 29. The only difference in this case is that we apply them from a different starting point, namely, the assumption that confidentiality should be preserved unless outweighed by countervailing factors. We suspect that this difference will rarely affect the outcome of a case, as it is unlikely that the relevant factors will be so finely balanced that the burden of proof will become the determinative factor. In this case we have revisited the factors in favour of disclosure, summarised in paragraph 26 above, and have decided that they are sufficient to outweigh the competing interest in maintaining confidentiality. The Council would, therefore, have had a public interest defence to any breach of confidence claim brought against it by Ryanair.

(n) Conclusion. We accordingly decide that (even if the Ryanair Financial Information must be treated as having been obtained from another person) the Council would not have been vulnerable to a claim for breach of confidence were the Ryanair Financial Information to have been disclosed in February 2005. It follows that the Council's case for maintaining the exemption under section 41 fails, (in the same way that it did under section 43 and section 29), that the Information Commissioner was right to decide that the Ryanair Financial Information should have been disclosed to the Complainant when requested and that it should be disclosed now.

Date 11th December 2006

Chris Ryan
Deputy Chairman