IN THE FIRST-TIER TRIBUNAL **Case No EA/2010/0106**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FER0237856
Dated: 24 August 2010

Appellant: **Elmbridge Borough Council**

Respondent: **Information Commissioner**

Additional Party: **Gladedale Group Limited**

Decided on the papers on 10th December 2010

Date of decision: **4th January 2011**

Before

Brian Kennedy QC
Judge

and

Malcom Clarke
John Randall
Tribunal Members

Subject matter:

Environmental Information Regulations 2004
Exceptions, Reg 12(5)(e) – Confidential information; Reg 12(5)(f) – Interests of an individual.

Cases:
Mersey Tunnels Users Association v Information Commissioner EA/2009/0001 (stage 2)
Bristol City Council v Information Commissioner (EA/2010/0012)

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Factual Background:

[1] Elmbridge Borough Council ("the Appellant") is appealing against the Decision of Information Commissioner ("the Respondent") in his Decision Notice dated 17 May 2010. The appeal is brought under section 57 of the Freedom of Information Act 2000 ("the Act").

[2] The Respondent's Decision arose on consideration of a complaint made by a Mr. Robert Wooley ("the Complainant") in relation to his request for Information from the Appellant relating to a planning application [reference 2008/1600] ("the planning application") concerning development at Hampton Court Station and the Jolly Boatman, Hampton Court Way. The application was received by the Council on 11 June 2008. The applicants were Gladedale Special Projects Limited, Network Rail and The Royal Star and Garter Homes. On 18 December 2008, the Council resolved to grant planning permission subject to the completion of a 'section 106 agreement' under the Town and Country Planning Act 1990. The section 106 agreement was made public on 16 June 2009 and a decision notice has been issued approving the planning application.

[3] The Complainant requested the viability figures and report ("the disputed information") that was submitted by the applicant in the planning application. The Appellant identified that it held a viability report submitted by the applicant but stated that the exemption under section 41 of the Freedom of Information Act 2000 applied. The Appellant also stated that disclosure would be likely to prejudice the applicant's commercial interests and asserted that this was an exemption under the Freedom of Information Act 2000 ("FOIA") and the Environmental Information Regulations 2004 ("the EIR"). The Respondent considered that the request should have been handled under

the EIR. As a result the Appellant stated that it wished to apply the exceptions under regulation 12(5)(e) and 12(5)(f). The Appellant stated that the public interest in maintaining both the exceptions outweighed the public interest in disclosing the information. The Respondent investigated and was not satisfied that the Appellant had adequately justified its position. The Respondent also found that the Appellant had breached regulation 5(1), 5(2), 14(2) and 14(3) of the EIR.

[4] The disputed information in the form of a viability report contains details on costs, revenues, values and finances of the development. The Appellants have argued that all of the information contained in the report is commercially sensitive and would be prejudicial to Gladedale ("the Additional Party"), Royal Star and Garter Homes and Network Rail if released to the public.

[5] The Respondent served a Decision Notice dated 17 May 2010 in relation to this matter on the Appellant in accordance with s. 50 of the Act. The Respondent decided that regulation 12(5) (e) and 12(5) (f) EIR were not engaged and ordered the disclosure of the disputed information. The Appellant's grounds of appeal are set out in part 6 of the Notice of Appeal dated the 7th day of June 2010.

[6] This Tribunal have been served with an "agreed bundle" of documents (164 Pages) including inter-alia the Decision Notice dated the 17th May 2010 (pages 1-21), the Notice of Appeal dated the 7th June 2010 (pages22 -29), the Commissioner's response dated 6th July (pages 30 – 49) and the Appellant's reply dated the 15th July 2010 (pages 50 -53). We have also been served with detailed submissions from the Respondent dated the 14th day of October 2010 and the Appellants Reply thereto dated the 19th day of October 2010 and authorities and materials referred to by the parties. This Tribunal is grateful for the detailed and conscientious background work by the parties in their presentation of the materials for this appeal and for their written submissions. The parties have agreed that this case should be decided on the papers.

[7] This Tribunal acknowledges the painstaking efforts made by the appellant in the careful consideration of the issues leading to the Decision Notice of the 17th May 2010. It is clear from our exhaustive reading of this document that this case has been considered on its merits and on the specific facts pertaining and made available to the Respondent that were relevant at the time the request for information was made. Throughout the investigation and consideration of the issues leading to the Decision, the Respondent consistently and repeatedly sought evidence from the Appellant to support their contention that the subject information was commercially sensitive or that its release would be prejudicial to the third parties concerned. It is noted by this Tribunal that the information made available to the respondent amounts to assertions and speculation by the interested parties. There is a notable absence of independent or objective evidence to support the assertions or speculation put before the Respondent. This Tribunal accepts the concern of the Respondent in this regard and notes that no further significant evidence was called or given for the conduct of this appeal, that could have altered the position (as it was before the Respondent in their decision making process) and allayed any such concern.

Relevant Statutory Framework:

[8] The Act and the Environmental Information Regulations 2004 ("EIR") both came into force on 1st January 2005.

[9] Under regulation 5(1) of the EIR, and subject to and in accordance with various other provisions of the EIR, a public authority that holds environmental information is required to make it available on request. "Environmental information" is defined in regulation 2(1) of the EIR.

[10] The enforcement and appeals provisions of FOIA (that is to say, Parts IV and V of FOIA, including Schedule 3 which has effect by virtue of section 55 of FOIA) apply for the purposes of the EIR, as modified by regulation 18 of the EIR.

[11] Under section 50(1) of FOIA (as so modified), a person may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by him to a public authority has been dealt with in accordance with Parts 2 and 3 of the EIR. Except where a complainant has failed to exhaust a local complaints procedure or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn or abandoned, the Commissioner has a duty to consider whether the request has been dealt with in accordance with Parts 2 and 3 of the EIR. He must issue a Decision Notice both to the complainant and to the public authority.

[12] Where the Commissioner decides that a public authority has failed to communicate information in a case where it is required to do so by regulation 5(1), or has failed to comply with any of the requirements of regulations 6, 11 or 14, the Decision Notice must specify what the authority is to do, and by when, in order to satisfy those requirements.

[13] The complainant or the public authority may appeal to the Information Tribunal against the Decision Notice: FOIA section 57 (as modified by EIR regulation 18).

The Issues:

[14] The issues are set out most clearly in the document prepared by the Respondent in reply to the Notice of Appeal. This document is entitled "Response by the Information Commissioner" and is dated 6th July 2010 at page 30 of the agreed bundle. In particular between pages 35 and 48 each of the Grounds of Appeal are set out and responded to seriatim. The Appellant has replied in turn to this response at pages 50and 51 of the agreed bundle.

We now set out the relevant details as referred to at pages 35 to 48 of the agreed bundle in ease of identification of the issues herein:

The Commissioner's response to the Grounds of Appeal

1. Generally, the Commissioner relies on the Decision Notice as setting out his findings and the reasons for those findings. The Commissioner nevertheless makes the following observations in respect of the Appellant's grounds of appeal:-

2. Firstly the Commissioner notes that the Appellant does not dispute the conclusion reached by the Commissioner in paragraph 37 of his Decision Notice that the information requested is environmental and that therefore, the EIR applies to this request rather than the Act. Therefore, rather than section 41 of the Act, for the purposes of this appeal, the exceptions relied upon under the EIR are 12(5)(e) and 12(5)(f) EIR.

1. The IC applied the wrong or too high a test in deciding whether EIR exception 12(5)(e) was engaged. In deciding whether confidentiality was required to protect a legitimate economic interest, the IC looked for evidence of significant and actual harm, exceeding the legal threshold and applying a test that is not apparent in IC guidance.

3. Firstly, the Commissioner notes that the Appellant, in his GOA, does not dispute that the Commissioner applied the correct overall test when assessing whether the exception under regulation 12(5)(e) EIR applied, set out in paragraph 40 of his decision notice, namely:-

    - Is the information commercial or industrial in nature?
    - Is the information subject to confidentiality provided by law?
    - Is the confidentiality required to protect a legitimate economic interest?
    - Would the confidentiality be adversely affected by disclosure?

4. The Commissioner further notes that it is not disputed that the information requested is commercial or industrial in nature or that the information is subject to

confidentiality provided by law. What is in dispute between the parties is the third and fourth of the questions above, namely whether the confidentiality is required to protect a legitimate economic interest and whether confidentiality would be adversely affected by disclosure.

5. The Appellant argues, in paragraph 1 of its GOA that the Commissioner, in reaching his decision, in paragraphs 46-66 of his decision notice, applied the wrong or too high a test by looking for evidence of significant and actual harm, exceeding the legal threshold and applying a test that is not apparent in IC guidance.

6. The Commissioner would submit that he applied the correct test in his decision notice in considering the question of whether the confidentiality was provided to protect a legitimate economic interest.

7. The Appellant argues that the test applied by the Commissioner exceeded "*the legal threshold"*. However, if the Appellant is arguing that the correct test or legal threshold is different to that applied by the Commissioner, the Appellant has not explained in his GOA what he believes the correct 'legal threshold' should be. In the absence of such an explanation, the Commissioner would submit that this ground of appeal does not have a reasonable prospect of succeeding.

8. The Appellant has argued that the Commissioner applied a test that is not apparent in IC guidance. The Appellant has not made clear in his GOA which particular guidance he is referring to. The Commissioner has not issued specific guidance relating to the application of the exception under regulation 12(5)(e) EIR save for very general guidance on what the exceptions under the EIR cover.[1]

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1 http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/introductory/eip076_guidance_for_pub_doc_version3.pdf

2. *Further, or in the alternative, the IC took account of irrelevant or unsubstantiated assumptions in forming a view as to harm. In particular, the IC considered that material may be out of date (e.g. para. 58) without inviting submissions on the point or considering the possibility that material is easily capable of professional updating, whilst remaining sensitive.*

9. The Commissioner would dispute that he took account of irrelevant or unsubstantiated assumptions in forming a view as to harm. The Commissioner based his opinion on the facts of the case as provided by the Appellant and third parties and on the documents disclosed.

10. The Appellant argues that the Commissioner, in paragraph 58 of his decision notice, considered that the material was out of date without inviting submissions on the point or considering the possibility that material is easily capable of professional updating, whilst remaining sensitive.

11. The Commissioner would concede that he was incorrect to consider, in paragraph 58 of his decision notice, whether the figures for major infrastructure works contained in the viability report would still be relevant to negotiations in the current market. The Commissioner accepts that the question for the Tribunal is whether disclosure of the information would have the adverse effect discussed at the time of the request and not in the current market.

12. This was confirmed by the Tribunal in the case of ***Mersey Tunnels Users Association v Information Commissioner EA/2009/0001*** (stage 2) ('the Mersey Tunnels case') (referred to by the Appellant in para 4 of his GOA). The Tribunal concluded (at paragraph 63) that "*the relevant time for considering the sensitivity of the information is the time of the request, not the time of the appeal."*

13. In light of the above, the Commissioner would therefore submit that it is not relevant to consider whether the figures in the viability report were capable of

professional updating now. The Commissioner would not therefore have needed to have requested submissions on the same.

14. The Commissioner would submit that the Appellant was aware from the commencement of the Commissioner's investigation the information the Commissioner was seeking and that the Commissioner sought evidence of harm as at the time of the request.

15. In the event that the Appellant wishes to argue that the "*material is easily capable of professional updating, whilst remaining sensitive"*, it is submitted that the onus is on the Appellant to provide the evidence to support this and to persuade the Tribunal that this is the case. The Commissioner would submit that the Appellant has failed to provide any or any adequate evidence. In the absence of such evidence, the Commissioner would submit that he was correct to reach the conclusion he did in his decision notice.

3. The IC failed to give consideration to the point that the specific financial model (i.e. a model specific to Gladedale) may itself be capable of protection and that disclosure could, on a balance of probabilities, be harmful to economic interests.

16. The Appellant argues, at paragraph 3 of the GOA, that the Commissioner failed to give consideration to the point that Gladedale's specific financial model may itself be capable of protection and that disclosure could, on the balance of probabilities, be harmful to economic interests.

17. The Commissioner disputes that he failed to give consideration to Gladedale's economic interests. The Commissioner is not entirely clear as to what the Council is meaning when it refers to the 'specific financial model' though the Commissioner assumes that it refers to information such as the general construction costs and overhead, finance and profit included within the disputed information.

18. The Commissioner accepted in his decision notice that, in applying the exception under regulation 12(5)(e) EIR, it was necessary to consider whether disclosure would adversely affect a legitimate economic interest of the person the confidentiality is designed to protect, i.e. in this case, the applicants of whom Gladedale was one.

19. During the Commissioner's investigation, the Commissioner invited the Council to provide evidence that its arguments regarding harm to the interests of the third parties genuinely reflected the concerns of the third parties involved. The Council provided to the Commissioner a letter from Gladedale dated 11 February 2010 in which Gladedale listed the specific information that it considered would prejudice its legitimate economic interests.

20. On the particular facts of this case, it is submitted that the Commissioner was correct to conclude that this letter is not sufficient evidence to support the Council's argument that disclosure of the disputed information would harm Gladedale's legitimate economic interests. The Commissioner set out the reasons why he took this view in paragraphs 49 to 66 of his Decision Notice and the Commissioner adopts these arguments for the purpose of this response.

21. The Commissioner notes that the Council have failed to adduce any further evidence from Gladedale with its notice of appeal. The Commissioner therefore sees no reason to change his opinion. The Commissioner would submit that the Council have failed to provide sufficient evidence from Gladedale as to why or how disclosure of the disputed information would harm Gladedale's legitimate economic interests.

4. The IC failed to address at all the relevance of Information Tribunal Decision (EA/2009/0001) referred to by the Council in its submissions. The IC failed to consider the decision in its weighting of facts relevant to commercial interest,

particularly the significance of value and costs predictions in achieving best value and how disclosure of one party's assessment of risk and commercial pricing can be prejudicial to a competitive process.

22. The Commissioner would submit that the Tribunal must decide each case on its own facts. In the Mersey Tunnels case, the Tribunal received evidence from Halton Borough Council that disclosure of the requested information in that case would harm the Council's negotiating position as the process of tendering was not concluded at the time of the request.

23. On the particular facts of this case, at the time of the request, the Council had (on 18 December 2008) resolved to grant planning permission subject to completion of a 'section 106 agreement'. The Commissioner would submit that he was correct to conclude that the Appellant has not provided sufficient evidence to show how and why disclosure of the disputed information at the time of the request would have adversely affected the Council or the applicants.

5. The IC failed to have regard, or give sufficient weight to its own guidance in deciding whether EIR exception 12(5)(e) was engaged. In particular, the IC failed to acknowledge that the exception covers a wide range of commercial information and provides a wider category of exemption than that contained in section 41 of the Act.

24. The Appellant argues that the Commissioner failed to have regard or give sufficient weight to its own guidance in deciding whether EIR exception 12(5)(e) was engaged. The Commissioner is not clear as to what specific guidance the Appellant is referring to. In any event, the Commissioner believes that his decision is in accordance with guidance that the Commissioner has published.

25. The Commissioner would dispute that he failed to acknowledge that the exception covers a wide range of commercial information and provides a wider category of exemption than that contained in section 41 of the Act.

26. The Commissioner accepts that the approach in considering whether the exception under regulation 12(5)(e) EIR applies is different to the approach to confidentiality under section 41 of the Act. In particular, there is no need to consider whether there would be a public interest defence to any claim for breach of confidence. Instead, the exception is subject to the usual public interest test under the EIR.

27. Further, the Commissioner accepts that it is not enough to argue that disclosure would adversely affect the commercial interests of any person. Under 12(5)(e) EIR, there must also be confidentiality provided by law, which may include consideration of some of the factors relevant to section 41 of the Act, but it is not an identical test.

6. In deciding erroneously that EIR exception 12(5)(e) was not engaged, the IC erred by not giving consideration to the test of public interest.

28. The Commissioner would submit that this is not a reasonable ground of appeal. The Commissioner could only have erred in the event that he found that the exception under regulation 12(5)(e) *was* engaged and then failed to give consideration to the public interest test.

29. The Commissioner would submit that, having concluded that the exception under regulation 12(5)(e) EIR was not engaged, he was not obliged in his decision notice to then go on to consider, in the alternative, whether, in the event that the exception under 12(5)(e) was engaged, the public interest in maintaining the exception outweighed the public interest in disclosure.

7. The IC failed to consider whether EIR exception 12(5)(f) was engaged in its own right. The IC appears to have relied upon a consideration of issues relevant to exception 12(5)(e) in reaching a view that exception 12(5)(f) was not engaged. Even if the IC

applied the correct tests in assessing 12(5)(f) (which is not admitted), the IC received separate and distinct evidence in respect of reg. 12(5)(e) [the Commissioner believes that the Appellant meant to refer to reg. 12(5)(f) here] *and should have addressed these points separately.*

30. The Appellant, in paragraph 7 of the GOA, argued that the Commissioner erred in failing to consider whether EIR exception 12(5)(f) was engaged in its own right, by relying upon the same issues considered relevant to exception 12(5)(e).The Appellant believes that the Commissioner should have considered the separate evidence provided in respect of regulation 12(5)(f) EIR.

31. The exception under regulation 12(5)(f) EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information in circumstances where the person:-

i) was not under, and could not have been under any legal obligation to supply it to that or any other public authority;

ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

iii) has not consented to its disclosure;

32. The Commissioner agrees with the Appellants that Gladedale could not have been under any legal obligation to supply the disputed information to the Appellants. Indeed, the Commissioner notes from the letter from Gladedale to the Appellants dated 11 February 2010 that the disputed information was only provided informally in relation to the provision of affordable housing when considered in conjunction with other 'planning gain' elements being secured through section 106 provisions. Further, the disputed information was not supplied in circumstances such that the Appellants are entitled to disclose it and Gladedale have not consented to its disclosure.

33. It must then be determined whether disclosure of the information would adversely affect the interests of Gladedale. The Appellants argue that they have provided separate evidence to this effect regarding exception 12(5)(f) EIR. When asked by the Commissioner to provide evidence as to what interests would be adversely affected by disclosure of the disputed information and why disclosure of the information would adversely affect the interests of Gladedale other than those interests referred to in connection with the exception under section 12(5)(e), the Appellants sought to rely upon the letter from Gladedale addressed to the Appellants dated 11 February 2010 referred to above.

34. The Appellants have not sought to rely upon this letter specifically in relation to exception 12(5)(f), rather than 12(5)(e). The Commissioner therefore considered the content of the letter from Gladedale dated 11 February 2010 in connection with his consideration of the exception under regulation 12(5)(e) EIR. Further, in an email received from the Appellants dated 26 January 2010, the Appellants quoted from Gladedale's solicitors (having sought their view) referring to the possible adverse effect of disclosure of the disputed information on their clients, which referred to the exception under 12(5)(e) and not 12(5)(f). The Commissioner would therefore dispute that the Appellants have provided separate and distinct evidence in respect of regulation 12(5)(f) EIR.

35. In any event, the Commissioner would submit that he was correct to find in his decision notice that, on the particular facts of this case, the Appellants have failed to provide sufficient evidence that disclosure of the disputed information would adversely affect the interests of Gladedale and that therefore the exception under regulation 12(5)(f) EIR was not engaged.

8. By failing to address the relevant tests in deciding whether exception 12(5)(f) was engaged, the IC's approach gave risk to further error by failing to consider the test of public interest on which significant evidence had been adduced.

36. The Commissioner would submit that this is not a reasonable ground of appeal. The Commissioner could only have erred in the event that he found that the exception under regulation 12(5)(f) EIR *was* engaged and then failed to give consideration to the public interest test under regulation 2 EIR

37. The Commissioner would submit that, having concluded, on the particular facts of this case that the exception under regulation 12(5)(f) EIR was *not* engaged, he was not obliged in his decision notice to then go on to consider, in the alternative, whether, in the event that the exception under 12(5)(f) was engaged, the public interest in maintaining the exception outweighed the public interest in disclosure.

[15] For the sake of completeness we now set out the Appellant's Reply to the above Response:

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1. This Reply is made in accordance with Rule 23 of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009.

2. The Information Commissioner states at paragraph 30 of his Response that he has not issued specific guidance relating to the application of the exception under Regulation 12(5)(e) save for very general guidance on what the exceptions cover.

3. However, that general guidance in its section on Regulation 12(5)(e) refers the reader to FOIA guidance on commercial interests and information provided in confidence. These guides are referenced as follows:-
    - Awareness Guidance No.5 – Commercial Interests – V3.0 6 March 2008
    - Awareness Guidance No.2 – Information provided in confidence – Version 4 12 September 2008

4. Awareness Guidance No.5 provides a further link to the prejudice test in Awareness Guidance No.20.

5. Presumably the Commissioner provides these references and links because he considers that the guidance is relevant to the tests to be applied. The Appellant had regard to the advice in the Guidance Notes. The Commissioner does not appear to have had regard to his own guidance.

6. The guidance notes generally provide a more balanced appraisal of, for example, the need to consider the potential for harm to legitimate economic interests. Guidance Note No.5, for example, states that prejudice may not be substantial (but equally should not be trivial). The Commissioner, in contrast, at paragraph 46 of his decision relies upon the implementation guide for the Aarhus Convention and the need for significant damage to the interest in question.

7. The correct legal threshold for the Commissioner was to consider whether confidentiality was provided to protect a legitimate economic interest. The Commissioner appears to require evidence of actual or genuine harm (as demonstrable fact) in his analysis. This contrasts with the approach of the First-Tier Tribunal in Case No. EA/2010/0012 (attached to this Reply). That case involved Bristol City Council and the withholding of viability information in connection with a planning application. The facts are similar to the present case and the First-Tier Tribunal was careful not to impose too high a test on the protection of legitimate economic interests. The Tribunal dealt with the point in this way at paragraph 13:-

   "It may be that the release of the report would in fact have had no adverse effect on the economic interests of the developer but, as we have found, it was subject to confidentiality provided by law because there were reasonable grounds for saying its release would damage their economic interests. It is clear therefore that the confidentiality provided by law was there to protect a legitimate economic interest…"

8. The Appellant does not agree that either it or the interested parties failed to provide evidence to assert the application of exception 12(5)(f). This exception requires a consideration of whether disclosure would adversely affect the interests of the person who provided the information. The majority of the evidence submitted by the Appellant and the interested parties is directed precisely at the effect on the interests of those parties. The Commissioner at paragraph 69 merely states that arguments presented to him on this point were insufficient. The Commissioner appears to rely on his assessment of issues under exception 12(5)(e) which it is submitted is a different test."

Decision:

[16] The appeal is dismissed. The information requested must be made available by the 5th February 2011.

Reasons for Decision:

[17] The Tribunal repeats the concerns set out at paragraph [7] above.

[18] It is not disputed between the parties that the Respondent applied the correct overall test when assessing whether the exception under regulation 12(5)(e) of the EIR applied, namely:-

i) Is the information commercial or industrial in nature?

ii) Is the information subject to confidentiality provided by law?

iii) Is the confidentiality required to protect a legitimate economic interest?

iv) Would the confidentiality be adversely affected?

We accept that the question for this Tribunal is whether, on the particular facts of this case, the confidentiality is required to protect a legitimate economic interest and whether the confidentiality would be adversely affected by the disclosure of the disputed facts. We accept the submission that disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect and that this

requires consideration of the sensitivity of the information and the nature of any harm that would be caused by disclosure. We accept the submission made on behalf of the Respondent that broader arguments that the confidentiality provision was originally intended to protect legitimate economic interests at the time it was imposed will not be sufficient. We accept the Respondent's view that, taking into account the duty in paragraph 4.2 of Directive 2003/4 EC to interpret exceptions in a restrictive way, the wording *"where such confidentiality is provided to protect a legitimate economic interest"* (as opposed to "*was provided"*) indicates that the confidentiality of this information must be objectively required at the time of the request in order to protect a relevant interest.

We further agree with and accept the submission made on behalf of the respondent that it is not enough that some harm might be caused by disclosure. We agree that it is necessary to establish (on the balance of probabilities) that some harm to the economic interest would be caused by disclosure.

[19] It is accepted by this Tribunal, in support of the submissions made by the Respondent and referred to at [18] above, that in addition to the duty to interpret exceptions restrictively, the Respondent, properly in our view, notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests: *"Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors"*. We are of the view that this is consistent with the general scheme of Regulation 12(2) EIR which states that *"a public authority shall apply a presumption in favour of disclosure"* and accept the submission on behalf of the Respondent that this interpretation is also more consistent with the EIR 12(5) exceptions, which require that *"disclosure would adversely affect"* the relevant interests identified in each exception. We accept the contention, as submitted by the Respondent, that unlike FOIA there is no lesser limb of "would be likely to adversely affect".

[20] The Tribunal accepts that the Respondent's guidance and its link to the FOIA guidance notes are misleading but we hold that the correct interpretation of the Law must prevail. This Tribunal is of the view that the Respondent should consider the criticisms made and implied of its own guidelines and modify same where necessary.

[21] The Respondent has submitted that on the particular facts of this case, based on the information provided to him during his investigation, he was not persuaded that disclosure of the disputed information would have caused harm to the extent that this would have been "more probable than not". We accept this to be the case. The Respondent further argues that the evidence put forward by the Appellant, in the absence of further evidence, does not adequately justify why harm *would* occur to the developer's economic interests and submits that the fact that, for example, the cost of the additional party's development finance is considered by them to be confidential is not an argument that disclosure would necessarily result in any commercial prejudice or financial loss. We accept this submission.

[22] This Tribunal accepts that the Respondent was correct in his assessment of the particular facts of the case as presented by the Appellants in that they have failed to provide sufficient evidence that disclosure of the disputed information would adversely affect the interests of the Additional Party at the time of the request and that therefore any exception under regulation 12(5)(f) was not engaged.

[23] While this Tribunal accepts that public interest is inextricably linked to considerations of potential commercial prejudice to an interested party in the sense that they are not mutually exclusive, we find that this does not detract from the burden of proof of harm or prejudice. The onus of proof remains at all times with the Appellant. This Tribunal finds as a fact that the Appellant has failed to establish, on the balance of probabilities, through evidence provided to the Respondent or before this Tribunal, that any harm or prejudice would result to interested parties. Statements by interested parties that harm might or could be caused are insufficient for the reasons outlined by the

Respondent and referred to above. This Tribunal accepts also that in finding that exceptions, either under regulation 12(5)(e), or 12(5)(f) EIR, were not engaged, the Respondent was not required to go on to consider the public interest test.

[24] A letter from the Additional Party dated the 11th February 2010 and referred to above is exhibited at pages 106 -108 of the agreed bundle of documents. This Tribunal finds that whether or not it was intended to be disclosed to a public body, in this case the Appellant, it was in fact so disclosed and is therefore subject to scrutiny and potential disclosure. Again we find that assertions such as *"would be prejudicial"* and speculation about potential harm are significantly unconvincing. We have read this letter in carefully and find no supportive evidence of the nature or extent of any harm or prejudice that would arise from disclosure at the time the request was made. The use of words such as "could" or "may" do not in our view provide evidence of harm or prejudice to the required standard of proof as outlined above. Having considered this letter in detail we find it fails to provide any convincing evidence of harm or prejudice by disclosure of the information sought by the Complainant at the time of request.

As stated we are unconvinced that this letter provides evidence of harm or prejudice of the nature or extent that would engage the exception under 12(5)(e) or 12(5)(f). In paragraphs 1 and 2 of the letter it states that *"all"* the information in the appraisal is commercially sensitive and would be *"prejudicial"*. The generality of this statement casts doubt on whether the Additional Party have properly analysed it in the context of the regulations. Without prejudice to the generality of our assessment of the evidential shortcomings of this letter we would draw attention to some other shortcomings we noted therein.

We are of the view that possible misinterpretation of a document is not a ground for withholding disclosure.

We are of the view that professional evidence is needed to establish even the potential harm or prejudice asserted by the Appellant and/or the Additional Party. Assuming the

contractors do not operate as a cartel, given that there will be a competitive tender process, it is difficult to see how prejudice would result in the circumstances.

It seems to us that the fact that Network Rail is exempt from FOI is irrelevant. The Appellant now hold this information and it therefore comes within the FOIA. There is no evidence from Network Rail themselves about harm or prejudice.

[25] This Tribunal notes the absence of any additional evidence of harm or prejudice in the presentation of this appeal. We note that the Appellant has made no request for an oral hearing whereby witnesses, professional or otherwise, could have been called to give evidence in support of the claim of harm or prejudice. This is despite the detailed reasoning given by the Respondent in the Decision Notice of the 17th May 2010..

[26] For the above reasons we support the reasoning behind the Decision Notice of the Appellant dated the 17th May 2010 and dismiss this appeal.

[27] The Respondent did not find it necessary to go on to consider the public interest test for the reasons he has given. We accept his reasoning. It is impossible for this tribunal to carry out any balance of interest test without submissions on same however obiter we take Judicial Notice of the fact that this case is about a planning application on a highly significant site in which there is evidently substantial public interest. There is therefore likely to be public interest in releasing as much information as possible.

Brian Kennedy QC
Judge

4th January 2011