

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 18 December 2018

**Public Authority:** Blackpool Council

**Address:** PO Box 4  
Blackpool  
FY1 1NA

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about the sale of Blackpool Airport and adjacent land. The Council considered the request under the EIR, answering one question but refusing the remainder under regulations 12(4)(e) - internal communications; 12(5)(e) - confidentiality of commercial or industrial information; and 12(5)(f) - interests of the person who provided the information. Upon completion of the review, the Council released some information. By the end of the Commissioner's investigation the Council was still relying on regulations 12(4)(e), 12(5)(e), and now regulations 13 (third party personal data) and 12(5)(b) - the course of justice.
2. The Commissioner's decision is that Blackpool Council:
  - Has correctly engaged regulation 12(4)(e), with the exception of one email identified in Appendix A, but that the public interest in disclosing the information outweighs the public interest in maintaining the exception
  - Has not adequately demonstrated that regulation 12(5)(e) is engaged for information of a commercial nature, with the exception of one email identified in Appendix A
  - Has not adequately demonstrated information attracts legal advice privilege in order to engage regulation 12(5)(b)
  - Is entitled to rely on regulation 13 for personal data relating to third parties, the contact details of all Council staff, the names of

junior officers and an officer's email and password for an online account, but not the names of Senior Officers in the withheld information, as indicated in confidential Appendix B.

- Breached regulation 5(2) by failing to respond to the request within 20 working days and regulation 11(4) by failing to undertake the review within 40 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
    - Disclose the withheld information as indicated in Appendix A and confidential Appendix B.
  4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. On 22 December 2017, the complainant wrote to Blackpool Council and requested information in the following terms:

*'1. Any information and/or correspondence capable of being released regarding the purchase of Blackpool Airport to include correspondence with the Vendor or their agents prior to the purchase of Blackpool Airport.*

*2. Confirmation as to the date the Vendor (or their agent) of Blackpool Airport was approached with an offer to purchase Blackpool Airport and/or the date the Vendor was first approached and negotiations regarding the purchase of Blackpool Airport commenced.*

*3. Any correspondence with Regional & City Airports (Blackpool) Limited regarding the potential purchase of Blackpool Airport.*

*4. Any information and/or correspondence capable of being released regarding the purchase of Blackpool Airport to include correspondence with the Blackpool Fylde & Wyre EDC.*

*5. Any information capable of being released regarding the purchase of land adjacent to Blackpool Airport to include correspondence with the Vendor or their agents.'*

And

*'1. Any information and/or correspondence capable of being released regarding the purchase of Blackpool Airport to include correspondence with the Vendor or their agents and Blackpool Council prior to 31 August 2017.*

*2. Any correspondence with Regional & City Airports (Blackpool) Limited regarding the potential purchase of Blackpool Airport.*

*3. Any information capable of being released regarding the purchase of land adjacent to Blackpool Airport to include correspondence with the Vendor or their agents and Blackpool Council.'*

6. The Council responded on 26 January 2018. It stated that it was responding to the request under the Environmental Information Regulations (EIR). It refused to provide information falling within the scope of the request, citing the exceptions under regulations 12(4)(e) - internal communications; 12(5)(b) - confidentiality of commercial or industrial information; and 12(5)(f) - interests of the person who provided the information.
7. On 14 March the complainant requested a review of the Council's response, detailing why he was dissatisfied. The Council failed to undertake the review within 40 working days as required under regulation 11(4), at which point the complainant contacted the Commissioner.
8. The Commissioner urged the Council to complete the review as soon as possible. However, further delays were incurred as the Council struggled to find a suitable person to undertake the review, and it eventually engaged external solicitors to complete it. The Council finally provided a review response on 7 September 2018. At this point it switched its exclusive consideration of the request under the EIR to now include both the EIR and FOIA. It released some information falling within the scope of the request but refused to provide the remainder citing its original application of regulation 12(5)(e), and now included the following exemptions under the FOIA - sections 36 - prejudice to the conduct of public affairs; section 40 - personal data; section 42 - legal professional privilege; and section 43 - commercial interests.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 15 May 2018 to complain about the fact that the Council had failed to undertake a

review of its response to his request. Following the Commissioner's intervention, the review was completed on 7 September 2018.

10. As previously referenced, at this point the Council switched its exclusive reliance from the EIR to withhold information and now engaged exemptions under the FOIA.
11. The complainant contacted the Commissioner on 17 September 2018 to express dissatisfaction with the review and object to the Council's continued withholding of information. He considered that as the sale of the Airport had been concluded that 'chilling effect' and commercial interest arguments were redundant.
12. The complainant identified specific emails exchanged between 8 July 2017 and 18 August 2017 within the withheld information that he considered of particular importance as he believed they would shed light on the Council's seemingly late decision to buy the Airport.
13. The Commissioner sent the Council an investigation letter requiring it to supply the withheld information for examination and arguments for its use of the exemptions under FOIA and exceptions under the EIR. The Commissioner advised the Council that as the request related to the sale of Blackpool Airport and adjacent land it would appear that the review should have been considered under the EIR, as indeed the original request response was. However until she had seen the withheld information she could not be definitive at this stage.
14. The Council responded to the Commissioner's investigation letter maintaining its position on the request as falling under both the EIR and FOIA. Having reviewed the withheld information, the Commissioner determined that the request should have been considered solely under the EIR, and directed the Council to revise its response accordingly.
15. The Council subsequently revised its response. It continued to withhold all the information outlined by the complainant in his letter to the Commissioner dated 17 September 2018, citing the exceptions under regulations 13 – personal data; 12(4)(e) – internal communications; 12(5)(e) – confidentiality of commercial or industrial information; 12(5)(b) – course of justice.
16. The Commissioner considers the scope of the case to be whether the Council has correctly engaged the EIR regulations above to the withheld information, and where applicable whether the public interest in maintaining the exception outweighs the public interest in disclosure of the information. All references to withheld information in the 'Reasons for decision' relate only to that identified by the complainant in his letter

to the Commissioner dated 17 September 2018, and not the entirety of the information withheld by the Council in response to the request.

## Reasons for decision

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### Context of the request

17. Although requests for information under both the FOIA and EIR are motive and applicant blind, it is helpful to provide some context to the request as it is relevant to the public interest arguments.
18. Blackpool Airport was sold by the Council in 2004 to a consortium of private companies, with the Council retaining 5% of the Airport. In 2008 the Airport was sold again to Balfour Beatty, with the Council keeping its 5% ownership share. The Airport had been operating passenger as well as commercial and private flights but with dwindling passenger numbers and following a legal dispute with Jet2, in 2014 the Airport went into administration. Balfour Beatty tried to sell the Airport but without success and it temporarily closed, opening again a few months later. Losses eventually reduced and in 2017 Balfour Beatty again announced plans to sell, and entered into an exclusivity period with a private sector partnership.
19. However, the sale with the private sector partnership did not materialise, and the Council made the decision to purchase the Airport itself. The complainant considers there to be a significant lack of transparency about when, and why, the Council decided to purchase the Airport and given the sale is now complete, it is in the public interest to disclose this information.
20. The withheld information concerns email exchanges between Council staff, the Head of Enterprise and Investment at Blackpool, Fylde and Weir Economic Development Corporation (BFWEDC), Balfour Beatty and other external organisations. The content relates primarily to the Council's position regarding the sale of the Airport prior to its decision to purchase the Airport itself, the purchase of neighbouring land and the Council's decision to then buy the Airport along with associated negotiations.

### Regulation 12(4)(e) – internal communications

21. Regulation 12(4)(e) states:

*'For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—*

*(e) the request involves the disclosure of internal communications.'*

22. There is no specific definition of what constitutes internal communications but the concept is broad. A 'communication' will include any information intended to be communicated to others or stored where others may readily access it. For it to be deemed internal, the communication must be shared or sent within the public authority.
23. The Council has argued that the email exchanges to which it has applied regulation 12(4)(e) are internal within the Council and therefore the regulation is engaged. It has explained that a key individual involved in the sale of the Airport was the 'Head of Enterprise and Investment' for Blackpool Fylde & Wyre Economic Development Company (BFWEDC). BFWEDC is a partnership between three Councils and the private sector with aim of driving economic growth in the area. Blackpool Council discharges its core regeneration functions through the partnership, whilst maintaining responsibility for the delivery for regeneration. The Head of Enterprise and Investment, although an officer of BFWEDC, held regeneration responsibility on behalf of the Council and during the period to which the emails relate, continued to be an employee of the Council located within one of its regeneration services.
24. The Council has drawn a parallel with the First Tier Tribunal decision in *Salford City Council and Redwater Developments v The Information Commissioner [EA/2015/0276]*<sup>1</sup> where the Tribunal found:

*"Mr. Norbury's evidence described clearly how, inter alia Urban Vision discharges "core function" on behalf of the council with respect of its disposal of land. He described how Urban Vision are not merely an advisory service which the council brought in, but are an integral part of the council decision making process and further in discharging and implementing those decisions."*
25. The Council maintains that the Head of Enterprise and Investment was included on emails as he was an employee of the Council. The Commissioner is not convinced by this argument – an employee simply means that the individual is on the Council's payroll; it does not prove

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1949/Salford%20City%20Council%20EA.2015.0276%20\(04.07.17\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1949/Salford%20City%20Council%20EA.2015.0276%20(04.07.17).pdf)

that this arrangement is anything more than administrative. However, the Commissioner is persuaded that the officer concerned was discharging regeneration functions on behalf of the Council through the BFWEDC, which provided an appropriate conduit. This is reinforced by the communications themselves which show no meaningful demarcation between the officer's role as Head of Enterprise and Investment at the EDC or his regeneration responsibilities within the Council, and is further supported by the use of 'we' between the officer and Council staff, with 'we' denoting the Council. The Commissioner is therefore satisfied that communications between Council officers, including those with the Head of Enterprise and Investment at BFWEDC, constitute internal communications for the purposes of regulation 12(4)(e).

26. When the Council reviewed its response to the original request, it did so under both the FOIA and EIR. At this stage it applied section 36 of the FOIA – prejudice to the conduct of public affairs – to the majority of withheld emails that the complainant is challenging. When the Commissioner requested that the Council reconsider its response under the EIR, it replaced its reliance on section 36 with regulation 12(4)(e) for most of the emails. However, the Commissioner notes that one of these emails cannot be deemed internal communications because it involves third parties and therefore does not accept that regulation 12(4)(e) is engaged. This email is highlighted in Appendix A, and should be disclosed.
27. The underlying rationale behind regulation 12(4)(e) is to provide public authorities with the necessary space to think and explore issues in private. It is a class-based exception, meaning that all information is caught if it constitutes internal communications and there is no need to consider content or sensitivity. However, in practice, because the exception is subject to the public interest test, and the intention of the regulation is to create a safe thinking space, this will limit information that can be considered.

#### *The Public Interest Test*

28. Having been satisfied that regulation 12(4)(e) is engaged for communication between Council staff and with the Head of Enterprise and Investment at the EDC, the Commissioner now turns to the public interest test. A public authority must consider, in all the circumstances of the case, whether the public interest in maintaining the exception outweighs the public interest in disclosure. When assessing this, the public authority must apply a presumption in favour of disclosure.
29. The EIR implements the EU Directive 2003/4/EC on public access to environmental information. The public interest in disclosure is emphasised in the preamble to the directive:



*"Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."*

30. The Directive derives from the 'Convention on Access to Information, Public Participation' in Decision-Making and Access to Justice in Environmental Matters', known more commonly as the Aarhus Convention. The Objective of the Convention is that:

*"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing, each Party shall guarantee the rights of access to information ... in accordance with the provisions of this Convention."*

31. It is therefore clear that there is a strong, general interest in the disclosure of environmental information to promote public participation in decision-making and facilitate better living environments. There are also other aspects of public interest in transparency, accountability, integrity and value for money that are promoted through the disclosure of information by public authorities. However, this must be considered in the context of what the exception is protecting, in this case a safe thinking space for public authorities to debate and make decisions.

#### *The Council's Position*

32. As previously noted, the Council reviewed the complainant's request under both the FOIA and EIR. At this stage it applied section 36 of the FOIA (prejudice to the conduct of public affairs) to the majority of the information that it later applied regulation 12(4)(b). In its representations to the Commissioner the Council said that the majority of its arguments regarding the public interest test for the application of section 36 now applied to regulation 12(4)(b).
33. These arguments centre on the link between the purchase of the Airport and the ongoing development of the surrounding Enterprise Zone (EZ). Although the purchase of the Airport is now complete, the EZ development is still a live issue, and discussions about this need to be undertaken in a 'free and frank manner'. The Council states:

*'It is essential that with significant development opportunities, individuals within the Council are able to freely discuss strategy, options and methodologies, testing the strength and importance of specific issues, without such strategy development being published to the world at large. If the strategy development*



*discussions were at risk of being made public, it would have a significant effect on the Council's ability to fully and properly test its commercial and strategic decisions'*

34. The Council maintains that it continues to negotiate regarding the EZ and has commitments to various government and funding sources and contends that release of the information about the sale of the Airport would be likely to inhibit these discussions.
35. The Council considers it needs a safe space to develop ideas and debate issues about the EZ away from external scrutiny and '*without becoming distracted by the release of the intricacies of the internal communications to the public*'. It considers arguments regarding the 'chilling effect' to be particularly strong due to the timing of the request and significant media interest in the matter.
36. The Council asserts that the *only* public interest expressed regarding the Airport was that it continued to operate as an Airport, and that any interest in the request is purely a private one driven by the complainant. Counter-intuitively though, it does acknowledge wider public interest arguments in disclosure of the information including demonstrating the Council is getting value for money in the purchase of land/property, and transparency/accountability in decision-making. On balance it considers the impact of the chilling effect that disclosure of internal communications would have on the ongoing development of the EZ outweighs any public interest in disclosure.

#### *The Complainant's Position*

37. The complainant does not consider that chilling effect arguments have any weight in this matter as the Airport sale concluded on 18 September 2017 and the request was made on 22 March 2018, over 6 months later. The chilling effect could not apply to the sale process as the sale is now complete.
38. The complainant further maintains that there is significant public interest in understanding why the Council decided to purchase the Airport, especially given that this was not apparent during negotiations between Balfour Beatty and other interested parties. He considers that in terms of transparency and accountability, there is a compelling public interest in taxpayers being made aware of how the Council reached the decision to purchase the Airport at a cost of approximately £4.5 million.
39. In addition to the overall weakness in the Council's arguments, the complainant does not believe that the Council has applied a public interest in favour of disclosure of the information as required in regulation 12(2).

*The Commissioner's Position*

40. The Commissioner recognises that public authorities need a safe space to discuss and debate live issues without distraction and free from scrutiny whilst matters are still current and potentially fast-changing. The need for this space is strongest when the issue is still live, and diminishes significantly once a decision has been made. This was confirmed by the Information Tribunal in *DBERR v Information Commissioner and Friends of the Earth* (EA/2007/0072, 29 April 2008)<sup>2</sup> where it stated: *"This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public."*
41. The Council has linked the sale of the Airport with the ongoing development of the EZ, and as the latter is still live, believes the need for a safe space remains:

*'Blackpool Council has given close consideration to the reopening of Blackpool Airport and delivery of the surrounding EZ. The Council needs to be in a position to have a free and frank exchange of views where such a significant activity is being undertaken, to enable potential strategies and options to be tested and scrutinised. Equally, the Council (and its advisers) need to be able to avail of the free and frank provision of advice in order to ensure the most efficient and productive courses of action are undertaken'.*

42. As the complainant notes, the sale of the Airport was completed on 18 September 2017, 6 months before he made his request and therefore the matter is no longer live. The Commissioner agrees that the matter is no longer live, and therefore a safe space for the matter is no longer required. The Council asserts that the safe space is still needed for the EZ development, of which the Airport lies within. However the request relates to communication about the *sale* of the Airport, and the Commissioner does not therefore consider any links made in terms of ongoing development for the Airport and /or the EZ are relevant.

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[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i181/DBERRvIC\\_FOEfinaldecision\\_web0408.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i181/DBERRvIC_FOEfinaldecision_web0408.pdf)

43. Connected to the Council's argument of maintaining a safe space for ongoing discussions about the EZ is the negative impact that disclosure under this request would have on future debates and decisions, known as the chilling effect. Again, chilling effects will be stronger when the issue is still live, or at least very recent. As the EZ development is still live, the Commissioner understands these concerns, but she is not convinced of their realisation. In *Scotland Office v Information Commissioner* (EA/2007/0128, 5 August 2008)<sup>3</sup> the Tribunal noted:

*'In relation to the suggestion that officials would no longer feel able to express themselves in a frank and candid way, with a resulting adverse impact on the quality of debate and of advice tendered, Mr. Henderson identified the impact on candour as having two effects; civil servants being less keen to record their views on paper and more ambiguity in the language they used.'*

*'There is, unsurprisingly, no evidence that since FOIA has come into force, or since DFES, that this has been the case. We share the scepticism expressed by other Panels of this Tribunal as to the extent of the "chilling" effects predicted in relation to the impact of disclosure in relation to internal governmental deliberations.'*

44. The Council maintains that the interest in the withheld information is driven by a private interest. The complainant has been open with the Commissioner that his partnership was engaged in talks with Balfour Beatty to purchase the Airport which was covered by an exclusivity agreement. The Commissioner pays no attention to either the Council's position regarding a private interest or the complainant's business position. Her consideration of the public interest is confined to that detailed in her guidance on *'How Exceptions and the public interest test work in the EIR'*<sup>4</sup>, such as transparency, accountability, public interest in the issue/information, suspicion of wrongdoing and presenting a full picture.
45. The Commissioner notes that there appears some contradiction in the Council's position regarding the public interest. On the one hand it

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i201/ScotlandOffice1.pdf>

<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1629/eir\\_effect\\_of\\_exceptions\\_and\\_the\\_public\\_interest\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1629/eir_effect_of_exceptions_and_the_public_interest_test.pdf)

maintains that the public has shown very little interest in the sale of the Airport but then also refers to significant media interest in the matter. Whilst the public interest is in no way synonymous with media interest, and that what is of interest to the public is not the same as the public interest, the Council's concerns about media coverage could indicate that there is in fact a wider public stake, and therefore interest, in the matter. The Commissioner also notes that the Council's assessment of minimal public interest based on how much interest the public has shown in the matter is misplaced as general curiosity will be driven as much by what is in the public domain as what is not.

46. The purchase of Blackpool Airport at a cost of £4.25 million was a major investment decision on the part of the Council. The Commissioner considers that making publicly available the rationale for this decision supports the wider principle of transparency and holds senior officers to account for the Council's approach. The Council argues that it should not be '*distracted by the release of the intricacies of the internal communications to the public*'. However if, as the Council asserts, there is little public interest in the sale then these concerns regarding distraction are not going to materialise. The Commissioner has already stated that the safe space arguments advanced by the Council do not hold weight for the purchase of an asset made six months prior to the complainant's request. Similarly she attaches minimal importance to the chilling effect arguments put forward by the Council. She therefore concludes that the public interest in disclosing the communications for which regulation 12(4)(e) is engaged (highlighted in the confidential Appendix), outweighs the public interest in maintaining the exception and should be released.

### **Regulation 12(5)(e)**

47. The exception under regulation 12(5)(e) of the EIR provides that public authorities are entitled to refuse to disclose information where to do so would adversely affect the confidentiality of commercial or industrial information, where such confidentiality is provided by law. If the exception is engaged, it is then subject to the public interest test.
48. In assessing whether the exception is properly engaged, the Commissioner applies a four stage test, of which all must be met:
- The information is commercial or industrial in nature
  - Confidentiality is provided by law
  - The confidentiality is protecting a legitimate economic interest
  - The confidentiality would be adversely affected by disclosure
49. As the Council reviewed the request under both the FOIA and EIR, it withheld commercial information under both section 43 of the FOIA –

and regulation 12(5)(e). The Commissioner asked the Council to consider the request solely under the EIR, after which the application of section 43 was replaced with regulation 12(5)(e); this accounts for the Council's varying use of the terms commercial interests (under the FOIA) and economic interests (under 12(5)(e)). The Council also identified some information it had previously considered under section 36 of the FOIA and now applied regulation 12(5)(e).

50. The Council maintains that the information is commercial in nature as it relates to the purchase of the Airport and commercial development opportunities within the EZ. Having reviewed the information, the Commissioner has determined that the information to which regulation 12(5)(e) has been applied falls in to the following categories:
- Information about the cost of the Airport and EZ land
  - Negotiations with Balfour Beatty
  - Communication between or about third parties linked to the sale of the Airport and adjacent land, and the delivery of Airport services.
51. Having reviewed the withheld information, the Commissioner is satisfied that as it relates to the sale of the Airport and surrounding land, it is commercial in nature.
52. The Council has argued that the information has a duty of confidence provided by law either because the party providing it stated as much, or because it was part of a negotiation process. The Council says that it does not have the permission of Balfour Beatty to supply the information it has provided. However, the Council does not appear to have approached other parties about whom the withheld information relates, and therefore the Commissioner can only consider the economic interest of the Council and Balfour Beatty in the application of the exception.
53. Regarding the first category of withheld information, the cost of the Airport and EZ land, the Commissioner notes that much of this information is already in the public domain<sup>5</sup>. The Commissioner has also

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<sup>5</sup> <https://www.aeroexpo.co.uk/news/blackpool-council-swoops-to-protect-Airport-in-4-25m-buy-out/>

<https://www.bbc.co.uk/news/uk-england-lancashire-41251805>

seen information that was released to the complainant as part of the review process that includes financial information regarding the sale of the Airport and adjacent land. The Council has provided no explanation as to why it has redacted this type of information in some communications but not others. As a result of the majority of this information already being in the public domain, either because it is freely available in media articles or because it has already been released in part to the complainant, the Commissioner does not consider it can now be subject to a duty of confidence and as a result the exception is not engaged for information within this category.

54. Moving on to the secondary category, negotiations with Balfour Beatty, the Council maintains that the information was provided as part of a negotiation process, and as such it was communicated with an obligation of confidence. The Council states *'we do not have consent from those who provided this information, and that any such disclosure would be of detriment to those communicating it whether this be Council staff or Balfour Beatty'*. The Commissioner accepts that, at the time the communications were made, they were done with an expectation of a duty of confidence. She also accepts that this information has the necessary quality of confidence as it is not trivial in nature.
55. Having established that the communications between Council staff, the Head of Enterprise and Investment at the EDC and Balfour Beatty withheld under regulation 12(5)(e) are both commercial in nature and have the necessary duty of confidence, the Commissioner now considers whether disclosure of the information is protecting a legitimate economic interest. The Council has stated:

*'The economic interest of Balfour Beatty relates to their ability as a private commercial venture to negotiate and contract for the purchase and sale of assets*

*The economic interest of the Council relates to their ability to engage in commercial ventures and the ongoing development plans linked to the EZ'.*

It goes on to say that disclosure would impact (i.e. adversely affect) the Council's ability to negotiate similar purchases as part of the EZ development, thereby preventing it from obtaining the best deal as well as dissuading third party commercial organisations from engaging with the Council for fear that commercial information will be disclosed.

56. The Council has argued that the price offered for the Airport took in to account due diligence on the viability of the purchase and relevant market prices for land. It considers that release of this information, including how it negotiates prices, would prejudice its ability to negotiate



fair prices in the future. It says the EZ development will be achieved over a 20 year period and whilst information will not remain sensitive for all of this time, land values have not changed substantially between the time of the airport sale and now and the Council's position would be undermined by disclosure.

57. The implementation guide for the Aarhus Convention (on which the European Directive 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.'*

There is no lesser test of 'would be likely, and therefore the occurrence of the harm or adverse effect must be more likely than not.

58. The Commissioner notes that the arguments the Council relies on for regulation 12(5)(e) include those it had provided under section 43 of the FOIA. Under its section 43 arguments, the Council said that disclosure of this information would be likely to harm its commercial position, but under regulation 12(5)(e) has asserted the higher 12(5)(e) threshold of 'would adversely affect'. However, the Council has not provided any additional, stronger arguments to support this claim.
59. The communications between Balfour Beatty and the Council relate specifically to the purchase of the Airport, which as already noted completed in September 2017. Whilst the development of the EZ is still in progress, the Commissioner does not consider that there is a causal link between disclosure of negotiations regarding the purchased Airport and the anticipated adverse effect on other possible commercial negotiations. The fact that the Council takes into account due diligence and risk when entering into large commercial ventures is exactly what it should be doing, and making this information publicly available should demonstrate sound and robust commercial decision-making. In addition, the Commissioner considers the sale of the Airport to be a unique event; there is no neighbouring Airport or similar asset that the Council has said it is intending to purchase and therefore she can see no causal link between disclosure of the Airport negotiations and future, unspecified EZ developments.
60. The Council has argued that its economic interests would also be harmed as disclosure would dissuade third parties from doing business with the Council. The Commissioner is not convinced by this argument; businesses are driven by commercial gain and profit and it is not really sustainable to think that commercial contracts including multi-million

pound business deals would be influenced by the distant possibility of release of commercial information through FOIA or EIR requests. Followed to its logical conclusion, if this were realised there would be a gradual halting of any commercial engagement by third parties with public authorities and this is clearly not the case.

61. In terms of Balfour Beatty's economic interest of being able to negotiate for the sale and purchase of assets, the Council has said that it would prejudice the company's commercial interests as it would give an indication to its customers and competitors as to their likely conduct in negotiations which would put them at an unfair advantage in the future. Similar to the Commissioner's view regarding the Council's negotiating position, she is not persuaded by this argument; it appears a general statement which is not directly linked to the specific nature of the withheld information. The Council has not referenced any similar current or pending negotiations which the Airport information would affect, and as with its own interests the Council has not made a clear causal link between release of the information and how this would (i.e. more likely than not) adversely affect the economic interest of Balfour Beatty.
62. For these reasons the Commissioner is not satisfied that the confidentiality of information withheld under regulation 12(5)(e) is protecting a legitimate economic interest that would be adversely affected by its disclosure and therefore the exception is not engaged for the information pertaining to the negotiations between Balfour Beatty and the Council for the sale of the Airport.
63. Turning to the final category of withheld information under 12(5)(e) – communications between or about third parties linked to the sale of the Airport and adjacent land, and the delivery of Airport services, the Commissioner notes that the third parties have not been consulted regarding disclosure and therefore she can only consider the economic interests of the Council.
64. Information in this category relates to a number of individuals and businesses with an interest in the sale of the Airport and surrounding land – either as investors or because they use / deliver Airport services. Having reviewed the information, the Commissioner is satisfied that it was provided at the time with an expectation of confidence, and is not trivial in nature.
65. The Council considers that the economic interest protected by the confidence of this information is the same as that for the other categories of information withheld under 12(5)(e), which is its ability to engage in commercial ventures and the ongoing development of the EZ. It maintains that disclosure would prevent the Council from getting the

best deal from contracts and dissuade third parties from engaging with the Council.

66. The Commissioner is not persuaded by this argument (with the exception of one paragraph – see next point) partly because this again is a general presumption which does not provide a convincing causal link between the actual nature of the withheld information and how disclosure of this would result in the detriment proposed (see para. 59). As the Council has not specifically approached the parties referred to in this information, she can draw no conclusion as to their positions and on the basis that that the Council has failed to adequately demonstrate how the disclosure of this specific information would adversely affect its economic interests, the exception is not engaged.
67. The Commissioner has identified one paragraph in an email sent on 3 August 2017 that the Council has withheld under 12(5)(e) which relates specifically to an identifiable, live EZ development matter and already satisfies the tests of being commercial in nature and having a common law duty of confidence. For this paragraph the Commissioner accepts that the legitimate economic interest being protected by the confidentiality of the information is the Council's ability to develop the EZ and it therefore follows that release of this information would adversely affect this economic interest. Consequently the exception is engaged, as shown in Appendix A. The Commissioner attaches significant weight to how disclosure of this (strategic) information, would affect the Council's ongoing development of the EZ and as a result considers the public interest in maintaining the exception outweighs the public interest in disclosure.

### **Regulation 13 – personal data**

68. Regulation 12(3) provides that third party personal data can only be disclosed in accordance with regulation 13, which sets out the detail of the exceptions. If disclosure of the information would breach any of the data protection principles, it must not be released. There is no additional public interest test.
69. In deciding whether regulation 13 is engaged the first issue to consider is whether the requested information is personal data. Personal data is defined in the Data Protection Act 1998 as:

*"personal data" means data which relate to a living individual who can be identified –*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual'*

70. The personal data redacted from the communications includes names, email addresses, work addresses and telephone numbers of Council employees and external individuals. It also includes a Council employee email address and password to access an account. The Commissioner accepts that this is third party personal data in accordance with regulation 13(1).
71. The next issue to consider is whether disclosure of the requested information would contravene any of the data protection principles. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that disclosure would be fair will she go on to look at whether a Schedule 2 processing condition can be satisfied. In assessing whether disclosure would be unfair, and thus constitute a breach of the first data protection principle, the Commissioner takes into account a number of factors, including the following:
- What reasonable expectations does the individual have about what will happen to their personal data?
  - What are the consequences of disclosure?
  - Are there any legitimate interests in disclosure which would outweigh the rights and freedoms of the data subject?
72. The Council has stated the employee information relates to both senior and junior members of staff, and individuals from external organisations. The Council acknowledges that senior staff may have an expectation that their work details might be released but junior staff would not. The junior staff that have been redacted were included in the communication because they were involved in collating and printing the information falling within the scope of the request, or because they had a solely administrative role in communications about the sale of the airport and adjacent land. The Commissioner therefore accepts that it would not be fair to disclose this information and regulation 13 applies to this personal data, shown in the table in Appendix B.
73. Turning to the other Council staff involved in the communications, the Commissioner notes that this includes very senior staff such as the Chief

Executive, a number of Directors and Heads of Service or similar. The Council has said that it has consulted with all these staff, who have requested that their personal data is not released '*because they are involved on further similar work which they believe would be impacted by the disclosure to the public domain of their involvement in the ongoing matter that the Complainant appears to be pursuing*'. It goes on to say that the complainant has in the past made unacceptable and inappropriate direct contact with individuals in the process, including abusive and threatening language and that contact details may be used by the complainant to harass and distress staff.

74. The Council also considers that as the regeneration of the EZ is an ongoing development, disclosure of the personal details of staff involved in that will risk their ability to freely make decisions, given the potential for media scrutiny.
75. The Commissioner takes very seriously the concerns the Council has expressed about the health and well-being of staff in relation to the behaviour of the complainant, but the seniority of staff is a key consideration here. Staff at this level should have wide and extensive experience of dealing with challenging members of the public in various contexts, and it is hard to believe that steps cannot or have not been put in place for dealing with such situations. The Council has not provided the Commissioner with any evidence of the behaviour of the complainant to which it refers. The Commissioner notes that much of the personal data (including emails and telephone numbers) is already known to the complainant – but not the role each played in the decision to purchase the Airport. In any event, the disclosure of the information would be to the world at large, to demonstrate transparency and accountability regarding a hugely significant financial and strategic investment by the Council, and as a result the Commissioner does not consider any potential response from the complainant is the primary consideration.
76. In determining whether disclosure would be fair, the Commissioner notes the findings of the Information Tribunal in the case of *The Corporate Officer of the House of Commons v Information Commissioner and Norman Baker MP* (EA/2006/0015 & 0016, 16 January 2007). They stated in paragraph 43 that:

*"The existence of FOIA in itself modifies the expectations that individuals can reasonably maintain in relation to the disclosure of information by public authorities, especially where the information relates to the performance of public duties or the expenditure of public money. This is a factor that can properly be taken into account in assessing the fairness of disclosure."*

77. In this case the staff concerned are the most senior within the Council. They are public facing, required to explain and justify decisions and policies, and had a direct role in the decision to purchase the Airport and spend millions of pounds of public money. The Commissioner does not give weight to the concern that the Council has regarding the impact release of the personal data will have on the ability of staff to freely make decisions due to media scrutiny. Key strategic and financial decisions should be subject to scrutiny and accountability and it is hard to be believe that such senior officers would be so easily intimidated by media coverage, particularly if they have confidence in their decisions.
78. For these reasons the Commissioner does not accept the Council's view that the disclosure of the *names* of senior staff involved in the decision to purchase Blackpool Airport would be unfair. She does not consider that it is reasonable for either those staff, given their seniority, or the Council, to expect that this information should remain confidential. Consequently she does not accept there is breach of the first data protection principle and therefore regulation 13(2) is not engaged for the staff as detailed in Appendix B.
79. In considering the *contact details* of senior staff, the Commissioner notes that there is little consistency in the Council's application of regulation 13 to this data; there are examples of where this has already been disclosed to the complainant and examples where it has been redacted with no explanation of the inconsistency. Despite this, the Commissioner does accept the general principle that release of contact details of staff, and the email address plus password for an online account, would not be fair. This is because information disclosed under the FOIA or EIR is released to the world at large, and it would not be fair to expose Council staff to unsolicited contact that may result from the release of contact information, or give access to an online account. She therefore accepts that regulation 13(2) is engaged for the contact details of Council staff and there is no schedule condition under the Data Protection Act 1998 that would allow disclosure.
80. Turning to the personal data of external individuals, the Council has contacted Balfour Beatty who has requested personal data is not disclosed. The Council has not been able to contact other third parties, but argues that they would have no expectations that business negotiation discussions would be disclosed.
81. The Commissioner does not consider this argument to be relevant as the regulation relates to personal data of individuals and not the specifics of discussions held. The withholding of commercial information has been dealt with earlier in this decision notice so will not be considered here. However, the Commissioner does accept that the names and emails of individuals acting on behalf of their company, or as a sole trader, is



personal data. As it is not the personal data of Council employees or another public authority and the individuals would have no expectation this would be put into the public domain, the Commissioner accepts that regulation 13 is engaged for those individuals identified in Appendix B.

82. Finally, the Commissioner considers the personal data of the complainant. Similar to the application of regulation 13 to the personal data of Council staff, the Council has in some cases redacted this information but in others not, with no justification of its approach. In terms of the complainant, the Council should have dealt with any personal data as a subject access request. There is no indication that it has done this, and again the Commissioner notes that release of this information under the complainant's EIR request is to the world at large. The complainant has not himself raised this as a concern, but the Commissioner remains concerned about the Council's handling of the complainant's personal data in the context of its response to the request. She cannot do anything about the information already released, but accepts that any further disclosure would be unfair and therefore regulation 13 applies.

### **Regulation 12(5)(b) – the course of justice and inquiries**

83. Regulation 12(5)(b) of the EIR provides that a public authority may refuse to disclose information if to do so would adversely affect:

*'the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.'*

84. The Commissioner has issued guidance on the application of regulation 12(5)(b) – The course of justice and inquiries exception<sup>6</sup>. The exception is permissive and subject to the public interest test.
85. At the review stage, the Council withheld information that it considered attracted legal professional privilege under section 42 of the FOIA, and later transferred its reliance and associated arguments to the exception under regulation 12(5)(b) of the EIR.
86. LPP protects the confidentiality of communications between a lawyer and client, and is a cornerstone of the justice system. It has been described

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<sup>6</sup> [https://ico.org.uk/media/for-organisations/documents/1625/course\\_of\\_justice\\_and\\_inquiries\\_exception\\_eir\\_guidance.pdf](https://ico.org.uk/media/for-organisations/documents/1625/course_of_justice_and_inquiries_exception_eir_guidance.pdf)

by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTA* (EA/2005/0023) (Bellamy)<sup>7</sup> as:

*" ... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation."*

87. There are two categories of LPP – litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies when no litigation is in progress or contemplated. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
88. The Council has confirmed that it considers the information to attract legal advice privilege. This is because it concerns communications between the Deputy Head of Legal Services (a professional legal adviser) and her clients – various Council departments and Blackpool Wyre & Fylde EDC. The Council states that the dominant purpose of the communication was for legal advice, and communicated in the Deputy Head of Legal Services Professional Capacity. The information itself concerns the legal aspects of the purchase of the Airport and the approach taken by the Council including the legal reasons behind this.
89. Having reviewed the withheld information to which section 12(5)(b) has been applied, the Commissioner does not accept that it attracts legal advice privilege. Although it includes communication between / from the Deputy Head of Legal Services, she cannot see anything in the communications that has been provided which is specific to the officer's legal adviser role in connection with the purchase of the Airport. The majority of the information is redacted personal data, which has already been dealt with previously. As the Commissioner is not satisfied that the withheld information attracts legal advice privilege, regulation 12(5)(b) is not engaged.

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<sup>7</sup>[http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i28/bellamy\\_v\\_information\\_commissioner1.pdf](http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf)

## **Regulations 5(2) and 11(4) – time for compliance**

90. Regulation 5(2) states that if a public authority holds the information requested, such information shall be made available

*"as soon as possible and no later than 20 working days after the date of receipt of the request."*

91. The Council received the request on 22 December 2017 and responded on 26 January 2018. It apologised for the delay, which it attributed to holiday closures. Nonetheless the Council responded 21 days after receiving the request and has therefore breached regulation 5(2) by failing to respond within the required 20 working days.

92. Regulation 11(4) requires that, on receipt of a request for a review:

*"A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations."*

93. The complainant requested a review of the Council's response on 14 March 2018. Following ongoing communications with the Commissioner, the Council eventually responded to the review request on 7 September 2018, just under 6 months after it was made. This was in part due to difficulties in finding someone suitable to undertake the review, and the Council then deciding to engage external solicitors to do it. The Commissioner understands the efforts of the Council to undertake the review in a fair and thorough way, but wishes to impress on the Council a response 4 months after the 40 day deadline is unacceptable in any situation, and that the method employed by the Council was entirely its own choice and not a requirement of the regulations. It is clear that the Council breached regulation 11(4) by taking almost 6 months to complete the review.

## **Other matters**

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94. Reference to the Council's breach of regulation 11(4) has already been made in this decision notice but the Commissioner wishes to emphasise that taking six months to complete a review of the complainant's request is unacceptable. Whilst she understands this was in part due to engaging an external third party to undertake the review, this was entirely the Council's choice and should have been managed to ensure completion much sooner than it was.
95. When asked to consider its review response solely under the EIR, the Council did so and transferred its arguments under the FOIA to the relevant exception under the EIR. The Commissioner has taken account

of these where possible, but draws the Council's attention to the fact that the exemptions under the FOIA and exceptions under the EIR are not completely interchangeable and the tests to demonstrate engagement are different. The Commissioner reminds the Council of the difference between the regimes and the need to address the specific requirements of each.

## **Right of appeal**

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96. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

97. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
98. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**