

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision FER0497122 dated 10th December 2013 which concluded that a redacted version of the withheld information should be disclosed, redactions being made under regulations 12(5)(b), 12(5)(d) and 13 of the Environmental Information Regulations (EIR)¹. Cheshire East Borough Council (CEBC) have disclosed a redacted version in accordance with the Commissioner's schedule, the Appellant appeals against the extent of these redactions.

Background

2. In 2011 contractors for CEBC started work to develop a waste transfer station at Lyme Green. Work started prior to public consultation and any application for planning permission. The costs of the project escalated beyond the budget and there were concerns that procurement and tendering procedures had been breached and the public misled. The development was abandoned at considerable cost to the public². The Council's Audit Manager produced a report dated 30th May 2012 which concluded that there were a number of failings in the way that the project had been conducted. This was discussed at the Audit and Governance Committee on 14th June 2012 and an Action Plan agreed to implement the recommendations of that report.
3. The report highlighted concerns relating to the actions of certain senior Council officers. Consequently a Designated Independent Person (DIP) was appointed pursuant to *The Local Authorities (Standing Orders) (England) Regulations 2001*. These provide that:
7(1) ... where it appears to the local authority that an allegation of misconduct by—
(a) the head of the authority's paid service;
(b) its monitoring officer; or
(c) its chief finance officer,
... requires to be investigated, the authority must appoint a person ("the designated independent person") for the purposes of the standing order which incorporates the provisions in Schedule 3.
4. Regulation 7 further provides that the DIP:
(3)(c) may require any member of staff of the authority to answer questions concerning the conduct of the relevant officer;
(d) must make a report to the authority—
(i) stating his opinion as to whether (and, if so, the extent to which) the evidence he has obtained supports any allegation of misconduct against the relevant officer; ...
(ii) recommending any disciplinary action which appears to him to be appropriate for the authority to take against the relevant officer.
5. Schedule 3 provides that no disciplinary action may be taken against the relevant officer other than in accordance with a recommendation in a report made by a DIP.

¹ Adverse effect on enquiry of a disciplinary nature, confidentiality of proceedings and personal data.

² From the Minutes of the Audit and Governance Committee 14.6.12, the costs of the incomplete Lyme Green WTS project were between £700,000-£800,000 (although CEBC argue in their June 2013 summary of the DIP's report that much of that was necessary spending to decontaminate a Council owned site and wasted expenditure was around £100,000). The maximum value of the replacement services was estimated at £900,000. The cost of the DIP report is asserted to be £225,000 by the Appellant, no evidence has been provided to support or refute this estimate.

6. The DIP investigation commenced in October 2012 and the report was provided to the Council in December 2012. CEBC's response to the report was still being considered at the time that the request was received and refused by CEBC and any consequential actions were not at that time concluded. It has subsequently been disclosed that a number of individuals left the Council's employment having exercised their right to resign. None of those senior officers criticised by the DIP for their role in this matter are now employed by the Council.³ That these individuals have left was at the point of their departure a matter of public record.
7. Following the conclusion of the disciplinary proceedings and after the request had been received and responded to by CEBC "*The Open summary of the confidential report of the investigation of the designated Independent Person into the related actions of Council Officers and elected members*" (The summary) was published on 17th June 2013. The Tribunal is satisfied that it is required to address the situation which existed at the relevant time (ie when the request was received and responded to by the Council) and that whilst it is required to take into consideration the fact that it was expected that such a summary would be published, it had not at that stage been disclosed.

The Information Request

8. The Appellant wrote to CEBC on 2nd January 2013 asking:
"I would like the full report submitted by the Designated Independent Person on the investigation into the Lyme Green Scheme in Macclesfield".
9. CEBC issued a refusal notice dated 19th February 2013 relying upon various provisions under FOIA⁴. Although the Appellant requested an internal review, in light of the seniority at which the original decision to refuse had been taken and the limited circulation of the DIP report within the Council, there was no member of staff of sufficient seniority to conduct an internal review and none was conducted.
10. The Appellant complained to the Commissioner on 10th May 2013. During his investigation the Commissioner raised the issue of whether the request should have been dealt with under the EIRs. CEBC whilst not conceding that this was correct provided the EIR regulations that they maintained were applicable⁵.
11. The Commissioner held that the EIRs were applicable⁶ and that in relation to the EIR exemptions relied upon held:
 - i) Regulation 13 – not all the information identified as such, was personal data and some personal data could be disclosed without breaching the DPA, however, some material should be withheld under that ground.
 - ii) Regulation 12(5)(b) is not engaged in relation to legal professional privilege, but is engaged on the grounds that disclosure of some of the information would have

³ P241 OB

⁴ S40(2) personal data, s41 (information provided in confidence), s36 (prejudice free and frank exchange of views for deliberation or prejudice to the conduct of public affairs) s31(1)(g) prejudice to an investigation into improper conduct), s42 (legal professional privilege).

⁵ Regulation 13 (personal data), Regulation 12(5)(d) confidentiality of proceedings, Regulation 12(4)(e) internal communication, Regulation 12(5)(b) course of justice and inquiries of a disciplinary nature).

⁶ None of the parties have appealed the Commissioner's decision that the EIRs were applicable and consequently this has not been addressed by the Tribunal.

an adverse effect on an inquiry of a disciplinary nature but where it is engaged the public interest favoured withholding the information.

- iii) Reg 12(5)(d) (confidentiality of proceedings) is only engaged in respect of some of the information to which it was applied, but where it is engaged the public interest favoured withholding the information.
- iv) Regulation 12(4)(e) is not engaged because the report does not constitute internal information.

The Commissioner required CEBC to disclose a redacted copy of the report and provided a closed annex to the Decision Notice setting out the necessary redactions.

12. The Tribunal case was adjourned on 15th August in order to ensure that the Tribunal had a complete copy of the unredacted disputed information, which it is satisfied that it now does have. Following that adjournment further disclosure was also made of some of the material in the Commissioner's redacted annex although the majority remains withheld pursuant to rule 14 of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009 (GRC rules).

The Appeal

13. The Appellant appealed and all parties indicated that they were content for the case to be determined upon the papers. The Tribunal is satisfied under rule 32(1)(b) of the GRC rules that it can properly determine the issues without a hearing. A bundle has been provided and all parties have had the opportunity to make submissions in writing, the Tribunal has also been provided with a closed bundle. The Tribunal was not provided with closed submissions and has not found it necessary to refer directly to the contents of the closed material. As such there is no closed annex to the Tribunal's decision.
14. The Appellant appeals on the grounds that the public interest favours disclosure, and disclosure would not breach the data protection principles. To the extent that it is suggested by the Commissioner that the Appellant accepts that the names should be redacted on the grounds of personal data, the Tribunal notes that the Appellant complains that in the redacted version of the closed material details of which officers made which decisions and how much Councillors knew about the project have again been redacted. Consequently we consider this to be in issue during this appeal.

Personal Data

15. Reg13 EIRs provides

—(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

(2) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene—

(i) any of the data protection principles; ...

16. Personal data has the same meaning as in section 1(1) of the Data Protection Act (DPA) and 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;

17. Having had regard to the redacted material which has been withheld on the grounds of personal data, we are satisfied that this is the personal data of those investigated, those whose actions are being scrutinised and those interviewed in the report⁷. The individuals are still living and can be identified from the report. The report relates to them because, it is about them, has biographical significance for them. In the case of those whose conduct was being assessed it is used to make decisions about them and it has them as their main focus, in relation to those interviewed it contains their views and opinions.
18. The Commissioner considered whether disclosure to the world at large would breach any of the data protection principles. The first data protection principle states that *“personal data shall be processed fairly and lawfully”* and that at least one of the conditions of schedule 2 should be met.
19. The DPA further provides that:
- 1(1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.*

Expectations of those involved

20. We have taken into consideration the status of those who were the primary focus of the DIP report. We are satisfied that they would expect to be subject to public scrutiny and to be held to account for their actions in public facing roles. However, we are satisfied that this does not affect their expectation around disclosure of the withheld information. Scrutiny by their employers of their conduct and competence is achieved by the DIP investigation and any associated disciplinary proceedings. Public transparency is achieved through the publication of the conclusions of that report (but not the recommendations) in summary form albeit with the names redacted, together with the publication of the Audit report and the action plan. We also take into consideration that many of those named in the report as witnesses or the subject of investigation are less senior and do not necessarily have a public facing role.
21. We are satisfied on the facts of this case that all those who feature in this report would have expected the information to be treated confidentially and to have had a very limited circulation within the Council. This expectation would have been informed by the following:
- i) Disciplinary proceedings are virtually always conducted in circumstances of confidentiality. We have had regard to the policies of CEBC, they state that confidentiality *“is normal practice in relation to conducting any disciplinary proceedings against Council Staff”*.⁸
 - ii) The Joint Negotiating Committee for Chief Executives of Local Authorities (JNC) is the national negotiating body for the pay and conditions of service of

⁷ It is also the personal data of the DIP as it contains his views however, the Commissioner held that disclosure of the DIP's personal data in this context would not be unfair or breach the data protection principles and this has not been appealed and is not considered in this decision.

⁸ P219 OB from summary

Chief Executives in England and Wales. CEBC has had regard to the National Salary Framework and conditions of Service Handbook 2009 which provides a guidance note (Appendix 7) applicable where a DIP is appointed. This categorises the DIP procedure as “*an internal and confidential process of the authority*”⁹. Whilst acknowledging that there is no explicit bar, it asserts that disciplinary matters are customarily held in private and “*anyone the subject of a DIP hearing is likely to expect the same*”¹⁰. Additionally paragraph 3.10 states that “*The joint secretaries consider DIP reports to be exempt from freedom of information disclosure by virtue of section 40 of Freedom of information Act 2000*”. Whilst the Tribunal observes that this is not binding and does not have the force of law, the Tribunal is satisfied that this would inform the expectation of all those involved in the DIP procedure and that the status of the JNC means that it was reasonable for those involved to rely upon the JNC guidance.

- iii) Those who provided information to the DIP (both those being investigated and those not) were asked to sign a confidentiality agreement¹¹ or accepted that they were bound by a duty of confidentiality attached to their office as Councillors.
- iv) Importantly *Schedule 12A of the Local Government Act 1972 paragraph 1* provides that information relating to any individual is “exempt information” which means that it would not be discussed in an open Council meeting or disclosed to the public by way of agendas and background papers in the ordinary way.

22. We are satisfied that disclosure would be unlawful (see findings relating to confidentiality as set out in para 47-51 below) and unfair. As well as the expectations of the data subjects the Tribunal takes into consideration that those investigated in the report had not had the opportunity to challenge the findings of the DIP. Disclosure would be detrimental to those criticised in the report as it has the potential to jeopardize their career. Those criticized less or not at all would still be likely to suffer detriment by association by the mere fact that they had been the subject of investigation and by association with the project, in particular if their involvement was disclosed but that of those subjected to stronger criticism was withheld.

23. In light of our findings that disclosure would be unfair we have not gone on to consider the conditions of Schedule 2 of DPA.

24. The Appellant argues that redaction of the names and job title of the individuals would mean that disclosure would not breach the data protection principles, he draws an analogy with the reporting of rape cases in the media where the victim is entitled to remain anonymous but the facts of the case and the trial can be reported. We take into consideration *Edem v The Information Commissioner and Another [2014] EWCA Civ 92* which requires us to consider context. Having had regard to the contents of the withheld material we are satisfied that the identity of the individuals would be apparent to a knowledgeable member of the public from the contents of the report and the material then in the public domain even if the name and

⁹ Paragraph 2.9 and 3.8

¹⁰ Paragraph 3.6

¹¹ P105-6 OB

job title were redacted. Consequently we are satisfied that even if so redacted, disclosure would breach the data protection principles for the same reasons set out above.

Adverse affect on an inquiry of a disciplinary nature

25. Reg 12(5) EIRs:

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

(b)... the ability of a public authority to conduct an inquiry of a ... disciplinary nature;

26. We are satisfied that the exemption is engaged. The DIP report was a mandatory legal requirement in the conduct of disciplinary proceedings. The disciplinary proceedings were not yet completed and the action to be taken by CEBC was not yet finalised, as such we are satisfied that the inquiry of a disciplinary nature was ongoing at the relevant date.

27. CEBC argued and the Commissioner accepted that disclosure at this stage would have had an adverse effect because:

- a) If the report had been released there would have been a public and media spotlight on those criticized in the report.
- b) Any decisions taken then would no longer have the appearance of impartiality. Those affected could argue that any decisions taken were unduly influenced by public pressure and were unfair.
- c) There would be a greater risk that CEBC would be exposed to litigation, and disclosure would be likely to have prolonged the proceedings.

In concluding that the exemption is engaged we take into consideration that a number of individuals chose to resign faced with the conclusions of the report, it is common sense that one of the reasons for this is the limitation to reputational damage that resignation allows. We are supported in this inference by the terms of the specimen severance agreement provided by CEBC. If the report were published those concerned would have had nothing to lose in seeking to challenge the findings, there is no opportunity to do this as part of the DIP process, that opportunity arises as part of disciplinary proceedings. This necessarily would prolong the process and increase the risk of litigation.

28. It is also argued that disclosure at this stage would jeopardize future disciplinary investigations. We are satisfied that if disclosure had been made it is likely that in future cases staff would be more circumspect and less frank in their co-operation (notwithstanding that pursuant to the Standing Orders a member of staff can be required to answer questions concerning the conduct of the person being investigated)¹². The consequences of such a “chilling effect” would be the risk that future enquiries would take longer and would be based upon incomplete or reduced information thus affecting their ability to reach a just conclusion. The Tribunal accepts the force of this argument especially in the circumstances of this case where there was such an explicit expectation of confidentiality (as set out in para 21 above).

The public interest test:

29. Pursuant to rule 12(1)(b) EIRs the information can only be withheld in relation to r12(5)(b) EIRs if the public interest in maintaining the exemption outweighs the public interest in disclosure. We find that the public interest in withholding the disputed information outweighs the public interest in disclosure.

¹² 3(c)

In favour of disclosure

30. We take into consideration the general presumption of disclosure as set out in r 12(2) EIRs. Other general public interests favouring disclosure are those of scrutiny, transparency, accountability, and promoting public understanding and furthering debate. The Appellant argues that the Commissioner gave insufficient weight to the pressing social need for transparency, in light of the damage to the Council's reputation, the cost to the tax payer of the abandoned scheme, the alternative arrangements and the cost of the DIP report.
31. CEBC accept that the public have an expectation that they will be given information about matters relating to the governance of the Council and any perceived problems (especially relating to public funds and regulatory compliance issues) in order to hold the Council to account.
32. In considering these public interests we take into consideration the context of this DIP report which is the controversial abandoned waste disposal project and the necessity to make less efficient alternative arrangements at short notice. We accept the public interest in ensuring the promotion of good decision making within the public body which upholds standards of integrity and secures the best use of public resources. We accept that disclosure of the DIP report would shed some light on areas of weakness where better processes could be put in place to prevent a similar situation occurring again. The transparency involved in disclosure of the DIP report would restore confidence in the public authority which might be undermined by incomplete disclosure and the perception that material information was being withheld.
33. Whilst we accept that transparency, scrutiny and accountability are important legitimate interests we are bound to consider if these public interest aims can be met in a different way that does not require the disclosure of the withheld information¹³ and we take into consideration the information already publicly available at the date of the request or that was intended to (and has now) become available once the disciplinary process was completed. We are satisfied that this material substantially reduces the public interest in disclosure.
34. The Appellant argues that no adequate account of what went wrong has been published. Although the statutory focus for the DIP's report was to investigate allegations of misconduct relating to prescribed senior officers, the terms of reference were to *"produce a report which will include evidence of any action or decision taken by any individual without due regard to council policy, permission or with intent to mislead. This to include clarification regarding who was responsible, to what extent was staff and/or Members culpable and/or was the action/decision caused by cultural or procedural errors."*¹⁴ We accept that in apportioning responsibility within his statutory remit, the DIP would necessarily need to consider the roles of other officers and elected members, and acknowledge that in consequence the report had the potential to highlight others against whom it might be appropriate to consider disciplinary action. Whilst the DIP report traces the history of the proposal and highlights where procedures were not followed in order to provide context and analysis of the allegations under investigation it was intended that this would be disclosed by way of the summary and much of the disclosure ordered by the Commissioner was in relation to this aspect of the public interest.

¹³ South Lanarkshire Council v The Scottish Information Commissioner UKSC 55 Paragraph 27 (whilst this case dealt with Schedule 2 para 6 DPA we are satisfied that the principle applies here).

¹⁴ Appendix 1 of redacted version of the DIP report.

35. However, we are satisfied that the purpose of a DIP report is not to provide a comprehensive review of what went wrong and what processes need to be amended to prevent a similar situation in the future. That role was fulfilled by the Audit report which was published in full whose purpose was to “*establish whether controls procedures or policies have been compromised and identify the steps that need to be taken to prevent a re-occurrence*”, and the action plan adopted by the Audit and Governance Committee. We are supported in this conclusion not only by the terms of the Standing Orders but also because “*the Council gave a commitment to the DIP that in receiving his report it would be used solely for the purpose of and in connection with any disciplinary proceedings arising from the investigation and would otherwise remain confidential as is normal practice in relation to conducting any disciplinary proceedings against Council Staff.*”¹⁵
36. The Appellant maintains that there is insufficient transparency as the recommendations of the DIP have never been disclosed. Only a small number of people within the Council have seen the DIP’s report. There is a fog of suspicion over the whole Council – even the roles played by elected members is not clear.
37. We are satisfied that the mechanism of having an investigation by a DIP and associated disciplinary proceedings is itself a form of scrutiny. The circulation of the report is not limited to a single individual and has gone through a committee process. Although the recommendations have not been published, CEBC have confirmed that all those senior officers criticised by the DIP for their role in this matter are no longer employed by the Council. It is a matter of record who has left and at what date. At the relevant date it was expected that the conclusions of the DIP’s report would be published. This has now happened and includes findings in relation to elected members as a category. We remind ourselves that the statutory focus of a DIP’s report is not the elected members.
38. The Appellant argues that the redacted version is insufficient to meet the public interests of assisting public debate, scrutiny and transparency because it is “unreadable.” The Tribunal observes that if by this it is meant that it is not possible to determine the individuals who are criticized and who have contributed to the report, that is the purpose of the redaction. The Tribunal does not agree with any contention that the redaction obscures the information that is being disclosed or is misleading.
39. We accept that disclosure would provide more of the whole picture in circumstances where there is some evidence of a suspicion of wrong doing; from the Audit report it is clear that the CEBC have provided incorrect information in the past¹⁶ (namely the assurance that development had not started when works had in fact commenced) and that a considerable amount of public money has been spent unnecessarily both in relation to the abandoned project, the alternative arrangements that had to be made at short notice and the cost itself of the DIP report. Where there is a suspicion of wrongdoing, disclosure is a strong public interest.
40. However, in this case this public interest is considerably reduced because the Council had already accepted their fault in the material that was already in the public domain at the relevant date namely: the audit and governance committee report and the public report on the Council’s review of management roles and responsibilities (considered by Cabinet on 4.2.13). Additionally it was minuted by the Staffing sub-committee that the issues of process, policy and organisational culture highlighted in the report would be addressed by

¹⁵ P219 OB from summary

¹⁶ E.g.as per summary p239-240 OB

the subcommittee when the staffing matters had been resolved. As well as various public statements on the topic from the CEBC¹⁷ we are satisfied that it was the intention of the CEBC to continue to update the public by way of press releases and a summary outlining the causes of and main learning points gleaned from the DIP report once the disciplinary process was concluded¹⁸.

41. Having regard to the contents of the DIP report we are satisfied that the actual and anticipated disclosure whilst not complete does not paint a misleading picture. We also take into consideration the purpose and statutory aims of the DIP report and that it is not, nor it is intended to replace a review of the processes, as such the information it would shed on this aspect of debate is limited.
42. In the absence of disclosure of the withheld material the Appellant contends that the public cannot be satisfied that the DIP report was properly conducted and that the allegations have been dealt with in sufficient depth, fairly and impartially, especially as the Council has admitted that some of its statements were misleading.
43. Although we agree with the Commissioner that it would add to the public interest in disclosure if there was evidence that the investigation was flawed; we have been supplied with a copy of the report, there is no evidence before us that the report was not conducted properly. We take into account that CEBC have applied the JNC guidelines. The DIP is named (so their suitability for the role can be scrutinised). At the relevant date a summary was contemplated. In the event that the summary was not a fair representation of the report, the DIP would have been in a position to challenge this. We are satisfied that sufficient information relating to the type of information taken into consideration has been disclosed in the redacted report and it was intended that sufficient detail and reasoning would be provided in the summary to enable the public to assess whether the appropriate procedure have been followed.

In favour of withholding the information

44. The public interest strongly favours CEBC being able to conclude the disciplinary process fairly and in a timely fashion, having the space and time to consider their options so that they can arrive at impartial and appropriate decisions free of undue influence. The Tribunal accepts the evidence as to the precise stage that proceedings had reached as set out in the closed material and takes into account that at the relevant date the proceedings were critical and disclosure would have hampered the CEBC in its efforts to conclude the proceedings, undermined the appearance of impartiality and called into question the justice of the process. Disclosure would have been likely to prolong the proceedings and risk involving the Council in litigation with the costs and uncertainty associated with litigation.
45. For the avoidance of doubt, the Tribunal does not believe that the weight of public interest against disclosure would be significantly changed had the disciplinary process been concluded at the time of the request in light of the strong public interest in CEBC and other Councils being able to rely upon DIP reports as an efficient and effective means of investigating allegations against senior officers in future cases without its efficacy being reduced by the "chilling effect" as set out in paragraph 28 above. CEBC relied upon *WS v Information Commissioner and North Lancashire PCT [2013] UKUT 181 (AAC)* in support of the contention that future precedent was a matter to be weighed in the public interest, we

¹⁷ E.g 7.1.13, 14.1.13 and 1.2.13 p 196-204 OB

¹⁸ That additional press releases were issued is evidenced at p 205 et seq and the summary was published 17.6.13

agree. The public interest also favours ensuring justice and fair treatment for all. We are satisfied that disclosure contrary to the expectation of confidentiality would substantially undermine this public interest.

Confidential information

46. *12(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect— ...*

... (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

47. We are satisfied that the preparation of a DIP report as required pursuant to the Standing Orders which is a mandatory prerequisite for disciplinary proceedings, constitutes proceedings for the purposes of r12(5). As set out in paragraph 21 above those Officers whose conduct was being investigated, the other Officers and Councillors who participated in the investigation would have had a legitimate expectation that the report would remain confidential and that the Council did not intend for the information contained within it to become public thus creating an implied duty of confidence enforceable at common law.

48. Additionally at the date of the request there was an explicit duty of confidence owed to staff who at the relevant date had already left the Council by mutual agreement. They entered into a compromise agreement which (based on the specimen agreement contained in the open bundle at p246) contained an undertaking by the council not to disclose the DIP's report¹⁹.

49. Whilst the contents of the summary were not in the public domain at the relevant date we take into consideration that it was the intention of the CEBC to publish a detailed summary of the conclusions and reasoning of the report at the relevant date. Now that the summary has been published the Appellant observes that this discloses more information than the redacted report ordered by the Commissioner. The Tribunal observes that the Commissioner was assessing the public interest balance at the relevant date (when disciplinary proceedings were still live) and was therefore assessing a different factual backdrop to that which existed when the summary was prepared. CEBC have provided arguments as to why they do not consider the summary to have breached their obligations of confidentiality. It is not part of the Tribunal's remit to assess whether anything published subsequently breaches the implied or explicit duty of confidentiality, we are required to consider the position at the relevant date (namely when the request was received and responded to by the public authority).

50. Necessary quality of confidence. The implied and explicit duty of confidence only applied to information which had the necessary quality of confidence at the relevant time. Due to the nature of the DIP report, we are satisfied that this was not trivial. The Tribunal has had regard to the information that was in the public domain at the relevant date in particular the information contained within the report of the audit committee. Although it may be apparent from the Audit report and the terms of the Standing Order the persons who are the main focus of the report we take into consideration the level of detail in the DIP report including the attributable comments, views and actions in concluding that the withheld information in the report was not in the public domain at the relevant time. To the extent that any of the material from the audit review is repeated in the withheld material its disclosure at the relevant date in redacted form (confirming its presence in the DIP report) would not add greatly to the public debate and might provide a misleading picture of the information

¹⁹ Paragraph 9.8

considered by the DIP. It would also be difficult to achieve in light of the likelihood that direct wording would be used which might be attributable. We also have regard to those whose views appear and those who became the subject of conclusions even though they were not the statutory focus of the report in determining that disclosure of the withheld information would provide information that was not in the public domain at the relevant date and which therefore was at that time confidential.

51. The tribunal observes that there are certain inconsistencies between the redactions ordered by the Commissioner and the disclosed parts of the DIP report. We are satisfied that some of these have arisen by the application of the Commissioner's direction that information already in the public domain should be disclosed in the redacted document. It does not follow from this that if it is known that an individual was responsible for one action, all further actions undertaken by them should be disclosed if to do so would breach the confidentiality either of the person investigated or the witness. Additionally from the annotations on the closed material and schedule of redactions, we are satisfied that some of these inconsistent disclosures are inadvertent. This highlights the care that is required when a document is being redacted prior to disclosure. It is not the role of the Tribunal to homogenise inconsistencies between information that has been inadvertently disclosed at a later date and information that was rightfully withheld at the relevant date.

The public interest test:

52. Pursuant to rule 12(1)(b) EIRs the information can only be withheld in relation to r12 (5)(d) EIRs if the public interest in maintaining the exemption outweighs the public interest in disclosure. We have considered the public interest test in relation to this exemption and find that the public interest in withholding the disputed information outweighs the public interest in disclosure. The Tribunal adopts its analysis and findings as set out in paragraphs 30-45 above.

Conclusion

53. For the reasons set out above this appeal must fail. Our decision is unanimous.

Dated this 12th day of November 2014

Fiona Henderson
Tribunal Judge