



IN THE FIRST-TIER TRIBUNAL

Appeal No: EA/2015/0062

**GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

ROY BENFORD

Appellant

- v -

INFORMATION COMMISSIONER

Respondent

Hearing

Held on the papers on 17 July 2015 at Fox Court, London.

Panel

Judge Taylor, G Jones and P De Waal

Date of Decision: 27 December 2015

Date of Promulgation: 8 January 2016

Decision

The appeal is upheld in part for the reasons set out below, such that we find partially in favour of the Appellant.

Steps to be taken

We find that Cambridgeshire County Council must disclose within 20 working days the requested information, redacting the names and job titles of anyone present who was not a councilor or official.

We note that there is a 'closed' version of this decision, because we found it necessary to refer to the contents of the requested information to provide our full reasons. This closed version must be kept confidential and not disclosed to the Appellant or public in case a party wishes to appeal.

Reasons For The Decision

The Request

1. On 8 August 2014 the Appellant requested from Cambridgeshire County Council ('the Council'): *"I have been advised by Balfour Beatty to request minutes of network board meetings from the County Council, see email below. Please could you send me electronic copies of the minutes by email held in 2014."*
2. The email referred to by the Appellant dated 5 August 2014, stated: *"... we here at Balfour Beatty work in conjunction with Cambridgeshire County Council on the street lighting project. We also facilitate lender monthly monitoring meetings and there is also a network board who also meet to oversee the contract. If you require the minutes of these meetings I am afraid you would have to go through Cambridgeshire County direct under the freedom of information act."*
3. The Council refused the Appellant's request for the minutes relying on exceptions set out in Regulation 12(5)(d) (*confidentiality of proceedings*) and Regulation 12(5)(e) (*confidentiality of commercial or industrial information*) of the Environmental Information Regulations 2004 ('EIR'). The Appellant proceeded with his request, which resulted in an investigation by the Information Commissioner ('Commissioner'). The Decision Notice (*ref. FER0557858*) upheld the Council's position on the basis of Regulation 12(5)(e) EIR.
4. The Appellant now appeals the Commissioner's decision. The Council elected not to participate in the appeal.
5. For the avoidance of doubt, we note that the Appellant requested minutes of Network Board meetings and not of lender monthly monitoring meetings. The Information Commissioner ('the Commissioner') described the request in the Decision Notice as for the Network Board meetings minutes and the Appellant has not contested this. We are informed that the meetings referred to in the request related to a Private Finance Initiative or 'PFI' contract for street lighting in the county covering a 25-year period. The Decision Notice refers to this contract as being between the Council and Balfour Beatty¹, presumably informed by the Council's response to the request which stated this. However, the documents indicate that there was a Streetlighting PFI Contract (referred below as 'the PFI contract') entered into in April 2011 between the Council and Connect Roads Cambridgeshire Limited ('CRCL'); and a Cambridgeshire Street Lighting PFI Project Installation and Maintenance Contract entered into in April 2011 between CRCL and Balfour Beatty Workplace Limited for the latter to perform services owed by CRCL to the Council under the PFI contract.
6. During this appeal, we asked for a copy of the contractual confidentiality provisions relied on by the Commissioner in the Decision Notice.² We were provided with Clause 35 of the PFI Contract which is referred to below as the contractual confidentiality provisions.

¹ See paragraph 18 of the Decision Notice.

² See paragraphs 22 and 50 of the Decision Notice.

Law

i. EIR

7. Where a request for 'environmental information' is made, the question of whether or not a public authority is required to provide that information is governed by the EIR. (See regulation 5(1) EIR.)
8. Environmental information is defined in regulation 2(1) EIR to include:

'any information in written, ... electronic or any other material form on

 - (a) *the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements; ...*
 - (c) *measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements'*
9. The Appellant's request is for minutes of the Network Board meetings concerning the PFI contract relating to the design, installation, operation and maintenance of street lighting within Cambridgeshire. The Commissioner considers that the requested information is 'environmental information'. The Appellant has not disagreed with this, and we find no reason to do so either because it falls within Regulation 2(1)(c) EIR.

ii. Exceptions to Disclosure

10. Under regulation 5(1) EIR, a public authority that holds 'environmental information' is required to make it available on request. This is subject to exceptions set out in the Act.
11. For the purpose of this appeal, a public authority may refuse to disclose information to the extent that an exception applies and *'in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.'* (Regulation 12(1)(b) EIR). Under regulation 12(2) EIR *'a public authority shall apply a presumption in favour of disclosure.'*
12. Commercial Confidentiality: One such exception is that the public authority may refuse to disclose information to the extent that its disclosure would adversely affect *'the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest'*. (Regulation 12(5)(e) EIR).
13. Personal Data: The EIR also provide an exception in respect of personal data.

Regulation 12(3) states:

'To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.'

Regulation 13 states:

'13.— Personal data

(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; or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) and in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it; and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(3) *The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1) of that Act and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.'*

14. Section 1(1) of the Data Protection Act ('DPA') defines 'personal data' as follows:

"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'

15. For our purposes, the first data protection principle is relevant (Para.1, Sch. 1 DPA). This provides:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met...'

16. Condition 6 of Schedule 2 DPA has been identified as being relevant to this appeal. It provides that data may be processed where:

‘6.—(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.’

Task of the Tribunal

17. The Tribunal’s remit (also in relation to EIR cases) is governed by s.58 of the Freedom of Information Act 2000 (‘FOIA’). This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.
18. For the benefit of the Appellant who may not have received legal advice or have legal experience, we note that the Tribunal’s role is to be fair and independent, and to try to ensure that appellants are not unfairly prejudiced by not being legally represented. As such, we try to reach the right decision and consider any pertinent issues or arguments that an appellant might make were they legally represented. The Tribunal is independent of the Commissioner. We do not simply accept arguments from the parties without their proper consideration, considering the veracity of their arguments on their merits, and their supporting evidence.
19. We have received a bundle of documents, the requested information and submissions from the parties, all of which we have considered, even if not specifically referred to below.
20. The Appellant’s grounds of appeal focus primarily on the weight of public interest in relation to his concerns relating to the requested information and its subject matter. Elsewhere in his submissions, he questions the Commissioner’s arguments relating to the applicability of the confidentiality and personal data. Therefore, the issues for the Tribunal are:

Issue 1: Is the exception under Regulation 12(5)(e) engaged?

Issue 2: If Regulation 12(5)(e) is engaged, what is the weight of public interest in this case?

Issue 3: Is any of the requested information personal data to which Regulation 13 applies so as to exclude it from disclosure?

Issue 1: Is Regulation 12(5)(e) engaged?

21. We have followed below the Commissioner’s approach (which is not disputed) to determining whether the exception has been appropriately applied: (a) Is the information commercial or industrial in nature? (b) Is the information subject to confidentiality provided by law? (c) Is the confidentiality provided to protect a legitimate economic interest? (d) Would the confidentiality be adversely affected by disclosure of the information?
22. We include in our analysis the Appellant’s arguments to the extent that they might be said to address these issues.

Is the withheld information commercial or industrial in nature?

23. The Commissioner's arguments included:
- a. The disputed information was commercial in nature and that the requested meeting minutes and discussions of the PFI contract and its implementation recorded in the minutes constituted commercial information.
 - b. The Commissioner considered that the essence of commerce is trade and a commercial activity that would generally involve the sale or purchase of goods or services for profit. He concluded that the information contained in the minutes could not be separated from the actual PFI contract. As such the Commissioner found that the minutes were commercial in nature and this element of the exception was satisfied.
24. We have not found arguments by the Appellant addressing this issue.

Our Finding

25. We accept that the requested information is, at a high level, commercial in nature because it broadly concerns matters relating to a commercial project and to contractual arrangements.

Is the information subject to confidentiality provided by law?

26. The Commissioner considered that the requested information is subject to confidentiality provided by law, due to both a common law duty of confidence and a contractual confidentiality obligation.
27. First, he submitted that the requested information was the subject of an equitable duty of confidence or a duty at common law. He referred to the case of *Coco v Clark (Engineers) Ltd* [1969] RPC 41. In this In this case, Megarry, J stated:

"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence."

28. The Commissioner considered that a reasonable person would conclude that the disputed information in the minutes was imparted and shared in circumstances giving rise to an obligation of confidence. This was because both parties to the PFI contract considered the minutes to be of a sensitive nature, and further, that they would not be published or made otherwise available to members of the public. Furthermore, the attendees of the Network Board meetings have an expectation that the matters under discussion would not be divulged outside the meetings and that the confidential nature of the proceedings will be maintained.
29. Second, he asserted that the requested information is covered by a confidentiality clause in the PFI contract which states:

'Each party shall keep confidential all Confidential Information received by one party from the other party relating to this contract, the Project Documents

and/or the project and shall use all reasonable endeavours to prevent their respective employees and agents from making any disclosure to any person of such Confidential Information.’ (Clause 35.1(c) of the PFI contract.)

30. The Commissioner noted that, whilst the PFI contract contained provisions recognising the Council’s obligations under FOIA and the EIR that may require it to disclose information, it had attempted to protect commercially sensitive and confidential information insofar as permitted by these disclosure regimes. He considered that this recognition did not alter the assessment of whether the information should be disclosed under FOIA or EIR, but confirmed that the Council did not attempt to ‘contract out of’ its obligations. The Council had asserted that there was a genuine purpose for the inclusion of this clause because contractual confidentiality was required to foster the working relationship between the contracting parties and to allow resolutions to be reached quickly at little cost, thereby protecting economic interests.

30. The Appellant’s arguments in response are:

- a) Clause 35.1(a) of the contract clearly states that “*each Project Document shall, subject to clause 35.1(b), not be treated as Confidential Information and may be disclosed without restrictions;*” The Cambridgeshire County Council’s Network Board Meeting minutes are such Project Document and may be disclosed without restrictions.
- b) Clause 35.1(b) states “*a Project Document designated as Commercial Sensitive Information and listed in Part 1 and Part 2 of Schedule 22.*” The Information Commissioner has not included extracts from Schedule 22 in the open bundle, so I assume that they are not listed in Schedule 22. Balfour Beatty suggested in the email of 5th August that he apply to the Council for copies of the minutes under the FOIA, which suggests they are not listed in Schedule 22.
- c) Given that Balfour Beatty suggested *asking* Cambridgeshire County Council for copies of minutes, it seemed surprising to him that the Commissioner considered them to be confidential. He asserted that if they were genuinely confidential then he should not have been informed by Balfour Beatty about the [existence] of the minutes. *(See paragraph 2 above.)*

Our Finding

31. Looking first at any contractual obligation of confidence, we do not think the Appellant’s arguments hold. This is because the Commissioner has been referring to clause 35.1(c) rather than clauses 35.1(a) and 35.1(b) of the PFI contract as being of relevance here. They do not assert the minutes requested are subject to a contractual obligation of confidence by virtue of clauses 35.1(a) and 35.1(b).

32. We do not think the Commissioner’s arguments in relation to clause 35.1(c) hold. The clause provides:

‘(c) each party shall keep confidential all Confidential Information received by one party from the other party relating to this contract, the Project Documents and/or the Project and shall use all reasonable endeavours to prevent their respective employees and agents from making any disclosure to any person of such Confidential Information.’

33. Confidential Information is defined in Schedule 1 of the PFI contract as:

“(a) information that ought to be considered as confidential (however it is conveyed or whatever media it is stored) and may include information disclosure would, or would be likely to, prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and know-how of either party and all personal data and sensitive personal data within the meaning of the Data Protection Act 1988; (b) Commercially Sensitive Information and (c) Authority Confidential Information”.

34. It follows that, in order for information to be subject to confidentiality under the contract:

- (a) It must fall into one of the three categories of ‘Confidential Information’ as defined in Schedule 1, i.e. ‘Commercially Sensitive Information’, ‘Authority Confidential Information’ or ‘information that ought to be considered as confidential’.
- (b) It must be received by one party from the other party; and
- (c) It must relate to the contract, the Project Documents and/or the Project.

Dealing with these requirements in reverse order:

35. We accept that the Network Board minutes relate generally to the contract and to the Project.

36. However, we do not consider that they relate to Project Documents. Project Documents are defined in Schedule 1 to the contract as *“the agreements entered into by the Service Provider for the performance of its obligations under this Contract”*, which are then listed separately. There is no evidence or indication that the Network Board minutes (or the information they contain) were received by the Council from Balfour Beatty. On the contrary, the minutes appear to reflect information exchanged between all parties during a joint participation in the meetings.

37. Regardless of the point in paragraph 36, we consider in any event that the minutes do not fall into any of the three categories of ‘Confidential Information’ in the PFI contract.

38. As to whether the minutes ought to be considered as confidential, the Commissioner did not provide any analysis as to why the requested information falls within that definition. Having read the requested information, we can find nothing that ‘ought’ be considered confidential, save for anything that might be potentially considered personal data (see below). We also cannot find anything that might be said to be trade secrets, Intellectual Property Rights and know-how of either party or sensitive personal data. Neither can we find information that if disclosed would, or would be likely to, prejudice the commercial interests of any person.

39. Commercially Sensitive Information is defined by reference to Schedule 22, which was not provided to us, such that we must assume it is not considered relevant to this case. (We note that we had asked for the full contract shortly before the hearing. The main part was provided in confidence, but not the schedules, and was not used in the hearing.)

40. "Authority Confidential Information" is defined as:

"all Personal Data and any information, however it is conveyed, that relates to the business, affairs, trade secrets, know-how, personnel, and suppliers of the Authority, including all Intellectual Property Rights, together with all information derived from any of the above, and any other information clearly designated as being confidential (whether or not it is marked "confidential") all which ought reasonably be considered to be confidential."

41. We do not think Authority Confidential Information is relevant here because the information is held by the Council and we do not think it can rely on a contractual obligation to keep its own information confidential, in any event, we can find nothing that *'ought reasonably be considered to be confidential'*.
42. Turning to whether there appears to be a common law duty of confidence, we do not think there is much in Appellant's argument that Balfour Beatty had referred him to the Council. By doing so, they were not suggesting that he would gain access to them. They merely referred him to the Council as the appropriate party to whom he should make his request.
43. However, we do not think a reasonable person would conclude that the disputed information was imparted and shared in circumstances giving rise to an obligation of confidence. This is because the minutes (whilst commercial in contents) do not seem to be of a sensitive nature.
44. The Commissioner argued that the attendees of the Network Board Meetings had an expectation that the matters under discussion would not be divulged outside the meetings and that the confidential nature of the proceedings will be maintained. This would seem to be arguing that the parties had a blanket regard for all minutes of such meetings as to be confidential regardless of their contents. However, as referred to above, this would be at odds with the contractual provision that recognised the obligations to disclose information under FOIA and EIR, and given the existence of the Council's obligations under these Acts, this would not seem to us to be reasonable.
45. The reasoning in paragraphs 43 and 44 has been sufficient for us to conclude there was not a common law duty of confidence. However, we would also note the Appellant's arguments that (a) he thought matters to do with local street lighting which he is concerned with have had less public scrutiny - instead of being part of a cabinet member's oversight, they now belonged to the Highways and Community Infrastructure Committee; (b) he had not found minutes of that committee indicating discussions on the PFI Street Lighting contract; (c) he had experienced problems with concerning his own experiences of work undertaken in relation to the roll out of street lighting; and (d) he believed that the electorate and their representatives ought to be able to monitor the rollout of the new street lights, such that he would presumably argue that attendees of the meetings ought not reasonably expect that the matters discussed would not be divulged outside the meetings regardless of actual content.
46. In the Decision Notice, the Commissioner also considered whether the information had the necessary quality of confidence, which it considered it did because the material had not been distributed widely and was not trivial. We accept that the

material may not have been distributed widely and is not trivial, but this does not mean that the substantive material is in fact of a sensitive nature.

47. Since we do not think the exception is engaged as a result of this finding, we have only dealt with the other condition briefly.

Is the confidentiality provided to protect a legitimate economic interest?

48. The Commissioner stated that disclosure of the requested information would adversely affect the legitimate economic interests of the Council and Balfour Beatty protected by a duty of confidence because some harm would “more probably than not” be caused by the disclosure.
49. He asserted that this was because it would provide third parties with access to confidential information which neither the Council nor Balfour Beatty had conceived would be made public which was not normally available in a competitive market and this would be to the detriment to the commercial interest of both the Council and of Balfour Beatty. It was explained that the minutes contained full and frank discussions of a confidential nature, which would not normally be available to investors or competitors, and this would not be expected to be disclosed under the EIR.
50. We have not found arguments by the Appellant addressing this issue, however, this would likely have been difficult to do without having had sight of the requested information.

Our Finding

51. We have not been provided with any submissions on a closed basis from the Commissioner, and have not been shown with specific reference to any part of the requested information a reason why disclosure of the requested information would “more probably than not” adversely affect the legitimate economic interests of the Council and Balfour Beatty. Having reviewed the material, we cannot find a reason that disclosure would cause any harm or prejudice the legitimate economic interest of either the Council or Balfour Beatty.
52. To conclude, we do not find that regulation 12(5)(e) was appropriately applied, such that there is no need to consider Issue 2.

Issue 3: Is any of the requested information personal data to which Regulation 13 applies so as to exclude it from disclosure?

53. After the hearing, further submissions were sought in relation to Regulation 13 (personal data), in view of the Tribunal not being able to order disclosure of information falling within this provision and the submissions not having addressed this matter.
54. The Appellant’s position included:
 - a. That he did not agree to personal names being redacted.
 - b. That he did not accept that names were only ever personal data. When a person stands for election, they consent to their name being public in that context. When a person decides to trade under their own name, they

consent to their name being public in the context of their trade. When a person applies for a senior role in an organisation, they consent to their name being public in that context.

- c. That he disagreed that it would be easy to identify a person from their job description other than senior people who have already consented to their name being in the public domain.
- d. He disagreed that the job title in this context added no significant value to views being expressed whereas name of contractor's employer did.
- e. Where the Commissioner argued that several of the named attendees were not County Council employees would expect them to consider it 'unfair' to disclose the references to them in these minutes as there was no expectation on the attendees that these minutes would be disclosed into the public domain – he stated: that it was normal commercial practice for confidentiality clauses to be reflected in sub-contractors contracts, and that all should have been aware of the public nature of these minutes.

55. The Commissioner maintained:

1. What was personal data?

- a. The names and job titles were personal data, as they related to specific posts and in the context of the minutes, it would be possible to identify the individuals.
- b. The Commissioner's guidance on requests for personal data about public authority employees³ reflected that it was usual to redact names and job titles of more junior staff and that the fact that somebody has attended a meeting, albeit as a representative of another organisation, is personal data about them (*See paragraph 70 and Department for Business, Enterprise and Regulatory Reform v ICO and Friends of the Earth (EA/2007/0072, 29 April 2008)*).

Would disclosure be fair?

- c. When determining whether the disclosure would be 'fair', the Commissioner's guidance on personal information (section 40 FOIA and reg.13 EIR)⁴ identified factors that he considered would usually be necessary to consider (at paragraph 44). These included:
 - the reasonable expectations of the individual, taking into account: their expectations both at the time the information was collected and at the time of the request; the nature of the information itself; the circumstances in which the information was obtained; whether the information has been or remains in the public domain; and the FOIA principles of transparency and accountability; and

³ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

⁴ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

- any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.
- d. Several of the named attendees were not Council employees and he would expect them to consider it unfair to disclose the references to them in these minutes as there was no expectation on the attendees that these minutes would be disclosed into the public domain. Therefore they had a reasonable expectation that their personal data would not be disclosed into the public domain, particularly given the usual practice described in the Commissioner's guidance. Therefore the sub-contractors would not expect their personal data to be disclosed.
 - e. The Commissioner considered that disclosure of the personal data within the disputed information in this matter, that is the names and job titles, would be likely to be unfair and thus contrary to the first data protection principle. The Council has not yet had the opportunity to provide detailed submissions on the personal data contained within their information. However, taking into account the brief relevant considerations put forward by the Council, including the reasonable expectations of the data subjects attending the meeting, the Commissioner's position is that it would not seem to be fair for this personal data to be disclosed.
 - f. Even if disclosure of the information would be 'fair', it would still be contrary to regulation 13 EIR unless one of the conditions of Schedule 2 DPA were met. The only condition the Commissioner identified as of being potential relevance was condition 6(1), i.e. that the processing would be necessary for the purposes of the legitimate interests of the data controller or a third party. He did not consider the specific identity of the individuals to be of significant value, more which party (CCC, Balfour Beatty, Connect Roads) the views represented, and therefore providing the personal data element would be unfair processing.
 - g. If disclosure were to be deemed fair and would meet a Schedule 2 DPA condition, the disclosure must still be lawful. It will not be lawful if it would breach a duty of confidence or a legally enforceable contractual agreement. The Commissioner maintained the position that the disclosure of the personal data contained in the disputed information would not be lawful.
 - h. The Commissioner invited the Tribunal to seek further representations from the Council as to the specific redactions to personal data that would need to be made. For instance, he did not know how many people hold a particular role within the organisations attending the meetings.

56. The Tribunal then requested of the Council to provide submissions on specific points:

Tribunal question 1 - Personal Data: If personal names (other than any Councillors) were to be redacted, how it would be possible to identify living individuals from their job titles?

- a. Council response: Personal data is defined in the legislation as data which used alone or in conjunction with other information is capable of identifying a living individual. Disclosing the job titles of individuals who have attended the Network Board meetings would allow individual post holders to be identified with reasonable ease. The job titles, alongside

their employer, are explicit to specific individuals and there are very few individuals with the same or similar job titles.

Tribunal question 2 - Fairness: If individuals were identifiable from job titles, whether and how would the Council argue that the names and job titles would need to be properly redacted under the EIR, including giving reasons as to the relevance of any arguments as to the level of seniority of the Council's and Balfour Beatty's staff on questions of fairness and condition 6 of schedule 2 of the DPA.

- b. Council response: Under the first data protection principle, personal data must be processed fairly and lawfully.
- c. The meetings were not public, the attendees did not expect that their attendance and specific comments would be placed into the public domain. As regards Schedule 2, paragraph 1 of the Data Protection Act 1998 ('DPA'), non-County Council members of staff are private sector employees and have not consented to the disclosure of their personal information. As regards to Schedule 2, paragraph 6, the Council does not consider that the identification of specific Balfour Beatty and Connect Roads employees, both in their attendance and specific comments attributed to them, is "necessary" in the pursuance of legitimate interests. The individuals attended the meeting as representatives of their respective companies. The fact that it was person 'x' or person 'y' from that company who presented a report or was given an action does not convey any significant information in respect of transparency around these meetings.
- d. The significance of the information is in knowing which parties were represented at the meeting and what views or actions related to them. This could be achieved by removing the individuals' names and job titles to show the companies represented in attendance, and in replacing initials in the minutes to show that comments were from, or actions were assigned to, Balfour Beatty (BB) or Connect Roads (CR). The Council proposes that the significant information could be disclosed effectively in such an anonymised form; therefore disclosing the individual names is not "necessary" and Schedule 2, paragraph 6 is not engaged. Consequently, disclosing the personal data would be in breach of the first Data Protection principle as none of the conditions stated in Schedule 2 apply.

Tribunal Question 3: Personal Data: Whether the Council would consider the personal names of any Councillors to be personal data, and if so whether and how they would argue these would need to be properly redacted under the EIR.

- e. Council response: The Council does consider the personal names of Councillors to be personal data for the purposes of the DPA. However, when a Councillor, or officers employed by the Council, act in their capacity as a representative of the Council, the level of data protection that is afforded to them reduces according to the public nature of their position. The Council therefore believes that names of Councillors and officers, although personal data, should not be redacted from the minutes in the event that the Panel were to find against the Commissioner in relation to regulation 12(5)(e).

57. The Appellant made no further submissions in response to the Commissioner's and Council's submissions.

Our Finding

58. We accept and adopt the Council's reasoning set out above in relation to this. In particular:
59. First, we accept that the requested information where it includes personal names are the personal data of those individuals because their attendance and potential participation at the meetings reveals something personal about them. We also accept that were the personal names to be redacted, it is likely that the individuals (whether employed by the Council or private entities) would still be identifiable from the job titles, by those who were able to piece together their identity by knowing or being able to gather other relevant information. (See *paragraph 14 above*.)
60. Having decided that the information is personal data, we consider whether disclosing it would be fair. (See *paragraph 15 above*.) In the case of councillors and the officials present, the public nature of their roles would not accord an expectation of their identities being withheld on the facts of this case. We have not been given details from the Council as to the seniority of the officials, it is reasonable to assume from the Council's submissions that they are relatively senior and would not expect their identities to be withheld.
61. In the case of those present at the meetings who were not public officials or councillors, we accept the position of the Council and Commissioner that these individuals would legitimately not expect to have their names and job titles disclosed. Furthermore, we see limited benefit to be derived from disclosing this information, such that the legitimate interests of these individuals in their privacy would outweigh that of disclosing the information, and their names, job titles and any reference to them in the requested information should be redacted in view of the fact that disclosure would not be fair and that we have not been shown a condition set out in Schedule 2 of the DPA that would be met. (See *paragraph 16 above*.)

Regulation 12(5)(d)

62. In its response to the Directions, the Council sought to draw to our attention the fact that in its initial response, it relied on both regulation 12(5)(e) (*confidentiality of business and commercial interests*) and regulation 12(5)(d) (*confidentiality of proceedings*), but that the Commissioner had been satisfied that regulation 12(5)(e) applied and did not proceed to consider the effect of regulation 12(5)(d). The Council now seeks to maintain that the requested information is exempt under 12(5)(d).
63. The Tribunal panel reconvened to consider this matter. We find that it is not appropriate to accept the Council's submissions for the following reasons:
 - a. Under s.58 FOIA, the Tribunal's role is to consider whether a Decision Notice is in accordance with the law, and whether any exercise of discretion by the Commissioner ought to have been exercised differently. While the Tribunal may review any finding of fact on which the notice in question was based, and it is a generally established principle that Tribunal appeals are considered 'afresh', it is up to the parties to bring any relevant facts or submissions to the Tribunal's attention for consideration before an appeal hearing takes place. This would ordinarily include reliance on additional exceptions or exemptions

originally relied upon but which were not considered in the Decision Notice.

- b. Had the Council wished to play a role in the appeal so as to ensure the Tribunal considered what it regarded as important, the proper course of action would have been to become party to the appeal, and seek to make submissions on regulation 12(5)(d) in the usual course before the hearing. It did neither.
- c. We consider it reasonable to conclude from the Council's conduct that it had considered the importance of the case to it and decided not to participate.
- d. After the hearing, the Tribunal sought further submissions from the parties in relation to the exception for personal data making clear on 17 July that we were doing so "*given that we may not order a disclosure of information where it is personal data not falling within regulation 13 EIR*". This was the only reason for seeking further submissions after the hearing. We did not think it fair to the Appellant to order disclosure with all personal data redacted based on the failure of the Commissioner to provide arguments on this prior to the hearing unless he was willing to agree to this. Therefore we sought indication from the Appellant of his position. He indicated that he would not agree to agree to the redaction of job titles, such that we had to seek further submissions limited to the relevant exception. We note that the Commissioner's representative referred to having contacted the Council in July about this matter at this point, and also in her submissions of 9 September. The Council still made no attempt to be joined as a party and make representations during this period whilst clearly being aware of developments in this case.
- e. It was only because we found the Commissioner's post-hearing submissions of 9 September incomplete that we issued the Directions dated 13 October to the Council. These did not present an invitation or opportunity for them to be joined. The directions were limited to specific questions about adequate protection of personal data.
- f. Therefore, the Council's post-hearing reliance on regulation 12(5)(d) EIR clearly goes beyond the terms and scope of the post-hearing Directions, and came at the very latest stage such that they were not properly placed before the Tribunal when the Council had an opportunity to do so. Were we to now to consider such submissions we would yet again need to seek the further submissions of the other parties and reconvene as a panel.
- g. The totality of this means that considering the Council's further submissions would offend rule 2 of the Tribunal Procedure (*First-Tier Tribunal*) (*General Regulatory Chamber*) 2009 S.I. 2009 No. 1976 (L. 20) ('the Rules') and the overriding objective of dealing with the case fairly and justly including:
 - dealing with the case in ways which are proportionate to (a) the importance of the case; (b) the complexity of the issues; (c) the anticipated costs and the resources of the parties (and of the Tribunal); and

- avoiding delay, so far as compatible with proper consideration of the issues.

h. Rule 2(4) of the Rules provides:

“(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally. “

Where parties have opted for a paper hearing, we consider it an implicit duty and extremely important that they have provided the Tribunal with sufficiently complete submissions to enable the Tribunal to resolve the matter fully on the day of the hearing, particularly where the party is legally represented. It follows that any public authority wishing to have its arguments before the Tribunal at the hearing would need to have applied to be joined and also to cooperate with the Tribunal more generally.

64. Our decision is unanimous.

Judge Taylor

27 December 2015