IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2015/0254-6**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notices No: FER0579974, FER0579659, and FER0582261
Dated: 8 October 2015, 13 October 2015 and 14 October 2015 respectively

Appellant:	**Gloucestershire County Council**
First Respondent:	**The Information Commissioner**
Second Respondent:	**Costas Ttofa**
Third Respondent:	**UBB Waste (Gloucestershire) Ltd**
Heard at:	**Field House**
Date of Hearing:	**27 to 29 September and 5 December 2016**

Before

HH Judge Shanks

and

Nigel Watson and David Wilkinson

Representation:

Appellant/Third Respondent:	**Robin Hopkins (counsel)** **Instructed by Eversheds Sutherland (International) LLP** [1 Wood St, London EC2V 7WS]
First Respondent:	**Ewan West (counsel)**
Second Respondent:	**Gerald Hartley (lay representative)**
Date of decision:	**10 March 2017**

Subject matter:

Environmental Information Regulations 2004 (EIR)

Reg.12(1)(b)	Public interest test
Reg.12(2)	Presumption in favour of disclosure
Reg.12(5)(c)	Exception: *Intellectual property rights*
Reg.12(5)(e)	Exception: *Commercial confidence*

Cases considered:

DECC v IC and Henney [2015] UKUT 0671 (AAC)

Dept of Health v IC and Lewis [2015] UKUT 0159 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal allows the appeal in part and issues the following substituted decision notice.

SUBSTITUTED DECISION NOTICE

Public authority: **Gloucestershire County Council**

Name of Complainants: **Costas Ttofa, Paul Barker, Ray Purdy**

The Substituted Decision

Gloucestershire County Council did not deal with the requests for information made by Mr Ttofa, Mr Barker and Mr Purdy on 25 January, 29 March and 13 February 2015 respectively in accordance with the requirements of EIR in that (a) they ought to have supplied them with a copy of the contract made between the Council and UBB Waste (Gloucestershire) Ltd dated 22 February 2013 ("the Contract") redacted only in accordance with the Schedule hereto and (b) they ought to have supplied Mr Ttofa and Mr Barker with a full unredacted copy of "Annex 4".

Action Required

The Council is required to the supply all three Complainants with copies of the Contract so redacted and Mr Ttofa and Mr Barker with copies of Annex 4 by 7 April 2017.

HH Judge Shanks
10 March 2017

Schedule

Redactions shown on the following pages of the closed bundle are allowed:

111
226
243
261 (only the definition of Threshold Equity IRR)
337 (only cl 2.10.1)
387
436
439
880
881
889-894
908-915
961-963 (final two columns only)
995 (top two redactions only)
1024 - 1033
1034 – 1043
1065 - 1084
1086
1090 (top of page under para 1.7.1 only)
1099 – 1108
1546-1557 (except provision re electricity on p1553 which must be disclosed).
1613
1653
1751

REASONS FOR DECISION

Introduction

1. These three appeals concern a substantial PFI (private finance initiative) contract made between Gloucestershire County Council (the Council) and UBB Waste (Gloucestershire) Ltd (UBB) on 22 February 2013 for the design, construction, installation, financing, operation and maintenance of an Energy from Waste (EfW) facility at Javelin Park close to junction 12 of the M5. This Contract will last about 25 years and is worth about £500 million. It is intended that the EfW facility will burn up to 190,000 tonnes of residual waste (ie what is left after recycling) per year and generate about 116,000 MWh of electricity (equivalent to the power required by about 26,000 homes).

2. The Council has made a large part of the Contract available to the public (and indeed there has been an on-going process of disclosure throughout these proceedings) but they continue to seek to withhold numerous details on the grounds, broadly speaking, that they are commercially sensitive. Following complaints by three individuals (Mr Ttofa, Mr Barker and Mr Purdy), the Information Commissioner, in decision notices made under the Environmental Information Regulations 2004 in October 2015, required the Council to disclose full unredacted versions of the Contract and of the Council's "business case" for entering into it. The Council, with the support of UBB, has appealed to this Tribunal against those decision notices. Mr Ttofa was joined as a party to the appeal and has been represented at the hearings by Mr Hartley, who is, like Mr Ttofa, involved with a pressure group vigorously opposed to the project called GlosVAIN.

3. The fundamental issues for the Tribunal are whether the details which the Council continues to withhold are truly confidential and commercially sensitive and, in so far as they are, whether the public interest in maintaining any such confidentiality outweighs the public interest in disclosure. There is no dispute that those issues have to be considered as at April 2015, when the requests for information which led to the Commissioner's decision notices (which were made in the period January to March 2015) should in the normal course of events have been dealt with.

4. The structure of this decision is as follows:

   (1) Facts: paras 5 to 29.

   (2) The appeals: procedural matters: paras 30 to 35.

   (3) Legal framework and issues for the Tribunal: paras 36 to 38.

   (4) EIR/FOIA: paras 39 to 41.

   (5) Regulation 12(5)(e): paras 42 to 50.

   (6) Regulation 12(5)(c): paras 51 to 53.

   (7) Public interest balance: general considerations: paras 54 to 73.

   (8) Specific redacted items: paras 74 to 216.

   (9) Result and final remarks: paras 217 to 220.

Facts

5. This account of the facts is based mainly on a large number of documents supplied to us (including in particular a full unredacted copy of the Contract) and on the written and oral evidence of Ian Mawdsley, the Council's Project Lead on the residual waste project which led to the Contract, Javier Peiro, the managing director of UBB's parent company, and Sarah Lunnon, a Gloucestershire County councillor and member of the Green party.

Background to Contract

6. Gloucestershire is a predominantly rural county in the west of England. The Council is the waste disposal authority and the waste planning authority for the county and is also responsible for certain town and country planning decisions. It has a cabinet government system: there is a Cabinet made up of some eight councillors who are members of the ruling group which takes executive decisions on behalf of the Council, which itself consists of some 45 councillors. Gloucestershire has two tiers of local government, with district councils below the Council in the hierarchy. The next Council elections are scheduled for May 2017.

7. UBB is 50.5% owned by Urbaser Ltd which is itself a subsidiary of a Spanish environmental services company called Urbaser SA. Urbaser has a substantial

presence in the UK with over 600 employees. There are only seven or eight companies operating in the UK which have the financial and technical capabilities to fulfil a contract like that for the Javelin Park EfW facility.

8. The EU Landfill Directive (1991/31/EC) requires that the UK divert at least 60% of its waste from landfill by 2020. This requirement is largely driven by the climate change agenda since landfill generates methane, a gas which is 25 times more powerful than CO2. Landfill tax, which is paid by local authorities for each tonne of waste disposed of by landfill, has risen from £10 in 1999/2000 to £84 in 2016/7. As a consequence there has been an increasing demand in the UK (and throughout the EU) for alternative ways of disposing of residual waste, which include EfW and other technologies such as Mechanical Biological Treatment (MBT) and Materials Recovery Facilities (MRF).

9. There are about 600 EfW plants operating across Europe, mainly in Northern Europe. We were told that there are 32 such plants operating in the UK and there is at least one other which is already contracted to be built (in Worcestershire, where UBB is again the contractor and there are similar proceedings before the Tribunal about the contents of the relevant contract). Mr Mawdsley told us that he knew of only one of these EfW plants which was not the subject of a PFI contract. There are three local authorities (in Leicester, London and Aberdeen) where a procurement process is (as at late 2016) about to start but it is unlikely that there will be any further requirement for EfW plants in the UK after that. However, there will be an on-going demand for such plants in Southern and Eastern Europe and, further afield, in Canada, the Middle East and ultimately China. The market for EfW plants is a global one and the same eight or ten companies compete with Urbaser throughout the world to build and operate them.

10. A Residual Waste Procurement Plan for the diversion of residual municipal waste from landfill was presented to the Council's Cabinet on 28 November 2007. It stated that its purpose was to seek approval for the plan to deliver a long term residual waste contract and that the aim was to provide the most environmentally sustainable and cost-effective solution. The background set out in the document included mention of the Council's strategy adopted in October 2007 to push recycling of household waste to 60% by 2020 and the problems of continuing to

landfill residual waste. It stated that doing nothing was not an option. It referred to the two ways of financing a long term contract as private, including PFI, which involved the potential for "PFI credits" from the government, and public, by obtaining funding via prudential borrowing by the Council itself. It referred to continuing negotiations to acquire Javelin Park and referred as part of the current resource implications to the cost of acquisition of Javelin Park.

11. On 23 April 2008 the Cabinet approved a business case for residual waste procurement. The report prepared by officers stated that the forecast cost for disposing of waste up to 2040 if a 60% recycling target was met would be about £1,445 million if no change was made and the Council continued to rely on landfill but between £1,208 million and £1,357 million if there was an EfW project based on a PFI contract (which assumed PFI credits of £171 million). The latter solution itself would involve an "affordability gap" of between £456 and 605 million. The Cabinet accepted the recommendation that a PFI rather than prudential borrowing solution should be pursued, that an application for PFI credits should be made and that it was committed to meeting the "affordability gap" of between £456 and £605 million.

12. The procurement process which led to the Contract started with a notice in the Official Journal of the EU on 30 January 2009. The notice stated that the Council wished to enter into a 25 to 30 year contract "for the provision of residual waste treatment capacity that will divert municipal solid waste from landfill." The type of procedure was to be "competitive dialogue" and the award criteria were to be the most economically advantageous tender in terms of the criteria stated in the contract documents. As Mr Mawdsley was anxious to stress the notice stated the Council were open to any technological solution and, although they would make a site available for the project, bidders would be free to propose alternative sites, so an EfW facility at Javelin Park was not a foregone conclusion of the process.

13. We were shown a HM Treasury/Office of Government Commerce guide to the Competitive Dialogue procedure produced in 2008 which sets out the process which ought to be followed. After the process of dialogue with the bidders has ended bidders are invited to submit their final tenders. The final tenders should contain all the elements required and necessary for the performance of the project. The final bid must be final and not subject to change or negotiation save to clarify, specify

and fine tune. It is recognised that changes in circumstances may occur between the closure of the dialogue stage and the signature of a contract but it is "inappropriate … to undertake any changes to bids … if these changes could have been anticipated and dealt with during the dialogue stage." Any clarification or refinement must not have the effect of modifying substantial aspects of the tender and must not risk distorting competition.

14. In this case, 11 proposals were received from eight bidders and they included a number of MBT based solutions. On 16 March 2011 two bidders were invited to submit final bids; both were proposing an EfW plant at Javelin Park. Following an evaluation process carried out by the Council's project team under Mr Mawdsley's leadership, UBB were selected as the preferred bidder by the Cabinet on 14 December 2011. Although he naturally stressed that the Competitive Dialogue procedure was fully complied with and that the Council was confident that the procurement process was operated with high levels of integrity and fairness, Mr Mawdsley accepted that there was thereafter a certain amount of "negotiation" before the final contract was signed in February 2013, mainly because of the involvement of the banks financing the project in tri-partite discussions; in particular he told us that concerns raised by the banks' lawyers about the access road to the Javelin Park site had to be addressed in the final contract.

15. On 12 September 2012 the Council's Cabinet approved the awarding of a contract to UBB. The 13 page paper supporting the recommendation to the Cabinet which is before us included among its annexes Annex 4 which was entitled "Resource Implications". The Council have identified Annex 4 as comprising the "business case" which Mr Ttofa in particular requested; he has been provided with a redacted copy of the document, from which most of the monetary amounts and a certain amount of text is still redacted. The main paper recorded at para 22 that "Planning is a shared risk and the council would be responsible for the costs of this up to a cap in the event that planning is not ultimately obtained. These costs are detailed in exempt annex 4". At para 29 it was stated that the contract was "…affordable within the Medium Term Financial Strategy as shown in exempt annex 4 and within the affordability limit originally set by Cabinet on 23 April 2008, which has been adjusted to reflect the latest tonnage forecast". Annex 4 stated that it was not for publication by virtue of the Local Government Act 1972 and that the public interest in

withholding the information in it outweighed the public interest in disclosing it to the public.

16. At the same time as the procurement process was proceeding the Council was also finalising its Waste Core Strategy which was adopted on 21 November 2012 following an Inspector's Report published on 3 September 2012. Strategic Objective 3 was to recover the maximum amount of value (including energy) from any waste that could not be re-used, recycled or composted by providing for between 108 and 145,000 tonnes of residual waste recovery for municipal waste by 2017 and recovery facilities with capacity to divert between 43 and 73,000 tonnes of commercial and industrial waste from landfill by 2020. Core Policy WCS6 provided that the waste planning authority would make provision for residual waste recovery capacity of 145,000 and 73,000 tonnes of municipal and commercial waste respectively and that planning permission would be granted for such facilities at, among others, Javelin Park, subject to various conditions.

The Contract

17. The Contract with UBB was signed on 13 February 2013. As we were told graphically by Mr Peiro, on the same day UBB signed 60 other contracts with sub-contractors, banks and others. We have already mentioned the broad parameters of the deal: it was to last at least 25 years, cost the Council some £500 million, burn up to 190,000 tonnes of residual waste and generate enough electricity for 26,000 homes. The planned dates for obtaining planning permission and an environmental permit were in July 2013 which would have allowed construction to begin shortly thereafter.

18. The Contract is based on HM Treasury's standard form for PFI contracts (SOPC4), as amended for waste projects (WIDP) although, as Mr Mawdsley points out, the precise commercial terms agreed were specific to the Contract. The final document is long and detailed and runs to some 1,750 pages comprising 100 clauses and 33 schedules. The bulk of the document, almost 1,000 pages, comprises Schedules 2 and 3 which set out the specifications for the construction and operation of the plant by UBB. Schedule 4 deals with payment mechanism; simplifying enormously, the basic structure is that UBB build and operate the plant in exchange for the Council

guaranteeing to provide a certain amount of waste for incineration per year (referred to as the "base tonnage') at a certain price; the base tonnages and the prices to be paid by the Council vary year by year over the lifetime of the contract.

19. It is also envisaged that "third party waste" in addition to waste provided by the Council will be treated and there are complicated provisions for UBB and the Council to share in the revenue from third party waste and the electricity to be produced by the plant. We were told that Schedule 33 ("Power Offtake Arrangements") includes provisions which will enable the Council to sell electricity to other public sector bodies (the NHS and schools for example) rather than to the national grid, as is apparently normally required by government regulations. This scheme was developed by Mr Mawdsley and his team with the assistance of advisors including the Council's solicitors Eversheds and is a matter of some pride to him, being an original piece of work which he believes will enable the Council to make money from the sale of electricity and avoid a constricting regulatory regime. The Council claim that they have intellectual property rights in relation to Schedule 33 and it is Mr Mawdsley's hope that the Council will be able to make a substantial amount of money by selling the scheme to other local authorities.

20. There are detailed provisions about the obtaining of planning permission (Schedule 26) and an environmental permit (Schedule 27) for the building and use of the plant and about the related topic of compensation on termination (Schedule 17). In a nutshell and again greatly oversimplifying, if a "satisfactory planning permission" was not obtained by the "planning permission longstop date" the Council would be obliged either to terminate the contract or invite UBB to propose a "revised project plan". In the event of such a termination or a later termination if a revised project plan could not be agreed or planning permission still could not be obtained, the Council would have to pay compensation in accordance with Part 5 of Schedule 17. Such compensation would include an amount fixed by reference to the "Base Senior Debt Termination Amount" which itself includes amounts outstanding from UBB to the lending banks and "all amounts including costs of early termination of interest rate hedging arrangements and other breakage costs … payable by [UBB] to the [banks] as a result of prepayment in respect of Permitted Borrowing …" (see definition in Schedule 17). As emerged in due course, the cost

to the Council of problems with planning process were therefore potentially very large.

21. A redacted form of the Contract was published on the Council's website in May 2013. The Council reviewed the position in 2014 to assess what more could be published in this way and, as we have said, more has been disclosed in the context of these proceedings. Mr Mawdsley says in his witness statement that 95% of the Contract is in the public domain; that is no doubt accurate in terms of words and pages but not, we think, in terms of substantive provisions in the Contract.

Planning permission and the situation in early 2015

22. An application for planning permission for the building of the EfW facility at Javelin Park was made by UBB on 31 January 2012 and was considered by the Council's planning committee on 21 March 2013, that is five weeks after the Contract was signed. The planning committee meeting lasted from 10.00 am to 9.10 pm. Among the many submissions made was one on behalf of UBB, the applicant for permission, one from Mr Ttofa on behalf of GlosVAIN and one from Stroud District Council. Those against the proposal raised not only its impact on the environment and affect on the nearby AONB (area of outstanding natural beauty) but also issues about the quantity of waste that would need to be treated and alternative technologies to EfW, in particular MBT. Planning permission was refused, with 18 councillors, including Ms Lunnon, voting against the grant of planning permission and none in favour.

23. UBB appealed to the Secretary of State against the refusal of planning permission and an Inspector was appointed to conduct a public inquiry. His report dated 6 June 2014 recommended that the appeal be allowed and planning permission granted, subject to conditions. Planning permission was finally granted by the Secretary of State on 16 January 2015.

24. Stroud District Council then launched an appeal under section 288 of the Town and Country Planning Act 1990 to the High Court against the grant of planning permission on the basis that the Inspector and the Secretary of State had misconstrued the Council's Policy WCS6 and failed to have proper regard to the

vital issues of height and scale of the proposed facility. That appeal was dismissed by Laing J on 25 June 2015. Until the appeal was dismissed the future of the facility remained in real doubt.

25. In the meantime, because of the time that had already elapsed since the contract was signed, the Council had had to request a "revised project plan" from UBB, which was the subject of negotiations between the parties in 2015.

26. There was also a call for an Extraordinary Meeting of the Council which took place on 18 February 2015 to consider a motion that the Contract should be cancelled on the basis that the building of the facility would disregard the findings of the Council's planning committee and "… the widespread public opposition to the building of an incinerator at Javelin Park." The motion was supported by a petition which had received over 7,600 signatures. It was said by those supporting it that the EfW facility would scar the natural beauty of the landscape with a 70 metre tall structure, that it would damage the environment and public health and that there were cheaper and better alternatives to the EfW solution, in particular MBT. The Council's officers advised that it would cost up to £100 million to cancel the Contract and this was relied on at the meeting by those in favour of continuing with the project. Councillors who were against the project said that this was "scaremongering" and expressed frustration that the evidence for the cancellation costs had not been made clear and that they should be able to see the Contract in full. The motion was lost by 27 votes to 24 with one abstention.

27. During the hearing in September 2016 the Tribunal expressed some incredulity that it could possibly cost £100 million to cancel a contract worth some £500 million over 25 years at a stage when construction had not even started. Mainly in "closed session" Mr Mawdsley referred us to the relevant contractual provisions in Schedules 17 and 27 and sought to explain how such a high figure had been arrived at, which he told us was mainly as a consequence of the very high costs of breaking the interest rate and currency "swap" contracts that were part of UBB's financing arrangements with the banks. He also referred us to a document produced by Ernst and Young for a Cabinet meeting on 11 November 2015 setting out the calculation (referred to inferentially at para 74 of his witness statement). Without being in a position to follow the intricacies of the contractual provisions or the transactions with

the banks we are bound to accept his evidence about this. However, it seems to us that the fact that the Contract contained provisions that could have had such consequences for the Council in 2015 is inevitably an important consideration when considering the public interest balance in this case.

Events post-April 2015

28. Strictly speaking events after April 2015 are irrelevant, save in so far as they may cast light back on the position as at that date. For completeness however we record that following the dismissal of Stroud's case by Laing J in June 2015, the project was in effect cleared to proceed at the Cabinet meeting on 11 November 2015, the papers for which included the Ernst and Young document referred to above which Mr Mawdsley showed us in closed session. The matter was also considered and approved by the Council's Overview and Scrutiny Management Committee.

29. When Mr Mawdsley made his witness statement early in 2016 it was envisaged that any remaining conditions attached to the planning permission would be met by May 2016 and that work on site would start shortly thereafter with the expectation that the facility would be operating in the summer of 2019. So far as we are aware that timetable remains valid. As stated already, the next Council elections are scheduled for May 2017.

The appeals: procedural matters

30. In his decision notices issued in October 2015 the Commissioner concentrated entirely on EIR regulation 12(5)(e), which is set out in detail below. The Commissioner said that for that regulation to be engaged it was necessary for the Council to demonstrate that disclosure of the information in question would result in specific harm to a party's economic interests. He concluded that the Council had failed to demonstrate this at all and that the exception was therefore not engaged and that the Council must disclose full unredacted copies of the documents requested. The Council's notice of appeal complained among other things that the Commissioner had refused to meet them during the investigation to discuss the complex commercial arrangement in more detail so as to understand their arguments fully. That complaint has undoubtedly been substantially remedied by these proceedings.

31. Our initial hearing lasted three days (Tuesday 27 to Thursday 30 September 2016) and we heard extensive oral evidence from Mr Mawdsley and Mr Peiro in both open and closed session. The main reason for allowing their oral evidence and cross-examination was that the Contract and background were clearly complex matters and they were the people in the best position to explain matters to the Tribunal; it was also convenient in our view to debate the issues relating to specific provisions in the Contract through a process of questioning them direct. While considering the content of the redacted provisions in detail we necessarily held the hearing in closed session, excluding members of the public, Mr Ttofa's representative and Ms Lunnon (and, for a period, even Mr Peiro), though Mr Hopkins for the Council on each occasion summarised so far as possible what had been discussed when the Tribunal went back into open session. In the interests of fairness and balance we also heard oral evidence from the Councillor, Ms Lunnon, though her evidence occupied only a short time. We did not require any witness to take an oath.

32. At the conclusion of the evidence on Thursday 30 September 2016 it was clear that the parties (and in particular the Commissioner) wanted time to consider their positions further before making their final submissions. We therefore adjourned to enable the parties to put in further written submissions and arranged a further hearing for 5 December 2016.

33. On reconsidering her position the Commissioner accepted that regulation 12(5)(e) was engaged in relation to many of the redactions sought and in some cases that the public interest balance favoured upholding the exception and, to that extent, she agreed with the Council's position; we note that it was clearly Mr West who took the initiative and did a great deal of work in connection with this reconsideration and we are particularly grateful to him for that. For their part the Council sought to rely on regulation 12(5)(c) (harm to intellectual property rights) in relation to Schedules 3, 29 and 33 with rather more emphasis than previously.

34. Although it was not envisaged that further evidence would be taken at the resumed hearing we allowed Mr Mawdsley to give evidence again in both closed and open

session, mainly to clarify a number of factual issues which the Tribunal itself had raised.

35. Given the length and complexity of the Contract it has been a big task (as well as an "intricate and difficult" one, as Mr West put it) for the Tribunal to decide what should and should not have been disclosed. We have no doubt that the hearing could have gone on for many more days and we could have spent even longer than we have in deliberating and preparing this judgment. We believe that we have nevertheless complied with the overriding objective, which includes, of course, dealing with the case proportionately.

The legal framework and the issues for the Tribunal

36. The EIR apply exclusively to "environmental information" which is defined as follows:

> **… any information … on-**
>
> **(a) the state of the elements of the environment, such as air and atmosphere … soil, land, landscape …**
>
> **(b) factors, such as … waste, … emissions, discharges … affecting or likely to affect the elements of the environment referred to at (a);**
>
> **(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements.**

Any request for information from a public authority which is not for environmental information is dealt with under the Freedom of Information Act 2000.

37. Regulation 5(1) of EIR provides that a public authority which holds environmental information must make it available on request. Regulation 12 is the crucial provision; so far as relevant it provides:

> **12(1) Subject to paragraphs (2) … and (9), a public authority may refuse to disclose environmental information requested if:**

(a) an exception to disclosure applies under paragraph … (5);

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

(2) A public authority shall apply a presumption in favour of disclosure.

…

(5) … a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(c) intellectual property rights;

…

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

…

(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in [paragraph (5)(e)]

38. The main issues which have arisen for the Tribunal are (a) whether or not the EIR apply to certain of the redacted provisions, (b) the applicability of regulations 12(5)(e) and 12(5)(c), and (c) the public interest balance arising from regulation 12(1)(b).

EIR/FOIA

39. The Council and the Commissioner now agree that the EIR apply to all the provisions which have been withheld except for those in Schedules 10 and 12, which the Council say are not "environmental information" and should be considered

under section 43(2) of FOIA, which covers all information whose disclosure would be likely to prejudice anyone's commercial interests. Schedule 10 deals with insurances which UBB are required to take out and Schedule 12 is the jointly appointed Independent Certifier's Deed of Appointment. The provisions which the Council seeks to withhold in Schedule 10 relate mainly to the required minimum indemnities and maximum deductibles and in Schedule 12 to the Certifier's fees and required insurance.

40. It seems to us that the answer to this issue is provided straightforwardly by the terms of (c) of the definition of "environmental information" set out above. The whole of the Contract we are concerned with is in our view a "measure" likely to affect the elements and factors referred to in (a) and (b), as well as containing specific measures designed to protect the elements of the environment, and it seems to us quite artificial, not to mention highly inconvenient, to attempt to divide up a contract of this nature in the way the Council seeks to do. We have considered what is said by Upper Tribunal Judge Wikeley in *DECC v IC and Henney* [2015] UKUT 0671 (AAC) at paras 32-37 and we do not see anything which is inconsistent with this conclusion.

41. Mr Hopkins says that the details which the Council are seeking to withhold from Schedules 10 and 12 are "… too far removed from any measure which is likely to have environmental effects" to be environmental information and that, viewed on their own terms, they "… could not constitute environmental information". Even if we are wrong in our analysis that this Contract must be seen as one "measure" for the purposes of the definition of "environmental information", we would not accept this categorisation of the withheld details. We note, for example, that the provisions redacted from Schedule 10 at pp 293 and 294 of the closed bundle relate specifically to pollution liability insurance. And Schedule 12 deals with the Certifier's duties which are, in effect, to see that the EfW facility is constructed in accordance with the terms of the Contract; that facility will undoubtedly have a great effect on the environment and the Certifier's fees are likely to have an effect on his performance of those duties.

Regulation 12(5)(e)

42. The Council say that regulation 12(5)(e) applies to all the provisions in the Contract which they refuse to disclose. In so far as the regulation did apply to such provisions the Council were entitled to withhold any information provided the public interest in maintaining the exception in regulation 12(5)(e) outweighed that in disclosure.

43. Before turning to consider regulation 12(5)(e) in detail we deal with one preliminary point. In her submissions served before the second hearing the Commissioner raised regulation 12(9) (emissions) and said that in so far as the redacted provisions related to information "on emissions" the Council could not rely on regulation 12(5)(e), regardless of any public interest balance. The Tribunal were rather dismayed that what appeared to be a new issue was being introduced so late in the day and we were considering not allowing its introduction under our case management powers. However, the Council's position was that they had already released any information relating to emissions and when the parties considered the position carefully together, the Commissioner was left relying on regulation 12(9) in relation to only two provisions in the Contract which were in charts which were almost illegible. In these circumstances the Tribunal is happy to accede to Mr Hopkins' submission that the point was *de minimis* and we need give no further consideration to regulation 12(9).

44. It is clear from the wording of regulation 12(5)(e) that in order for a public authority to rely on it four conditions must be satisfied:

    (a) the information in question must be commercial or industrial;

    (b) it must be subject to confidentiality provided by law;

    (c) the purpose of the confidentiality must be to protect legitimate economic interests; and

    (d) disclosure of the information would adversely affect the confidentiality.

    There is and can be no dispute in this case about (a) (all the information we are concerned with is clearly commercial) or (c) (if it is subject to confidentiality provided by law that confidentiality is clearly designed to protect economic interests). There are, however, issues in relation to (d) (what is the nature of the adverse effect that

must be present?) and (b) (to what extent is the withheld information subject to confidentiality provided by law?).

45. On (d), the Commissioner has maintained throughout the proceedings that for the regulation to apply at all, it must be shown that disclosure will have an adverse economic effect. We disagree for the simple reason that this is not what the provision says. It says it applies to information whose disclosure would adversely affect the information's confidentiality, not a party's economic interests. However, as all parties would agree, the protection of legitimate economic interests is clearly the purpose of the exception, so that the extent of any prospective damage to such interests will be the main consideration in considering the weight of the public interest in maintaining it.

46. On (b), there are provisions within the Contract itself which the Tribunal regard as very significant. Clause 84 of the Contract provides:

> **84.1 The Parties [ie the Council and UBB] agree that *the provisions of this Contract*, and any Offtake Agreement entered into pursuant to Schedule 33 (Power Offtake Arrangements) and each Ancillary Document *shall, subject to clause 84.2 below, not be treated as Confidential Information and may be disclosed without restriction.***
>
> **84.2 Clause 84.1 above shall not apply to provisions of this Contract or an Ancillary Document designated as Commercially Sensitive Information *and* listed in Part 1 and Part 2 of Schedule 23 (Commercially Sensitive Information) to this Contract which shall, subject to Clause 84.4 below be kept confidential for the periods specified in Part 1 and Part 2 of Schedule 23 …**
>
> **84.3 The parties shall keep confidential all Confidential Information received by one Party from the other Party relating to this Contract and Ancillary Documents or the Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.**
>
> **84.4 Clauses 84.2 and 84.3 shall not apply to:**
>
> **…**

84.4.10 any disclosure for the purpose of:

…

(d) … compliance with the FOIA and/or the Environmental Information Regulations. [our emphasis]

Schedule 23 Part 1 is headed "Commercially sensitive contractual provisions" and lists 17 specific contractual provisions or types of provision in the Contract in Column 1 and states in Column 2 that it applies for the period ending on the earlier of the Expiry Date [ie the projected end of the Contract] and the Termination Date [ie the date when the Contract would come to a premature end under a Schedule 17 termination]. It is right to record the preamble to the Schedule which says:

The parties acknowledge that the information set out in Parts 1 and 2 … are considered, as at the Commencement Date, to be commercially sensitive, and that this Schedule is not an exhaustive list of the information that, from time to time, may be considered commercially sensitive. However, any Request for Information under FOIA or EIR and any applicable exemptions will be considered by the [Council] at the time the request is made, and the Authority shall comply in all respects with all applicable Legislation.

Among the provisions listed in Column 1 of Part 1 of the Schedule are the following examples:

9. Schedule 3 (Service Delivery Plans) (to the extent such information could be a trade secret or is genuinely commercially sensitive – save in relation to any information contained therein which is also included in Schedule 2 (Output Specification).

…

11. Amounts and indemnity limits under insurance policies taken out by [UBB] or any Sub-Contractor in connection with the Project other than Required Insurances.

…

16. Costing mechanisms, financial modelling and price breakdowns contained in the Contract.

17. Any reference to a monetary or financial amount (including indemnity limits provided for under policies of insurance (other than the Required Insurances)), pricing information, ratios, limit of liability or exclusions from liability, profit margins, overheads, preliminaries, payment terms or details of any bank account.

Schedule 23 Part 2 lists types of commercially sensitive material which in our view are clearly intended to cover material other than contractual provisions within the Contract; such material may include provisions of Ancillary Documents, which would explain why clause 84.2 refers to both Parts 1 and 2 of Schedule 23. We add for completeness that the definition of Confidential Information includes at (b) Commercially Sensitive Information which is defined by reference to Schedule 23 but also, more generally, at (a), as "… information which ought to be considered confidential …" [see the definition in Schedule 1]. However, importantly for present purposes, it should also be noted that clause 84.1 says that, subject to clause 84.2, provisions of the Contract shall not be treated as Confidential Information (which must include both limbs of the definition) and may be disclosed without restriction.

47. The Tribunal has noted since the hearing that these provisions were almost certainly put in the Contract in order to comply with section VIII (Environmental Information Regulations and Public Sector Contracts) of the Code of Practice made by the Secretary of State under regulation 16 of the EIR which was laid before Parliament on 16 February 2005. It follows that the exercise of drawing up the list of contractual provisions in Schedule 23 should have been a task that was regarded as important in the context of the Council's on-going obligations under EIR.

48. As we interpret it, the effect of clause 84 of the Contract was that (at least at the outset) it was only those provisions in the Contract which came within Part 1 of Schedule 23 which were subject to confidentiality provided by law; as clause 84.1 makes quite clear, any other contractual provision could be disclosed without restriction and were not to be treated as Confidential Information so that the parties were free to make them public and under no obligation under clause 84.3 to see to it that their employees and agents did not disclose them. In response to the Tribunal expressing a provisional view that this might be the effect of clause 84, the Council put forward a closed document headed "Schedule 23- Commercially Sensitive Information Schedule" which, as we understand it, was an attempt to show that

various redacted provisions were covered by Schedule 23 although they were not obviously within its terms. We agree with Mr West that the attempt was hopeless; the document referred entirely to provisions in Part 2 of Schedule 23 which in our view were irrelevant to provisions within the Contract and, in any event, on analysis of some of the entries on the Council's document, they simply made no sense. This inevitably served to weaken somewhat our confidence in their case generally.

49. Mr Hopkins appeared to regard clause 84 and Schedule 23 as of really very little significance (although in fairness to him the Tribunal did not draw his attention to the EIR Code of Practice at the hearing). He suggested that (a) it was open to the parties to agree between themselves from time to time that any particular provision in the Contract which had not already been placed in the public domain was thereafter subject to confidentiality and (b) that when Mr Mawdsley and Mr Peiro met to consider what to publish on the Council's website or how to respond to the requests for information we are concerned with and agreed not to disclose a particular provision, that amounted to such an agreement. We would agree with the first of those propositions in principle (although given the carefully drawn provisions in Clause 84 and Schedule 23, we would have expected some formality if there was indeed going to be a new agreement departing from the position negotiated and set out clearly in the Contract itself) but, in any event, we do not think (as a matter of fact) that Mr Mawdsley agreeing with Mr Peiro in the course of a meeting that they would withhold certain provisions in the Contract the subject of an EIR request is the same as the Council and UBB agreeing that clause 84 of the Contract should be varied so that those provisions should thereafter be subject to the law of confidentiality.

50. We therefore agree with the Mr West's submission at para 53 of his submissions dated 21 October 2016 that "… where any Disputed Information is not specifically identified in Schedule 23 and/or the period there specified has expired, it cannot be deemed confidential" and, indeed, we would go further and specify that the information has to be identified in Part I of Schedule 23 if regulation 12(5)(e) is to apply to it. Perhaps by way of some consolation to the Council we make two observations. First, it seems that many of the provisions which the Council seeks to withhold will be within Schedule 23 (particularly given the wide terms of para 17 of Part 1 of the Schedule which we set out above). Second, even if we were wrong

in our view as to the effect of clause 84 and Schedule 23 on the applicability of regulation 12(5)(e), we would nevertheless have considered those provisions as being of considerable importance in assessing the public interest in maintaining the exception in relation to particular provisions (given that the provisions listed in Schedule 23 Part 1 are the only provisions which the parties at the time they signed the Contract regarded as sufficiently sensitive to warrant any kind of protection from disclosure) and we would have been very likely to have decided that the public interest balance in relation to provisions not within Schedule 23 Part 1 was therefore in favour of disclosure.

Regulation 12(5)(c)

51. The Council say that the redacted provisions in Schedules 3, 29 and 33 are covered not only by regulation 12(5)(e) but also by regulation 12(5)(c), on the basis that their disclosure would adversely affect intellectual property rights. This point was only raised in any substantial way in Mr Hopkins' written submissions dated 11 November 2016 between the two hearing by way of a response to the Commissioner's newly raised reliance on regulation 12(9) because regulation 12(9) is an answer to regulation 12(5)(e) but not 12(5)(c).

52. The Commissioner disputes that any of the information in question is the subject of any established intellectual property rights or that any such rights would be adversely affected by disclosure. Mr West points out that the establishment of such rights would normally require detailed evidence, including expert evidence, but says that the Council are here relying on no more than assertion.

53. We shall consider the applicability of regulation 12(5)(c) in the context of discussing Schedules 3, 29 and 33 but we would observe that even in a case where 12(5)(c) did apply, there would still have to be a public interest balance and the factors in favour of maintaining the two exceptions (ie reg 12(5)(c) and (e)), are likely to overlap to a great extent so that in practice the applicability of regulation 12(5)(c) might make little difference.

Public interest balance: general considerations

Introduction

54. Regulation 12(1)(b) provides in effect that an exception in regulation 12(5) can only be relied on by a public authority if the public interest in maintaining the exception outweighs that in disclosure of the information in question. If the public interest in disclosure is equal to that in maintaining the exception then the information in question must be disclosed. Further there is in regulation 12(2) of the EIR (unlike in FOIA) a specific presumption in favour of disclosure. We will need to consider the public interest balance in relation to many of the individual redactions sought by the Council but before we turn to the individual redactions we set out some general considerations on the public interest in this case.

55. Our attention was drawn to the decision of Charles J in the Upper Tribunal in *Dept of Health v IC and Lewis* [2015] UKUT 0159 (AAC) which helpfully brings together and emphasises a number of points which (in our own experience at least) reflect the existing approach of the First-tier Tribunal to the public interest balance issues which arise in FOIA and EIR cases. In particular we note the importance of focussing on the information which is in issue and on the need for any public interest factors relied on, however general or specific in nature, to relate to that information and the benefits and disbenefits of its disclosure. We also note the importance of critically evaluating the case put forward by the public authority and note that, although, as in this case, their witnesses are likely to have relevant knowledge and experience far beyond that of the Tribunal members, which must be recognised, there is inevitably a risk that such witnesses may also be somewhat partisan.

56. With those introductory remarks we turn to general considerations relevant to the public interest balance in this case.

Public interest in disclosure

57. The requests for information in this case relate to a very large public sector infrastructure project which will have consequences over many years. It is also a highly controversial project, as the factual history we have outlined shows. Concerns have been expressed about the EfW technology chosen by the Council, which those against it say may involve harmful emissions and toxic waste left over from the scrubbing process. Planning concerns have been expressed about the height, mass and design of the plant and about the increase in heavy road traffic which will be caused along with consequential air pollution. Although we are not in any position to assess the merits of these concerns, they are clearly genuine and not frivolous.

58. The Contract itself is a PFI contract involving the expenditure of a great deal of public money over many years; Mr Ttofa says, and we have no reason to doubt, that it is the largest contract ever entered into by the Council. We can, we think, take judicial notice of the fact that the PFI model is itself controversial, with legitimate concerns expressed about bad value for money, opacity and the tendency to load expenditure on future generations. Further, it is said that the structure of the Contract, by requiring the Council to pay for a certain amount of waste to be incinerated (the so-called "take or pay" arrangement) may have tied the Council in to supplying a quantity of waste which is not viable in future and may have the negative environmental effect of discouraging recycling: this was a point made forcefully by Councillor Lunnon in the course of her evidence.

59. Given those considerations, in our view there was a significant public interest in the disclosure of the entire Contract, in the interests both of transparency and accountability, ie to enable the public to be informed as to exactly what the Council had agreed on their behalf and its long-term consequences and to hold it properly accountable, in particular through Council elections. Mr Hopkins bridled at the proposition that there was a public interest in the disclosure of the entire Contract, re-itering the point that it is essential to focus on the information which is in issue. We make clear that we are not suggesting that the exercise is an "all or nothing" one; all we are doing is recognising that the provisions which the Council seeks to withhold are part of a greater interlocking whole and must inevitably be seen in that

context. We of course recognise that we must consider the withheld provisions individually, as we have done.

60. In this context we would also mention that our attention was drawn to the Government's own Local Government Transparency Code issued in October 2014 by the Secretary of State for Communities and Local Government under his powers under section 2 of the Local Government, Planning and Land Act 1980. Mr Hopkins submitted that it was of little weight but we regard it as of some significance in assessing the public interest factors given that it was issued by the relevant government department under a specific statutory power to make recommendations to local authorities as to publication of information about the discharge of their functions. The Code has these relevant provisions:

> **Part 2: Information which must be published**
>
> **…**
>
> **Procurement information**
>
> **27. Local authorities must also publish details of any contract … with a value that exceeds £5,000. For each contract the following details must be published:**
>
> **…**
>
> **- description of the goods and/or services being provided**
>
> **…**
>
> **- sum to be paid over the length of the contract or the estimated annual spending or budget for the contract**
>
> **…**
>
> **Part 3: Information *recommended* for publication**
>
> **…**
>
> **Procurement information**
>
> **…**
>
> **It is recommended that local authorities should go further than the minimum publication requirements set out in Part 2 and publish:**
>
> **…**

- *all contracts in their entirety* where the value of the contract exceeds £5,000 [our emphasis]

61. Further, as set out in our account of the facts, at the time of the requests in January to March 2015 the controversy was particularly intense and there was a danger that the whole Contract would have to be terminated at a cost, according to the Council, of up to £100 million. At that stage, in our view, the Council's obligation to act transparently was particularly strong as was the public interest in full disclosure of the exact position in relation to the compensation payable in so far as the Contract contained relevant provisions.

62. As Charles J mentions in the *Lewis* case at para 37, the reasons (or lack of reasons) for a request may be relevant to assessing the weight of the public interest in disclosure. We accept that this consideration is potentially relevant in this case, but it must also be recognised that the contents of this Contract are highly technical and that those requesting it cannot be expected to say very much about what exactly they want and why before they have got it and been able to seek help from experts about what it all means. But in so far as relevant we note that Mr Purdy's request dated 13 February 2015 specifically referred to the sections of the Contract relating to the compensation that would have to be paid to UBB if the project did not go ahead. Mr Ttofa's request for a review by the Council dated 16 March 2015 also referred to compensation and specifically mentioned Schedule 17; he also referred to Schedule 33 and said that this would enable a significant part of the Council's financial case to be understood. His written submissions in the course of our proceedings have raised many detailed issues relating to specific provisions. It was notable that Councillor Lunnon was somewhat non-plussed by the Tribunal's request that she identify specific redacted provisions that she would have liked to see but she did repeatedly refer to the "base tonnages", which are at the heart of the Contract and which are highly relevant to value for money and the potential issue of discouraging recycling, to termination provisions, and to Schedule 33, which she said is also relevant to the overall financial case for the Contract.

63. The Council rely strongly on the existence of the local government process as a consideration tending to lessen the weight of the public interest in disclosure. This would include the whole planning process, the financial monitoring reporting

process for the Cabinet (an important example being the report for the meeting on 11 November 2015 which we refer to above), the extraordinary meeting of the Council on 18 February 2015 and the meeting of the Council's Overview and Scrutiny Management Committee on 20 November 2015, and the fact that Councillors in their capacity as such may be entitled to call for further details of the Contract if they so require. The fact that such processes exist are clearly relevant but their limitations must be recognised. The planning process does not relate to the financial aspects of the Contract at all. The Cabinet system tends to concentrate decision making in the hands of a small number of people and individual elected Councillors do not always have the capability to ask for or act on the information that others might. In the end it is the electorate which must hold the Council as a whole to account and the electorate are more able to do that properly if relevant information is available to all.

64. The Council also rely on the fact that they have kept under review what can be disclosed from the Contract and have, as Mr Mawdsley puts it, "… placed over 95% of [it] in the public domain." Quite apart from the obvious point that the 5% left is clearly of more substance and interest than the 95% disclosed, this is not a point to which we attach any weight. The process of publication and disclosure is at the moment entirely in the hands of the Council and UBB and it is in any event no more than compliance by the Council with its duties as a public authority. Once a complaint is made as here the issue of what should have been disclosed is in the hands of the Commissioner or the Tribunal. In our view, the fact that the public authority has disclosed some information in the past cannot be relevant to the issue whether they should have disclosed more.

65. Taking account of these considerations in our view there was a significant public interest in the disclosure of the entire Contract in April 2015, and it was particularly weighty in relation to provisions relevant to the costs of termination, the financial cost and benefit of the project overall for the Council and the amount of residual waste that the Council was required to offer to UBB.

Public interest in maintaining exceptions

66. The Council and UBB's basic case is that disclosure of the redacted provisions in April 2015 would have had adverse effects on their respective commercial interests which would have outweighed any public interest in disclosure. When looking at specific provisions in the Contract we will consider whether regulations 12(5)(e) and/or 12(5)(c) apply and consider any specific adverse effects relied on, but there are some general points to be made which are relevant to the weight of the public interest in maintaining the exceptions.

67. As at April 2015, UBB's final bid (which was meant to contain the final commercial terms save for clarifications, specifications, fine-tuning or changes required by unanticipated circumstances) had been in existence for three and a half years and the Contract had been signed for over two years. By that stage, because of the planning problems, the project was already subject to a delay of over two years, no work had started on site and the Council had called for a revised project programme. We also accept that there was a danger at that stage that the Contract would have to be terminated.

68. A large part of the Council's case was that if the Contract did have to be terminated, they would have had to launch a new procurement exercise in 2015 and that if they had done so their position would have been prejudiced if the commercial terms they had agreed with UBB were in the public domain. We do not accept this case. It is our view that if a new procurement exercise had been launched it would only have come to fruition several years after the first, it would very likely have involved a different site (given the hypothesis that there was no planning consent) and it may have involved an alternative technology. We do not see how the Council's position could be prejudiced if the exercises were so different and the Council did not demonstrate how that could be.

69. Further, we accept Mr West's point that if the Contract had been terminated there would have been no way that the any part of the Contract (and particularly provisions related to compensation) would have remained confidential for long in practice (indeed it seems likely that the Council would have been facing a major scandal if they had had to pay out £100 million in exchange for nothing). We also note that Schedule 23 expressly states that the confidentiality provisions only apply until termination of the Contract, so that in any event in accordance with its terms

the entire Contract would have in principle been open to disclosure without restriction on termination.

70. It was also UBB's case that the disclosure of the commercial terms on which it had been prepared to contract with the Council would have prejudiced its position in relation to other procurement exercises. We accept that this to an extent but we do not think it carries much weight. We have referred to the likely parameters of a new procurement exercise in Gloucestershire. The only other possible comparable outstanding UK procurements that we have been told about are in very different parts of the country and would arise some years after the Gloucestershire one. We do not think it is very realistic to think that disclosure of UBB's commercial position in a contract made in the UK in 2013 could prejudice its position in relation to later contracts in other parts of Europe, still less the wider world. Mr Peiro himself states at paragraph 21 of his witness statement that commercial and technical terms will vary from project to project, with new technologies and approaches being developed over time.

71. We should make clear that different considerations may arise in relation to information about UBB's technical specifications (ie Schedule 3 in particular) or the terms that would relate to third parties once the Contract was in operation (ie for the sale of electricity or the disposal of third-party waste). We will consider factors specifically relating to these provisions later.

72. Before we leave general considerations, we should say that in both Mr Mawdsley's and Mr Peiro's evidence (at paras 56 and 46 respectively) and in the Council's final submissions at para 61(vi) and (vii) a point is made to the effect that if the Council discloses information which UBB regard as commercially confidential this would set a bad precedent and UBB and other contractors would be less willing in future to participate in procurement exercises or to share information in the course of them which would be to the detriment of the public interest. We cannot accept such a case. Any potential contractor seeking to do business throughout the EU must be well aware of the duties of public authorities in relation to environmental information. We do not accept that they would (or should) complain or change their behaviour in response to a disclosure of information by the Council or any other public authority which was required by the EIR (or indeed FOIA), particularly, as here, following

contested proceedings before the Commissioner and the Tribunal. Apart from anything else a number of express provisions in the Contract make it clear that such disclosure may have to be made. Mr Peiro himself accepted in cross-examination that he was not aware of anyone having not bid for a contract like the one we are concerned with because of fear of disclosure of contract details and that there is a general expectation that a large amount of information will be disclosed in such a case.

73. We recognise that our general conclusions on the public interest and the adverse effects of disclosure are at odds with the positions put forward by Mr Mawdsley and Mr Peiro and that we are not following the line urged on us by Mr Hopkins that their evidence was so compelling that we really had no choice but to accept it. As Charles J makes clear in his decision in the *Lewis* case, the Tribunal must always critically evaluate the case being made by a public authority in these cases. In this one, Mr Peiro's evidence was inevitably likely to be rather partisan and, although he is an official and was giving evidence on behalf of a public authority, we are afraid we reached the view that Mr Mawdsley's evidence on behalf of the Council was also rather partisan. We were surprised at the failure to attach any great importance to clause 84 and Schedule 23 or to the Transparency Code. Although Mr Mawdsley gave much evidence in closed session he did not persuade us by reference to any specific example that the Council's commercial position in future procurement negotiations would be damaged as he repeatedly asserted in his evidence. We accept the submission of Mr West at para 78 of his final submissions that Mr Mawdsley's evidence was "… so far-reaching as to be unconvincing, in particular in relation to matters such as Access Road Disruption Events".

Specific redacted items

74. We now turn to consider Annex 4 and the individual contractual provisions. In relation to each set of contractual provisions we will in general (a) briefly describe the provisions; (b) record the positions of the Council and the Commissioner (in general, the Council rely on reg 12(5)(e) so this is not always expressly mentioned); (c) reach our own conclusion on the applicability of the exception(s); and (d) consider the public interest balance if relevant. Page references are to the closed bundle containing the full unredacted version of the Contract and we make particular reference to a document presented at the final hearing which was headed "CHECKLIST" (this was also expressed to be a closed document but we are confident that Mr Ttofa was sufficiently aware of the Council's and the Commissioner's respective positions on the detail and we made sure that Mr Hartley was made aware of areas where the Commissioner by the end of the case was in agreement with the Council).

75. We emphasise that in considering the public interest balance in each case we have taken account of the factual background and the general considerations on the public interest that we have set out above as well as particular matters referred to below.

Annex 4

76. Annex 4 is an internal Council document headed Resource Implications which was prepared for the meeting of the Cabinet on 12 September 2012 at which approval was given for a contract with UBB. The Commissioner says regulation 12(5)(e) is not engaged in relation to the redactions made and in any event the public interest favours disclosure of the redacted information.

77. No particular case is made as to how the redacted information in Annex 4 comes within regulation 12(5)(e) but, even assuming it did, we are satisfied the Commissioner's assessment on the public interest is correct. The redacted information shows the figures that officers were putting before the Cabinet as at September 2012 and makes a comparison between the outcome if a contract was made with UBB and if the Council continued with landfill; it also makes reference to the access road issue which had apparently arisen since UBB's successful bid.

Given that by April 2015 the Contract had long since been signed and there was controversy surrounding it we consider that there was a strong public interest in disclosure of all this detail. The Council's Checklist says that release would have harmed its negotiating position, presumably in relation to a new procurement. We have commented on that scenario in general terms. Any information about the Council's general financial position reflected in Annex 4 ought we think to have been in the public domain in any event.

Main body of contract

78. ***Pp 28 – 30***: The redactions from these pages relate to the consequences of an "access road disruption event". The Council says that such an eventuality is a real risk as a result of protests and says that the redacted provisions are a key indicator of what the Council would accept on a future procurement relating to the Javelin Park site. The Commissioner does not accept that reg 12(5)(e) applies and says that the public interest in any event favours disclosure.

79. We consider that reg 12(5)(e) applies to these provisions on the basis of para 17 of Part 1 Schedule 23. However we agree with the Commissioner in relation to the public interest balance. Mr Mawdsley told us that the access road only became an issue and these provisions were only negotiated after the banks became involved at the point when UBB became the preferred bidder. Given in particular the nature of the procurement and that, according to Mr Hartley, there was apparently some controversy over the Council's acquisition of the site without the access road, we think there was a strong public interest in disclosure of the results of the negotiations. On the other hand, we do not consider there was a realistic prospect of the Council being prejudiced in any future negotiations relating to the site. Nor do we think that the risk that protesters will make specific use of information they obtain about these provisions (which is a small one in our view) is in itself a relevant consideration given the clear purpose of reg 12(5)(e) which is to avoid commercial harm.

80. ***Pp 50***. This relates to the Council's delivery obligations for waste during the commissioning period; under clause 21.2.3 and 21.2.4 the Council have to deliver

such amounts as UBB have specified subject to variations which are the redacted figures.

81. We agree with the Commissioner that reg 12(5)(e) does not apply as the provisions do not come within Schedule 23. In any event we can see no realistic harm in their disclosure: as we have said there is no realistic prospect of a new procurement exercise being harmed and, anyway, we note that the variations were to apply only to amounts to be specified during the commissioning period.

82. ***Pp 58-60***. These redacted provisions relate to the amount of supplementary contract waste which the Council is entitled to deliver. The Council say that they were commercially negotiated and their disclosure would prejudice both UBB and the Council in future procurements. The Commissioner says they are not covered by reg 12(5)(e) and the public interest favours disclosure in any event.

83. We consider that these provisions are sufficiently closely related to prices to come within para 17 of Schedule 23 Part 1 but we are clear that the public interest favours disclosure: as we have said we do not consider there is any realistic prospect of a future procurement being prejudiced; on the other hand, these provisions are relevant to the cost of the project as a whole and to the amount of waste the Council will be in a position to dispose of, both of which are matters of significant public interest.

84. ***P93***. This redaction relates to a "Relief Event" occurring in connection with problems in relation to the title of the Javelin Park site. This was apparently heavily negotiated with UBB and the banks. The Commissioner says that reg 12(5)(e) does not apply and that the public interest favours disclosure.

85. In our view reg 12(5)(e) probably does apply by virtue of para 17 of Part 1 Schedule 23. But we agree with the Commissioner in relation to the public interest. We do not think that future procurement negotiations in relation to Javelin Park would be prejudiced in any significant way and we think that any such prejudice was

outweighed by the public interest in disclosure of the result of the negotiations between the Council and UBB and the banks.

86. ***Pp103-105***: These are provisions relating to electricity payments set out in clause 45.6. The Council say in the Checklist that these were the outcome of negotiations between them and UBB which were advantageous to the Council so their disclosure would be harmful to UBB's negotiating position for any "alternative solution". The Commissioner does not accept that reg 12(5)(e) is engaged and says the public interest balance favours disclosure in any event.

87. We agree with the Commissioner's assessment. These provisions do not come within any of the paras in Part 1 of Schedule 23 and we do not consider that they are therefore covered by reg 12(5)(e). In any event we do not think that there was any realistic prospect of UBB's position being compromised in relation to any future negotiation and consider that there was a high public interest in disclosure of provisions about what the respective parties were going to receive from electricity production by the EfW facility. We also refer to our decision in relation to Schedule 33 which is referred to in these provisions.

88. ***p111***: This provision relates to provisions that the Council requires to be included by UBB in third party waste and "off-take" contracts over a certain size. The Council says there is no public interest in the information which would only be of value to competitors for the third party business. The Commissioner says it is not covered by reg 12(5)(e) and the public interest favours disclosure in any event.

89. This is not an item on which we received any detailed information and we are not clear about its real significance. But in our view it clearly comes within para 17 of Part 1 Schedule 23 and since it relates to contracts which have not yet been made with third parties we see that its disclosure could prejudice future negotiations, if only slightly. Since we cannot see any particular public interest in disclosure we are of the view that this provision can be redacted.

90. ***P120***: The provisions on this page are headed Reinstatement and relate to what is to happen to insurance proceeds over certain amounts which have been redacted. The Council say that the fact of the provisions is of interest to the public and has been disclosed but that the amounts were the outcome of commercial negotiations between them and UBB. The Commissioner says reg 12(5)(e) is not engaged and the public interest favoured disclosure in any event.

91. The insurance policies in question are "Required Insurances". It is arguable that the redacted amounts are not within Schedule 23 Part 1 by virtue of para 11, although this is a moot point (they may come within para 17). But we agree with the Commissioner's assessment of the public interest in any event. We do not think that any significant prejudice in relation to future procurements would flow from disclosure of these amounts. The Council itself acknowledges that there is some public interest in disclosure of the agreement about what exactly is to happen to insurance proceeds under the Contract and we agree.

92. ***P124*** These redactions relate to a provision about what happens to the proceeds of insurance if they exceed the cost of repair or reinstatement of the facility; the redacted items are a ratio. The Council say it relates to the financial requirements of UBB and the banks and disclosure would have damaged negotiating positions in the event of a re-tender. The Commissioner does not accept that reg 12(5)(e) applies and says the public interest favours disclosure in any event.

93. In our view the redacted detail is within reg 12(5)(e) as a "ratio" within para 17 in Schedule 23 Part 1. However, we agree with the Commissioner on the public interest: we do not think there was a realistic danger of disclosure causing prejudice to any re-tender; there is a clear public interest in disclosure of the provision which relates to an important area, ie insurance in the event of the destruction or damage of the facility, and is part of the overall price the Council is paying.

94. ***P132***; These redacted items are caps on UBB obligations to indemnify the Council in certain events. The Council say it was heavily negotiated between the parties and relates to the requirements of the banks. The Commissioner says reg 12(5)(e) does not apply and the public interest balance favours disclosure in any event.

95. This item is expressly mentioned in Schedule 23 Part 1 at para 8; we are satisfied the reg 21(5)(e) applies to it. However, although expressly identified in the Schedule 23 list, we agree with the Commissioner on the public interest balance; we do not think there is a realistic prospect of re-tendering prejudice but the public interest in disclosure of a cap on liability like this, which is part of the overall price the Council are paying, is substantial.

96. ***P141/2***: These redacted items are a series of time scales related to the Council's ability to terminate the Contract for persistent breach. The Council say they are very specific, were heavily negotiated and comprise "granular financial detail"; they say their disclosure would damage the parties' position in a re-tender or in ongoing commercial discussions with third parties. The Commissioner says they are not covered by reg 12(5)(e) and the public interest favours disclosure in any event.

97. We do not see that these items come within Schedule 23 Part 1 and therefore agree that reg 12(5)(e) does not apply to them. But in any event we agree with the Commissioner on the public interest balance. We do not think there is any realistic prejudice in any negotiations for UBB or the Council while termination provisions are clearly an important element in the Contract whose disclosure would be in the public interest.

98. ***P143*** These redacted items provide time limits on the parties reaching agreement in the event of force majeure before a notice of termination can be given. For similar reasons to the redactions on pp141/2, we agree with the Commissioner they are not covered by reg 12(5)(e) and that the public interest balance in any event favours disclosure.

99. ***P150***: This redacted provision specifies the time before the expiry of the Contract when the Council is entitled to carry out a survey of the facility. The Council say that this figure varied greatly between bidders and that its disclosure could prejudice the Council and UBB in other procurement exercises. The Commissioner says reg 12(5)(e) does not apply and that the public interest balance favours disclosure.

100. This provision does not appear in Schedule 23 Part 1 and we do not accept it is covered by reg 12(5)(e). We have commented on the prospects of prejudice in a re-tendering or other procurement. We fail to see there could be any great sensitivity in disclosure of a time scale which will not start to run for over 20 years and ask rhetorically whether it would have to be kept secret until the Council elected to carry out its survey.

101. ***P156*** This redacted provision specifies the date before which UBB must indicate to UBB if they are going to seek a retender at the expiry of the Contract. For similar reasons as apply on p 150 we do not accept that reg 12(5)(e) applies and in any event conclude that the public interest favours disclosure.

Schedule 1: Definitions

102. ***P190*** This redacted provision provides the number of days that amount to a delay for the purposes of the definition of an "access road disruption event". The Council say that this is a key indicator of what the Council would accept in future in relation to the site. It also says there is a real risk of disruption of the road by protesters. The Commissioner says the redaction is not covered by reg 12(5)(e) and that the public interest favours disclosure.

103. This provision does not come within Schedule 23 Part 1 and in our view reg 12(5)(e) does not apply to it. In any event we agree with the Commissioner on the public interest balance. The agreement on the access road was of particular interest because it apparently came after the usual tendering process and we do not see any realistic prospect of the Council being prejudiced in a re-procurement relating to Javelin Park.

104. ***P194*** This redacted item is the amount of an "Appeal Contingency". We have not been able to locate the purpose of the Appeal Contingency in the Contract. The Council rely on prejudice in the event of a re-procurement. The Commissioner recites that reg 12(5)(e) does not apply and says the public interest favours disclosure.

105. We consider that reg 12(5)(e) does apply on the basis of para 17 of Schedule 23 Part 1 but on the limited information we have and given our views on the re-procurement possibility we agree with the Commissioner that the public interest favours disclosure.

106. ***P197*** These redactions are of periods of time arising in the definition of "Authority [ie the Council] Default". The Council say their disclosure would harm their legitimate economic interests because protesters or third party competitors could use the information to frustrate the Contract. The Commissioner denies that the provisions come within reg 12(5)(e) and says the public interest favours disclosure in any event.

107. Para 1 of Schedule 23 Part 1 expressly refers to the definition of Authority Default: it refers only to limb (b) and says "Amount only (once confirmed)". It is not entirely clear to us what is intended here but it is clear that the redactions do not come within it; we are therefore of the view that reg 12(5)(e) does not apply to these redactions. In any event we cannot see how protesters or third party competitors could make any realistic use of these provisions and we agree with the Commissioner in relation to the public interest balance.

108. ***P199*** These redactions are of parts of the text in the definitions of "Base Case" and "Base Case Tonnage". The Council say they relate to a heavily negotiated and commercially sensitive financial model and that disclosure would severely harm the Council's and UBB's interests in the waste market and with third party contractors. The Commissioner's position is that they are not covered by reg 12(5)(e) and the public interest favours disclosure.

109. As far as we can see they do not feature in any of the paras in Part 1 Schedule 23 and we therefore agree with the Commissioner that reg 12(5)(e) does not apply to them. In any event we also agree with the Commissioner on the public interest balance if relevant. We consider that there is a high public interest in disclosure of any provisions that may relate to what the Council is obliged to supply by way of waste and what it will have to pay and the significance of the specific provisions and

the way any commercial harm would result from their disclosure was not really explained to us.

110. ***P200*** This redaction is the figure for "Base Tonnage". The Council say that it goes to the core of the pricing model and that disclosure would " … severely hamper the parties' negotiating positions and cuts (sic) to their legitimate economic interests." The Commissioner says it is not covered by reg 12(5)(e) and the public interest favours disclosure in any event.

111. It seems to us that this redaction may come within para 17 of Part 1 Schedule 23 and therefore be covered by reg 12(5)(e) but in any event we agree with the Commissioner on the public interest balance. We do not consider that there was any realistic prospect of a future negotiation which would be prejudiced but the figure is clearly of significance in relation to the Council's obligations to supply waste and the price the Council had to pay, matters on which there is a high public interest in disclosure.

112. ***P206*** This redaction from the definition of Compensation Event refers back to the time period which we have already considered in the context of the redactions at p28 of the closed bundle relating to the access road. For the same reasons we conclude that the public interest favours disclosure.

113. ***PP211/2*** These redactions are of tonnages and percentages in the definition of "Contractor Default" for the purposes of the Contract. The Council says that the provisions concerned were "heavily negotiated" between them and UBB and that if disclosed they would be used by competitors to damage UBB and the Council "commercially and facially (sic)". The Commissioner says that reg 12(5)(e) does not apply and that the public interest favours disclosure.

114. These provisions are expressly referred to in para 3 of Part 1 Schedule 23; unlike the Commissioner we are satisfied that reg 12(5)(e) does cover them. However we agree with the Commissioner that the public interest favours disclosure. These are clearly important provisions in relation to the obligations that UBB has taken on (ie what the public should be expecting to get out of this Contract) which the public

ought to have access to. Although there is a suggestion in what the Council say of some nefarious intent on the part of others to undermine the position of the facility which may be helped by having sight of these provisions it was never properly explained.

115. ***P213:*** These redactions are of amounts of capital expenditure and percentages representing UBB's share in the definition of "Contractor's Share". The Council say they were heavily negotiated and their disclosure would cause significant harm to UBB in future projects and to the Council in relation to a re-tender. The Commissioner says they are not covered by reg 12(5)(e) and the public interest favours disclosure.

116. The percentages referred to in the definition of Contractor's Share are expressly referred to in para 2 of Part 1 Schedule 23; again we therefore think, contrary to the Commissioner, that reg 12(5)(e) does cover them. However, when it comes to the public interest balance, we consider on the one hand that there is a substantial public interest in the disclosure of such financial detail and on the other that there was, for reasons given above, minimal likelihood of prejudice to either the Council or UBB in relation to any future tenders or re-tenders.

117. ***P226***: These are bank account details. They come within para 17 of Schedule 23 Part 1 and the public interest clearly favours redaction. We agree with the Commissioner that this redaction should remain.

118. ***P230*** This redacted item is the time of the "Lock In Period". The Council say it was a negotiated position and is commercially sensitive. The Commissioner says reg 12(5)(e) is not engaged and the public interest favours disclosure in any event.

119. Although we are not clear as to the significance of this provision in the Contract, it is not an item listed in Schedule 23 Part 1 and we do not accept that it comes within reg 12(5)(e). Given our conclusions on re-procurement we also agree with the Commissioner in relation to the public interest.

120. ***P232*** This redacted item is the number of months comprising the "Minimum SCW [supplementary contract waste] Period". The same conclusions apply as in relation to p230 above. The Council also appears to accept a "wider public interest" in relation to information about supplementary contract waste.

121. ***P237*** The redacted provisions are in the definition of "Persistent Breach" and follow the redactions at p141 which we have dealt with above. For the same reasons, these should be disclosed.

122. ***P237/8*** There are also redacted dates from the definitions of Planned Commencement Date, Planned Readiness Date and Planned Commencement Date. These appear in Schedule 8 and for the reasons set out below when dealing with that Schedule, we conclude (contrary to the opinion of the Commissioner) that they should have been disclosed.

123. ***P239*** This redaction covers the limit of the value of Pre-Commencement Works. The Commissioner says it is not covered by reg 12(5)(e) and that the public interest favours disclosure in any event.

124. We consider that the redaction comes within para 17 of Schedule 23 Part 1 and is therefore within reg 12(5)(e). However, we agree with the Commissioner on the balance of the public interest. Although there is not a great public interest in disclosure there is almost none in maintaining its confidentiality, given in particular our conclusions on re-procurement.

125. ***P243*** This is the definition of Project IRR (internal rate of return). The Commissioner agrees it should be redacted. We also agree. The provision is within para 17 of Schedule 23 Part 1 ("profit margins") and so within reg 12(5)(e). We accept that this is a distinct piece of information which is commercially sensitive and whose disclosure to competitors may be damaging to UBB. No case has been made as to any particular public interest in disclosure.

126. ***P250*** These redacted items are of periods of time in a particular sub-paragraph of a long and complex definition of "Relief Event" relating to the Javelin Park site. The Council relies on the fact that details in relation to Javelin Park have already been disclosed and says that a re-procurement exercise or future procurements relating to the site will be prejudiced. The Commissioner does not accept that the provisions come within reg 12(4)(e) and says the public interest favours disclosure in any event.

127. These items do not come within Schedule 23 Part 1 and are not covered by reg 12(5)(e). In any event, we agree with the Commissioner as to the public interest balance, given in particular our conclusions relating to the risk of a re-procurement exercise.

128. ***P261*** The first redaction is the definition of Threshold Equity IRR. The Commissioner agrees that this should be redacted. We also agree. The percentage is expressly listed in Schedule 23 Part 1 and for the reasons in relation to the redaction at p243 we consider the public interest favours redaction.

129. The remaining redactions on p261 relate to the definition of "Top Up Waste" and Tranche 1 and 2 SCW Limits. The Council says that its negotiating position " … with a future provider over its forecast tonnage" would be damaged. The Commissioner does not accept that these redactions come within reg 12(5)(e) and says that the public interest favours disclosure in any event.

130. It seems to us that the definition of Top Up Waste certainly does not come within Schedule 23 Part 1; the tonnages in the SCW Limit definitions are a moot point. However, we agree with the Commissioner that the public interest favours disclosure of all three redactions. We have stated our conclusions in relation to a re-procurement exercise; we are not clear if the Council also rely on other putative negotiations or when they might take place. On the other hand, in our view there is a substantial public interest in disclosing all three items which relate to the financial cost and gain of the project for the Council and to matters which may influence treatment of waste and recycling.

131. ***P265***: This is the definition of the "Works Commencement Longstop Date" which also appears in Schedule 8 which we consider below. The Commissioner agrees with the Council that it should be redacted. We disagree for the reasons set out below.

Schedule 2: Output Specification

132. Schedule 2 is headed "Output Specification". The Council seek to redact items on 22 pages on the basis that they were specifically negotiated between the Council and UBB and their disclosure particularly in April 2015 would be commercially damaging to both parties to the Contract. The possibility of frustration of the Contract by protesters is also mentioned in relation to a number of items. The Commissioner says the items are not within reg 12(5)(e) and that the public interest favours disclosure.

133. With one exception, we do not think these items are covered by reg 12(5)(e). Schedule 2 is not mentioned in its own right in Part 1 Schedule 23 at all but is mentioned in paragraph 9 as providing an exception to information in Schedule 3 that would otherwise be confidential. Given that Schedule 2 is designed to show the output specification, ie what is required of the plant, we do not find this surprising. We therefore conclude that the only items within Schedule 2 which are covered by reg 12(5)(e) are those which come within para 17 of Part 1 Schedule 23, ie those on p811 which mention specific monetary amounts.

134. The Council rely on the fact that the Commissioner has in another decision agreed that the provisions at pp 809-810 are commercially sensitive and that the public interest favours redaction of them. We are of course not bound by the Commissioner's position in another case and we stand by our conclusion that they should be disclosed as not coming within Schedule 23. If the public interest was relevant, we would have agreed with the Commissioner that the public interest favoured disclosure: the provisions concern what is to happen if the Environment Agency do not agree that the facility achieves "R1" status; it seems to us that the public interest clearly favours disclosure of such details. We would also mention in this context the very weighty public interest in disclosure of the guaranteed efficiency rates and diversion for landfill figures at p752.

135. As for p811, it contains tables 3.1 and 3.2 to Appendix 3 (Performance Measurement Framework) to Schedule 2. Those tables set out default points and financial amounts in relation to performance standard failures by UBB. It seems to us that these details form part of the overall price (or, more specifically, rebate from price in the event of default) which the Council is having to pay and that the public interest clearly favours disclosure of such information.

Schedule 3

136. This Schedule comprises the bulk of the Contract in terms of pages. It is entitled "Service Delivery Plans" and contains a detailed manual of how to operate an EfW facility. The Council and UBB say the contents of the Schedule are UBB's intellectual property and that disclosure would harm their position within the market by disclosing their unique approach to competitors. The Council seeks to withhold about 165 items identified in the Checklist (some covering several pages) under both regulations 12(5)(e) and 12(5)(c). The Commissioner accepts in some cases that regulation 12(5)(e) (but not regulation 12(5)(c)) applies and that the public interest favours redaction but, in most, she does not accept that any exception applies and says that if it did the public interest would in any event favour disclosure.

137. Para 9 of Schedule 23 Part 1 expressly lists Schedule 3 but says that it is covered only to the extent that such information " … ***could be a trade secret or is genuinely commercially sensitive*** – save in relation to any information contained therein which is also included in Schedule 2 (Output Specification)". To that extent only we agree that reg 12(5)(e) applies to the contents of the Schedule. We have gone through the laborious process of ourselves looking at the contents of Schedule 3 in the light of the evidence given by Mr Peiro in particular and considered which of the redacted items may be "trade secrets" or "genuinely commercially sensitive" and, where appropriate, the public interest balance.

138. So far as reg 12(5)(c) is concerned, the claimed intellectual property rights are copyright, database rights and trade secrets and they are said to cover all the contents of Schedule 3, notwithstanding that a large part of it has not been withheld.

We accept Mr West's submission that the Tribunal was not put into a position to reach a proper view about whether these intellectual property rights applied to any of the contents of the Schedule. However, we do not think this matters much: only in the case of provisions which come within para 9 of Schedule 23 Part 1 is there any prospect in our view of the public interest in maintaining either reg 12(5)(c) or (e) outweighing that in disclosure and the balancing exercise would be the same whichever regulation applied.

139. Before turning to consider the redactions sought in more detail, we note in relation to the public interest balance that much of the information is very technical and detailed and that it may not therefore be of much use to the public. We also note that the Commissioner carried out a detailed assessment of each of the redactions sought in the interval between the two hearings and we of course give some weight to her view on the public interest balance. We turn to the detail of the individual redactions.

140. ***Pp854-863 (Works Delivery Plan ("WDP") 1: planning and permitting):*** We agree with the Commissioner's conclusion that, even if these redacted details could be described as "genuinely commercially sensitive", their disclosure would not involve any substantial commercial harm and the public interest balance would therefore favour disclosure. In relation to the redactions at p861/2 we note the Council's point that in another case the Commissioner appears to have taken a different view. Looking at the matter ourselves, however, we cannot see that details of how UBB were required to deal with various permitting eventualities (in accordance with plans required incidentally by provisions in Schedule 2 to the Contract) could really be said to be of significant use to competitors in the global market if released in April 2015.

141. ***Pp 866-872 (WDP 2A: design and design management):*** we repeat our comments in relation to pp854-863. We note that the Commissioner agrees the redaction at p866. We do not understand the logic of that concession; we just cannot see that disclosure of the thickness of the roof and cladding sheets given as a range, if it was really commercially sensitive, could be sufficiently harmful to UBB's commercial interests to warrant a finding that the public interest favoured

maintaining confidentiality, even having heard Mr Peiro give oral evidence in relation to these redactions.

142. ***Pp880-894 (WDP 2B-Technology):*** It is readily apparent that this WDP may contain details which are more genuinely commercially sensitive. We agree with the Commissioner that those on pp 880, 881 and 889-894 should be redacted. We have also considered what the Council say about the redactions on p886; although we can see that these parameters may be considered commercially sensitive, we also note that they are part of the Environmental Permit and will be of particular interest in assessing the output and capability of the plant and we are therefore of the view that the public interest is firmly in favour of disclosure of this detail.

143. ***Pp 908-915 (WDP2B.1):*** These are highly technical details. We were not given any kind of assistance with their significance. We are prepared to follow the Commissioner's position that they should be redacted.

144. ***P920 (WDP3)***: We just fail to see how a provision as to the time before the start of the commissioning period at which UBB must require sub-contractors to start working together can be said to be "genuinely commercially sensitive", or, as the Council's comments on the Final Checklist put it, that it represents "a unique approach and … a bid back item", let alone a trade secret.

145. ***Pp929-943 (WDP4-Commissioning);*** These redactions are of details relating to commissioning, in particular time scales and quantities. We agree with the Commissioner's assessment that these details are not genuinely commercially sensitive (still less, "unique" or trade secrets) and that in any event their disclosure would not cause any significant damage. We consider there would be a particular public interest in disclosure of information which would allow the public to see if they wished that the plant was being properly commissioned.

146. ***Pp 946-964 (WDP 5A; Environmental and Sustainable Works):*** These redactions relate to the environmental plans that must be developed to govern the way the construction works are carried out; as such there is obviously a high degree of

public interest in their disclosure pursuant to an EIR request. If they are genuinely commercially sensitive the public interest clearly favours disclosure in our view, even in relation to the table at pp 961-963 where the Commissioner would allow redaction; however, we can see that there may be a genuine commercial sensitivity in relation to the last two columns of that table which relate to the companies which may be the final destination for recycling items and to that extent alone we agree with the Commissioner that redaction should be allowed.

147. ***Pp966-978 (WDP 5B Works health and safety):*** These redactions relate to the time after the start of the works within which the health and safety management system must be certified by an accredited body and a list of "management duty holders" to be contacted in emergencies relating to health and safety. The public interest in their disclosure is obvious and we do not see that they can be considered to be "commercially sensitive" still less, as claimed by the Council in the Checklist, part of a trade secret. We note that the Commissioner has apparently agreed to the redaction of the list at pp977/8; we assume this is because Mr Peiro gave evidence that the disclosure of this list of positions would disclose matters related to UBB's costs to competitors. In the scheme of things, we would not regard this as significant in terms of damage to UBB in relation to competition in the world market after 2015 but, in any event, we note that the list is a list of positions and there is no indication that individual employees may not be able to cover more than one position.

148. ***Pp988-991 (MS1 Mobilisation)*** Again, these details cannot be realistically described as commercially sensitive, still less trade secrets: they should be disclosed.

149. ***Pp994-1005 (MS 2A-operational interface)*** These redactions relate mainly to vehicle movements and timings. The Commissioner's position is that, save in relation to two redactions at the top of p995, they are not commercially sensitive or, if they are, the public interest favours disclosure. We agree with that assessment. The two exceptions set out the storage capacity of the waste bunker (ie how much waste will be stored on site); we see that this information may be of interest to a competitor once the site is operational, although we would have thought it is likely to be public knowledge fairly soon. Given that it is also hard to see the public interest

in disclosure of this provision as at April 2015 we will go along with the Commissioner's position on these redactions.

150. ***P 1017 (MS2B)*** This redaction relates to the vehicle rejection procedure. We are unable to see any real commercial sensitivity in it. Nor do we see any realistic danger of it being used by competitors to "frustrate the contract" as a result of disclosure, as claimed in the Checklist. These provisions should be disclosed.

151. ***Pp1021-1033 (MS2C Waste treatment)*** These redactions relate to the operation of the incinerator itself. Apart from the redactions at pp 1021 and 1022 which set out the required contents of an operating manual the Commissioner agrees with the Council that regulation 12(5)(e) was engaged and that the public interest requires that confidentiality was maintained. We are inclined to agree with the Commissioner on this group of redactions: the details which she agrees should be redacted can properly be described as commercially sensitive and there was no particular public interest in their disclosure in April 2015.

152. ***Pp 1034-1043 (MS2D Acceptance of Third Party Waste)*** These redactions relate to provisions which UBB will be obliged to insert in contracts to be made with "third party waste providers" in due course. The Commissioner agrees with the Council that the redactions on p1034 should be allowed (they give details of such providers already identified and quantities and types of waste they have indicated they will supply) but says that the balance of the redacted details are not covered by reg 12(5)(e) and that the public interest favours disclosure in any event. In this case we can see that there is some commercial sensitivity in potential suppliers knowing the parameters under which UBB are required to contract and work with them in advance of making a final contract and are therefore of the view that reg 12(5)(e) applies to all these redactions (though we should say we are baffled at the concept that they comprise "trade secrets"). Given that we consider that the public interest is that the overall quantities of third party waste are disclosed, we do not consider the public interest in disclosure of these additional details as to how it is to be dealt with to be very great and overall we consider that the public interest balance favours redaction.

153. ***Pp1044-1062 (MS2E Environment and sustainability):*** These redactions relate to the environmental management systems required of UBB in the operation of the plant. Apart from redactions on pp 1046 and 1052 (which relate to guaranteed emission levels and storage and management of hazardous materials) the Commissioner says the exceptions are not engaged and that the public interest in any event favours disclosure. In our view none of the redacted details are genuinely commercially sensitive or trade secrets. But in any event we consider there to be a high public interest in disclosure of these details in the Contract which relate directly to the environmental effects of the project and how they are to be dealt with; this is particularly relevant to the redactions on pp 1046 and 1052 which we are surprised the Commissioner agreed (in particular that on p1046 which appears to relate directly to emissions (not that we would want to resurrect the reg 12(9) debate)). That high public interest certainly outweighs any public interest in maintaining confidentiality.

154. ***Pp 1065-1084 (Appendices MS2F.1 and MS2F.2) [note these pages are out of order]:*** These Appendices are in effect an Assets Register, describing the assets required by UBB to operate the waste facility. The Council seek to redact most of the contents of the Appendices. The Commissioner agrees that reg 12(5)(e) is engaged and that the public interest favours redaction. We agree with the Commissioner's assessment. We can see that disclosure would damage UBB's commercial interests and that the public interest in disclosure of such details is slight.

155. ***Pp 1085-1094 (MS2F Maintenance):*** The Council seek to redact details on seven pages of this document. Save for the redactions on three pages (pp 1086, 1090, 1091), the Commissioner does not accept that the redactions are covered by either exception relied on or that the public interest favours redaction in any event. We agree with the Commissioner's assessment save that we think that the details redacted in paras 1.8, 1.9 and 1.10 on pp1090 and 1091 should also be disclosed. We can see that there is some commercial sensitivity and potential damage in disclosure of the type of maintenance system UBB will have to buy and the amount of waste that must be stored (ie p 1086 and clause 1.7.1 on p1090) which outweighed any public interest in disclosure. The balance of the proposed

redactions are either not commercially sensitive or the public interest balance favours disclosure; they are definitely not the subject of intellectual property.

156. ***Pp1096-1110 (MS2G Contingency Plans):*** The Council appear to rely not only on regs 12(5)(c) and (e) but also (f) for redactions on 14 pages of this document. The Commissioner rightly points out that they cannot now raise reg 12(5)(f). We also agree with the Commissioner's assessment in relation to the reg 12(5)(e) and the public interest balance. The redactions at pp 1099-1108 which the Commissioner agrees relate to agreements UBB are to make with third parties to deal with waste in emergencies; clearly the disclosure of these details could harm UBB's negotiating position with these third parties and we agree that there was little public interest in their disclosure. The other redacted details do not seem to us commercially sensitive and in any event the public interest favours disclosure.

157. ***Pp1111-1541***: These are a series of existing environmental permits which the Council say show the link between UBB and its subcontractors. It is accepted that the information in them is publicly available. In accordance with general principles we do not see that it can be subject to confidentiality provided by law.

158. ***Pp1542 – 1561 (MS3 Markets for Products)*** : This document is concerned with the products that come out of the EfW plant and what is to happen to them.With one exception (p1545) the Commissioner agrees with the Council that the proposed redactions are covered by regulation 12(5)(e) and that the public interest favours redaction.

159. We agree with the Commissioner that the details of those who are to take such products and the terms on which they will do so which are included in the table at pp 1546 to 1557 are genuinely commercially sensitive for UBB and that there is little public interest in disclosure of such details. As to the balance of the document we consider it should be disclosed on the basis that it is not the subject of any intellectual property right (this goes particularly for the redaction at p1545) and, if genuinely commercially sensitive, the public interest balance favours disclosure. The quantities in the table at pp1542 and 1543 are expressed to relate to the first year and to be indicative but there is a clear public interest in their disclosure. The

provision redacted at p1545 is by way of exception to a requirement that UBB satisfy the Council about the credentials of those taking IBA aggregates: we consider there must be a strong public interest in the disclosure of this provision; as we have indicated we cannot see that there can possibly be any intellectual property rights in it. The provision in relation to electricity and the respective functions of the Council and UBB on p1553 seems to us to be at such a high level of generality as not to be commercially sensitive and the public interest balance of such information seems to us to clearly favour disclosure. The redaction at p1560 concerns UBB's obligations in relation to assessing third parties who take products; again we think there is a strong public interest in disclosure of this provision which clearly outweighs any commercial sensitivity.

160. We note that there does not appear to be an MS4; we would invite the Council and UBB to confirm this is so.

161. ***Pp 1562-1584 (MS 5ABC Contract Management and Management Information Systems)*** The Council seek to redact provisions on three pages of this document on the basis of regulations 12(5)(c) and (e). The Commissioner says that the exemptions are not engaged and in any event the public interest favours disclosure.

162. We are at a loss to see the commercial sensitivity of any of these provisions and we do not understand how the Council could seriously contend that they are subject to intellectual property rights. They seem rather banal and therefore likely to be of little interest to anyone but such public interest as there is in disclosure clearly outweighs that in upholding any commercial sensitivity that may exist.

163. ***Pp 1585-1609 (MS 5D Personnel)*** This document gives details of positions, numbers and reporting lines for the operation of the facility by UBB. The Council seek to redact provisions on 19 pages of this document on the basis of regulations 12(5)(e) and (c). With the exception of one provision (at p1602) the Commissioner accepts that regulation 12(5)(e) is engaged and that the public interest favours redaction. We agree with her that there are no intellectual property rights involved in this document.

164. We accept that there is some commercial sensitivity for UBB in the details of their personnel arrangements. We also consider that there is a clear public interest in the disclosure of this information so that the public can see how the plant will be run and judge the adequacy of the personnel arrangements. We think that the balance is on the borderline but we do not consider that the public interest in disclosure is outweighed. The public interest in disclosure of the provision at p1602 relating to the minimum percentage of jobs that will go to the local community seems to us weighty and we certainly agree with the Commissioner about that provision.

165. ***P1610 – 1624 (MS5E Contract Communications Plan)*** The Council seek redactions from two pages: from p1612 they seek to redact two very basic organisational charts which go with the text at paras 1.1.3 and 1.1.4 of the document and from p1613 telephone numbers and email addresses of named personnel. The Commissioner agreed these redactions but we are at a loss to see that any of the information in question is in any way commercially sensitive, still less the subject of intellectual property rights or how the Council can maintain that it is "bespoke detail … negotiated by the parties": again we rather have the impression this is just a mantra they have adopted throughout the Checklist document. However, the information on p 1613 is clearly personal data and, although we are not sure if the point was expressly raised at an earlier stage, it is clearly appropriate that on these grounds we should allow the redactions sought.

166. ***Pp1625-1650 MS6 Health and Safety*** The Council seek to redact one time period which appears twice on p1626, namely the period within which UBB is to obtain accreditation in relation to health and safety provision in the IMS. Again we are at a loss to see that this information is commercially sensitive, still less, as the Council say, that it represents "UBB's … unique approach [and] the use of specific methodology/equipment/timescales [which] forms the 'trade secrets' of UBB". In any event if the information was genuinely commercially sensitive we consider that the public interest balance would favour disclosure of this information relating to the important topic of health and safety.

167. ***Pp1650 A1-65 MS7 Stakeholder Management and Communications*** The Council seek to redact one item from p1650 A11 relating to their obligation to keep the area around the site free from litter and fly-tipped waste. Again we are at a loss

to see that this is genuinely commercially sensitive and repeat our comments in the previous two sections. In any event, the information appears in a table which is concerned with what UBB is going to say to "stakeholders"; in other words, they are undertaking to make the redacted material public as part of the public relations strategy. We do not understand how this redaction could properly have been put forward on UBB's behalf.

168. ***P1653:*** This redaction is of personal data relating to Council and UBB representatives and should be allowed on that basis.

169. ***Pp1654-1664 MS 8 Handback Requirements*** The Council seek to redact a timescale relating to the Council's survey of the facility on handback (ie in 25 years time). This is the same timescale as appears on p150 and we repeat our comments on that. Again, to suggest that this timescale is a "trade secret" as the Council do in the Checklist document is just hyperbole.

170. ***Pp1665-1670 Overall Works Plan*** The Council seek to redact a large part of this document and the Commissioner agrees the redactions. For our part we disagree with the Commissioner's assessment. We have read through the document and we do not think the redacted material is genuinely commercially sensitive, still less that it reveals trade secrets or contains anything the subject of intellectual property rights: rather it sets out in pretty general terms the requirements for the project management of a complicated works programme. For example, we simply fail to see how it can be commercially sensitive that there is a requirement for regular meetings to be held to ensure the Works are completed to programme as stated in the passage on p1670 which the Council seek to redact. If the public interest balance were relevant we would note that there must be a strong public interest in seeing that the construction of this facility is carried out properly and that UBB act in accordance with their obligations which would outweigh any commercial sensitivity that might exist.

171. ***pp 1670A1 Construction Plan*** This document appears to provide a time line for the construction of the facility. The version supplied to the Tribunal is too small to read and it is therefore difficult to make any assessment of the significance of the

document; that may explain why the Commissioner has apparently given no comment on the redaction of the relevant page. Even so, we cannot accept that there is anything unique or amounting to a trade secret in it as the Council maintain in the Checklist. There may be some commercial sensitivity to it in that it would reveal to sub-contractors the timescales under which UBB will be working. On the other hand we doubt they will come as any great surprise to anyone in the business but their general disclosure would be in the public interest and we have generally taken the view that timings ought to be disclosed. On balance we find that the public interest favours disclosure of this document.

Schedule 4

172. This Schedule is headed Payment Mechanism and it is undoubtedly at the heart of the Contract and of great importance to the Council and UBB. The Council seeks to redact details on 26 pages of the Schedule under reg 12(5)(e) on the basis that they include (as it is put in the Checklist) "financial data and granular detail relating to bespoke payment mechanisms negotiated between the parties …". The Commissioner agrees that reg 12(5)(e) applies to all the redactions save one (p1744) and that the public interest favours redaction of details on 17 pages.

173. Para 10 of Schedule 23 Part 1 deals expressly the contents of Schedule 4 in these terms:

> **Costing mechanisms, financial modelling and price breakdowns contained within Schedule 4 (Payment Mechanism) - to the extent that it reveals information about [UBB's] costs and/or profit levels, pricing or other financial information the disclosure of which could prejudice [UBB's] commercial interests.**

We consider that reg 12(5)(e) applies to the contents of Schedule 4 only to the extent that they come within those words and we note that it is UBB's commercial interests that are relevant here.

174. The Tribunal accepts that in general terms the redacted details describe what the parties respectively receive and pay under the Contract. We also accept that the disclosure of this information may harm UBB's commercial interests by showing competitors and sub-contractors what they are to receive under the deal with the

Council, although as we have said in our general comments, we do not believe there will be any great prejudice in relation to future procurement exercises by UBB or the Council. We therefore agree that reg 12(5)(e) applies to the redacted details.

175. The real issue is the public interest balance. It seems to us in the end that, however "granular" or "bespoke" all these provisions are, and however little understanding the Commissioner (or indeed the Tribunal) have of the complex technical information involved (see Mr Hopkins' final submissions at para 66), what they provide for is ultimately the price that the Council has agreed to pay for this facility over the next 25 years. We consider that the public had (and still has) a strong and legitimate interest in knowing what a public democratically elected body has committed to financially on their behalf. The disclosure of these provisions therefore seems to us something for which there was a very weighty public interest indeed.

176. On the other side we accept that disclosure will involve some commercial prejudice to UBB and, given the elaborate provisions allowing the Council to participate in third party income in various ways, the Council too. But looking at the whole picture in the light of the matters we have set out in our general considerations we are of the firm view that the public interest balance comes down in favour of disclosure of all the redactions in Schedule 4.

177. In reaching this conclusion we acknowledge and take account of the Commissioner's views on Schedule 4 recorded in the Checklist. However, we do not consider the fact that the Commissioner may have accepted in another similar case that "all financial data and formulae revealing financial data" could be redacted is of relevance to our decision.

Schedule 8

178. This Schedule is a list of key dates relating to the Contract, including the planned commencement date and the works period. The Commissioner agrees with the Council that the contents are covered by reg 12(5)(e) and that the public interest favours maintaining the exception.

179. We disagree with the Commissioner on the applicability of reg 12(5)(e): Schedule 8 is not mentioned in Schedule 23 Part 1 and we cannot see that the contents come within para 17 thereof.

180. In any event, we also disagree with the Commissioner and the Council in relation to the public interest balance. The dates which the Council seeks to withhold were all, by April 2015, clearly not going to be achieved. Their relevance by then related to the consequences of the delay and consequently the question of compensation for termination. Those were matters on which there was a strong public interest in full disclosure as at April 2015.

Schedule 10

181. This Schedule is headed "Required Insurances" and is concerned with insurances which UBB is required to take out in connection with the building and operation of the plant. The Council seeks to withhold items on 15 pages in the Schedule on the grounds that they contain figures and timescales that were negotiated between the Council and UBB or were provided voluntarily by UBB (pp 325-327). In all but one case (p319) the Commissioner does not accept that the reg 12(5)(e) is engaged and in all cases she maintains that the public interest favours disclosure.

182. Schedule 10 is not listed in Part 1 of Schedule 23 and paras 11 and 17 (which might otherwise have applied to some of the provisions the Council seeks to withhold) expressly exclude provisions relating to "Required Insurances". We therefore conclude that reg 12(5)(e) is not engaged in relation to any of the redactions from Schedule 10 and the whole of Schedule 10 should be disclosed.

183. In any event, it seems to us that the public interest would have favoured the disclosure of the withheld provisions. The public interest in the public knowing that the insurance arrangements surrounding the project were adequate and proper is great. The damage to the parties' commercial positions in a re-procurement or future procurements from disclosure of these provisions seems to us slight or non-existent, for the reasons set out above in our discussion of general considerations. The information provided by UBB at pp 325-327 is a "to whom it may concern" letter relating to insurance held by Balfour Beatty plc and associated companies for the period to 28 February 2012; we cannot see that appreciable damage would flow from its disclosure.

Schedule 12

184. This Schedule sets out the terms of the Independent Certifier's Deed of Appointment; the deed is to be made between the Council, UBB, the financiers of the project and the Certifier. According to clause 18 of the Contract the Certifier would have been appointed on the day the Contract was made. It is clear that the Certifier is a company, not an individual. The Council rely on regulation 12(5)(e) to redact details of the Certifier's personnel (para 2.10.2 on p337), fees (pp337, 350, 351), liability insurance, and limits on liability. The Commissioner denies that regulation 12(5)(e) applies and says the public interest balance favours disclosure in any event.

185. As for the details of the Certifier's personnel, we think that regardless of the anything else their names represent their personal data and that they should not be disclosed on that ground; we therefore allow the redaction at para 2.10.1 on p337.

186. As to the other redactions, Schedule 23 Part 1 mentions Schedule 12 at para 12 but says "references to Fees only" (that appears to be a reference to the fees which are to be paid by UBB to the Independent Certifier under clause 4.1 of the Deed of Appointment). It is not clear whether para 17 of Part 1 applies to make other provisions in Schedule 12 confidential but we are prepared to assume in the Council's favour that they do. We are therefore of the view that redacted provisions are covered by reg 12(5)(e). The issue therefore turns on our assessment of the public interest balance.

187. We think that public interest in disclosure of the provisions as to fees, insurance and liability in this document outweighs the public interest in maintaining their confidentiality. The Independent Certifier clearly has an important role in the establishment of this project which on any view has major environmental effects and is being paid for by the public. We think the public interest in disclosure of the terms on which the Certifier is working outweighs that in the commercial confidentiality of such terms. We note in this context that the fees are to be paid not to individuals but to a commercial company.

Schedule 16

188. This Schedule is entitled "Refinancing". The provisions which the Council seek to redact are details of the amounts which the Council are entitled to receive from any "Refinancing Gain" by UBB. The Council say that the figures were heavily negotiated between the parties and that disclosure at the time of the request would have harmed the Council's commercial position with bidders and it is in the public interest that they should get the best deal; it is also pointed out that any consequential financial gains will be published by the Council. The Commissioner accepts that reg 12(5)(e) applies but says the public interest favours disclosure.

189. The redacted provisions clearly come within para 17 of Schedule 23 Part 1 and we accept that they are covered by regulation 12(5)(e). The issue therefore turns on the public interest balance. We have commented on the position in relation to a new procurement exercise in 2015; we do not think disclosure would prejudice it in any significant way. We did consider whether damage would flow from financiers knowing the extent to which the Council would be gaining from any refinancing by UBB but looking at the definition of "Refinancing" on p376/7 it looks as if any financiers UBB would be dealing with would know about these provisions anyway. As to the public interest in disclosure, these figures are part of the overall financial deal that the Council has struck and the public would be entitled to hold the Council to account in relation to how they deal with any refinancing proposals by UBB, so there is a real public interest in disclosure which we consider to outweigh any public interest in maintaining commercial confidentiality.

Schedule 17

190. This Schedule is headed "Compensation on Termination". The Council seeks to withhold provisions on seven pages consisting of figures and dates relating to compensation that would be payable to UBB for an early termination of the Contract in various scenarios. They say that these contractual provisions were the product of heavy negotiation and their disclosure would damage the parties' positions in future procurements and a re-procurement for the project we are concerned with if that was necessary. In relation to one, at p387, namely "Base Case Equity IRR [internal rate of return]", the Commissioner agrees that reg 12(5)(e) applies and that the public interest favours redaction. In relation to the others, she says in some cases that reg 12(5)(e) does not apply and in all that the public interest favours disclosure.

191. Schedule 17 is not mentioned in Schedule 23 of the Contract but we accept that all the redacted details come within para 17. Reg 12(5)(e) therefore applies to them.

192. At the relevant date the issue of the costs of termination was very much "in the air" as we have described and there was a high public interest in disclosure of as much detail as possible about it. We have commented in our general comments on the public interest on the level of damage to the parties' commercial interest that would have been caused by disclosure. In general we consider that the public interest balance substantially favours disclosure, particularly in relation to the details on p411 which were relevant to the figures being mentioned as the cost of termination at the time. The exception is the figure for IRR at p387 which is agreed to be a matter of particular sensitivity to UBB and of potential use to competitors; we agree with the Commissioner that the public interest favours redaction of this figure.

Schedule 19

193. This Schedule is entitled "Revision of Base Case and Custody". As we understand it, a revision of the Base Case which is allowed in certain circumstances, can impact on the price paid by the Council under Schedule 4. The Council seeks to withhold certain figures on pages 436 and 439 in Appendix 1 to the Schedule which is itself headed "Financial model protocol for adjustments to the Base Case". The Commissioner agrees that these figures fall within reg 12(5)(e) and that the public interest favours maintaining the exception.

194. We accept that the redacted figures are clearly within para 17 of Schedule 23 Part 1 and that reg 12(5)(e) applies.

195. These provisions were not explained to us at all during the hearing and we find it difficult to know what their significance is. Accepting that they look as if they may be of some significance to UBB's financial position and were designed to be of relevance throughout the Contract, and given the Commissioner's own view, we are prepared to accept that the public interest favours maintaining the exception in this case.

Schedule 21

196. This Schedule is entitled "Change Protocol". It makes provision to allow for changes to the commercial terms in the event of changes in certain circumstances over the period of the Contract. The Council seeks to redact details on 10 pages of the Schedule, all of which are monetary amounts and percentages and periods of time. The Commissioner agrees in each case that reg 12(5)(e) applies but says that the public interest favours disclosure.

197. Schedule 23 Part 1 expressly mentions "each Appendix to Schedule 21" (ie the provisions at pp 500 to 504) at para 13 but not the Schedule as a whole. However, the other redacted provisions come within para 17 and we therefore accept that all these redactions come within reg 12(5)(e).

198. It seems to us that these provisions are of public interest in indicating variations in the potential long term cost of the project to the Council. In the Checklist the Council says that these provisions were heavily negotiated and their disclosure at the time of the requests would have harmed its position with bidders; we have dealt with this point in our general comments on the public interest. The Council also make the point that payments made under the Contract will in due course be published in future Council accounts; we do not consider that this is any kind of answer to the public interest in the public knowing at the outset the nature of the long-term commitments which have been signed up to. We agree with the Commissioner that the public interest favoured the disclosure of this material as at April 2015.

Schedule 26

199. Schedule 26 deals with the obtaining of planning consent and the consequences if there are problems. The whole of the Schedule is listed in Schedule 23 and we agree that regulation 12(5)(e) applies to it. The Commissioner says, however, that the public interest favours disclosure of the redacted provisions.

200. The redacted provisions are all figures and dates relating to the parties' rights and liabilities in relation to planning risk and were "heavily negotiated". The Council say in the Checklist that disclosure of the redacted information at the time of the requests would have seriously harmed the Council's commercial position with bidders and that any payments made would in due course be published in the Council's accounts.

201. We have commented on the new procurement scenario in our general comments. Given the planning problems and what officers were saying about termination payments it seems to us that the public interest in disclosure of the redacted provisions in this Schedule was weighty at the time. We therefore agree with the Commissioner's assessment.

Schedule 27

202. This Schedule is headed "Approach to Permit Risk" and deals with the eventuality that UBB not obtaining a satisfactory Environmental Permit to operate the facility. The Council seek to redact four sets of figures. The Commissioner agrees that regulation 12(5)(e) is engaged but says that the public interest favours disclosure.

203. Schedule 27 is specifically listed in Schedule 23 Part 1. We therefore accept that the redacted provisions are covered by reg 12(5)(e).

204. Again, the Council says that these provisions were heavily negotiated and that their disclosure at the time of the requests would damage its commercial position with bidders (presumably this is a reference to new bidders on a re-procurement exercise) and that any payments made would in due course be published in the

Council's accounts. We have already commented on both these points in different contexts. Looking at the whole picture we consider that the public interest in disclosure of the full potential costs of the project and the nature of the provision made for the risk of Environmental Permits not being obtained clearly outweighed any potential harm to the Council. We therefore agree with the Commissioner that these details should be disclosed.

Schedule 29

205. This Schedule is headed "Basic Design Proposal" and in 12 pages it describes the basic design proposals for the facility itself. The Council seeks to withhold technical details relating to the building and the surrounding landscape which are set out over nine pages of the Schedule on the grounds they are covered by regulation 12(5)(e) and (c). The Commissioner agrees that the details are covered by regulation 12(5)(e) (but not regulation 12(5)(c)) and that the public interest favours redaction.

206. Schedule 29 is not mentioned in Schedule 23 Part 1 and there is nothing else in Schedule 23 Part 1 which covers the redactions from Schedule 29 so that, consistently with our findings above, we are of the view that regulation 12(5)(e) simply does not apply to its contents and that the same must go for regulation 12(5)(c). Given the position of the Commissioner on regulation 12(5)(e), however, we have given further thought to this issue and looked again at the actual content of the redacted provisions.

207. We would accept that the redacted provisions are of a highly technical nature and no doubt emanated from UBB and are based on UBB's expertise and experience in building EfW facilities and are therefore matters which UBB might prefer competitors not to see in such a convenient format. But they are all provisions which set out exactly what it is the Council (and so the public) is ultimately paying for in terms of the facility and its landscape (that is, to pick up the wording in the Transparency Code published in October 2014, "a description of the goods being provided" under the Contract). And, furthermore, looking to the details of what the Council seek to withhold in this Schedule we find it hard to accept that most of them could seriously be said to warrant the protection of the law of confidentiality: we observe, for example, that the Council seek to withhold the fact that the roof structure in the

turbine hall should be formed with a central ridge and fall to each side at approximately 2 degree pitch (p 660) and the fact that the intention is to have between 3,900 to 6,500 ornamental plants selected from a range of shade tolerant ferns and perennials to be planted in drifts through a range of organic and inorganic mulches (pp 661/2); it is very hard to see how disclosure of such matters could cause any harm to UBB's commercial interests.

208. We therefore conclude that there has not been any mistake in Part 1 Schedule 23 and that it was indeed intended, as the Contract provides, that these provisions should be open to disclosure without restriction, and accordingly that neither reg 12(5)(c) nor 12(5)(e) applies.

Schedule 32

209. This Schedule is entitled "WCA Composition Protection". The WCAs are the six District Councils within Gloucestershire (including Stroud) which are responsible for collecting domestic waste. As we understand it the Schedule makes provision for changes to the nature or calorific value of such waste being presented to UBB and provides for remedial action to be taken by UBB in certain circumstances. The Council seeks to withhold various detailed provisions (including provisions relating to frequencies and times) over six pages of the Schedule, which they say were heavily negotiated and are " … a UBB liability [which] goes to the core of its legitimate economic interests". The Commissioner's position is that the redactions are not covered by reg 12(5)(e) and that in any event the public interest favours disclosure.

210. We agree with the Commissioner on both points. Schedule 32 is not listed in Schedule 23 Part 1 and the redacted provisions do not seem to us to come within any of the general paragraphs like para 17.

211. Further, the public interest in disclosure of these provisions, relating as they do to the nature and calorific value of waste in the future, seems to us high (and this was a point particularly relied on by Mr Hartley at the hearing), while the damage to UBB of disclosure of such detailed provisions particular to this facility in April 2015 would

in our view, for the reasons set out above under general considerations, be considerably outweighed.

Schedule 33

212. This Schedule is entitled "Power Offtake Arrangements". Mr Mawdsley explained that it contains a model or template for a new kind of contract by which the Council can participate in the sale of electricity direct to public sector users in circumstances where this was previously not thought legally possible and that this will involve the selection of a company to distribute electricity involving a further procurement exercise (see his statement at para 41). We were not shown any specific references to Schedule 33 in the main body of the Contract (the only references we have been able to find are in clause 45.6 concerning Electricity Payment Provisions, which appears to require UBB to enter into electricity supply contracts with third parties based on Annex 1 to Schedule 33) or given a very clear explanation of how this was all going to work (although we accept of course that it is complex and there was limited time available). We have already mentioned Mr Mawdsley's hope to sell the contents of Schedule 33 to other local authorities.

213. The Council seek to withhold what are described as "legal and technical details" appearing on 23 pages of the Schedule on the basis of both reg 12(5)(e) and also reg 12(5)(c). They state in the Checklist that the provisions were negotiated between them and UBB and, as we understand it, that disclosure would harm both parties' negotiating position with third parties in relation to the sale of electricity and would harm the Council's intellectual property rights. The Commissioner disputes that either exception is engaged and says that in any event the public interest favours disclosure.

214. Schedule 33 is not mentioned expressly in Schedule 23 Part 1 so that, save in relation to provisions that come within paras 16 or 17, we do not consider that the redacted provision come within regulation 12(5)(e). The only redactions that we are able to see which clearly come within those paras are a limit of liability on p 727 and the liquidated damages provisions at pp 738 to 741. As we mentioned above the Council put forward a document which attempted to identify the parts of Schedule 23 which brought the redactions in Schedule 33 within its terms; we have looked at

this document again in the context of considering Schedule 33 and are confirmed in our view that the attempt was hopeless.

215. In order for regulation 12(5)(c) to apply, the disclosure of the information in question has to adversely affect intellectual property rights. The Council submits through Mr Hopkins that they have intellectual property rights in the whole of Schedule 33 (surprisingly not just in Annex 1), based on copyright, database rights and the law relating to trade secrets. We agree with Mr West that this is a somewhat surprising submission in relation to a document which is said to be the product of a negotiation between the Council and UBB and, in any event, we would have expected much more legal and factual analysis if this was a serious position, particularly in light of the presumption in regulation 12(2) of EIR. We also note again our conclusions about clause 84 and Schedule 23 Part 1; if Schedule 33 was really subject to intellectual property rights on the part of the Council and those rights were likely to be harmed by disclosure, it makes no sense if the very Contract containing the Schedule provides that, apart from the redactions we have identified above, its provisions may be disclosed without restriction. We agree with the Commissioner that the Council have not established their case that regulation 12(5)(c) applies to the redacted provisions in Schedule 33.

216. So far as the public interest is concerned, we agree with the Commissioner that, if relevant, it favours the disclosure of Schedule 33. The Council expressly accepts that there is a public interest in transparency about its plans to sell electricity for wider use; in our view it is a weighty public interest. On the other hand, we remain unclear as to how the Council's or UBB's negotiating position with third parties will be damaged. As to the wish to protect the confidentiality of legal and technical details that are novel in order to sell them on to other local authorities, even assuming that Mr Mawdsley is not being overoptimistic about the potential for the Council to make money in this way, we do not think that there is a particularly great public interest in the Council being able to commercially exploit a scheme which is apparently designed to avoid the normal regulatory regime.

Result and final remarks

217. The overall result is that, with some notable exceptions which we have set out in the Schedule to the substituted decision notice above, we have reached the view that Annex 4 and the redacted provisions in the Contract ought to have been disclosed by the Council in April 2015.

218. This decision has in the normal way been supplied in draft to the Commissioner, the Council and UBB for them to consider whether there are any parts that should not be made public, in particular pending any appeal. Following their response, a few sentences will be redacted from the copy of the decision supplied to Mr Ttofa and for the moment the decision will not be placed on the Tribunal's website. This position will be reviewed on the expiry of the time limit for any appeal, which is 28 days from the date the decision is sent to the parties. We have also fixed the date for compliance 28 days from the date of the decision; obviously any application for permission to appeal would need to include an appropriate application for a stay.

219. Notwithstanding that we have rejected the Council and UBB's case to a great extent we wish to thank Mr Mawdsley and Mr Peiro for all their hard work both before and during the hearings, as well as thanking both counsel and Mr Hartley for their very substantial contributions.

220. Our decision is unanimous on all issues.

HH Judge Shanks

10 March 2017