



**Appeal number: EA/2019/0254V**

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**IAN DRIVER**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER**

**Respondent**

**TRIBUNAL PANEL: JUDGE ALEXANDRA MARKS CBE  
TRIBUNAL MEMBER JEAN NELSON  
TRIBUNAL MEMBER DAVE SIVERS**

- I. This was a remote hearing by agreement of the parties. It took place on Monday 8 March 2021. The form of remote hearing was Cloud Video Platform (CVP). Both parties and the Panel members participated by video, with the exception of Tribunal Member Nelson whose camera was initially malfunctioning, so she joined the first part of the hearing by audio only. Tribunal Member Nelson could see all parties, but we could only hear her, not see her. All participants were content with this arrangement. A face-to-face hearing was not held because all issues could be determined in a remote hearing.
- II. The documents to which the Panel was referred are in an Open bundle comprising an Index, six sections and a total of 293 pages, and a Supplementary Bundle of 24 pages (including front sheet and index). All parties were also provided with an Additional Bundle of Case Management Directions, and an agreed Bundle of Authorities comprising 565 pages. The Panel, but neither Mr Driver nor the public, were also referred to a Closed Bundle of 21 pages (including index) and a Closed Supplementary Bundle comprising 14 pages (including front sheet and index). The Panel noted the contents of all these bundles.
- III. The outcome of the appeal is stated at both the start and the end of this Decision.

**Mr Ian Driver appeared in person**

**The Information Commissioner was represented by Mr Will Perry, Counsel and Ms  
Sonia Taylor, Solicitor**

## DECISION

The appeal is dismissed.

### REASONS

#### *Background to Appeal*

1. The Appellant, Mr Driver, made a request on 15 June 2018 to Kent County Council (the 'Council') for information about Sandwich Rail Infrastructure Project (the 'Project'). He asked for:

*'a copy of Annex A to the [Project] Report produced on 12/06/18 by [Council] officer Stephanie Holt-Castle.'*

2. Annex A was part of a report produced by the Council in June 2018 for the South East Local Enterprise Partnership's ('SELEP') Accountability Board in order to seek further funding for the Project.

3. The purpose of the Project (which has since been completed) was to extend the platforms and create a footbridge at Sandwich Railway Station. This was to allow longer trains to stop at the station during the British Open Golf Championships (the 'Open') which R&A Championships Limited ('RACL') - as owner and operator of the Open - proposed to hold at Royal St George's Golf Club ('RSG') in Sandwich in July 2020 and on two further occasions before 2036. Due to the Covid pandemic, the July 2020 Open was postponed until July 2021.

4. The Project was proposed because the local transport infrastructure at Sandwich was insufficient to support the anticipated number of visitors to Sandwich (including spectators, staff, players etc) during the Open.

5. The Council responded to Mr Driver's request for information on 12 July 2018. The Council said that the report was not for publication because it identified the financial contributions of each funding party to the Project: it therefore withheld the requested information under the exemption for 'prejudice to commercial interests' in section 43(2) Freedom of Information Act 2000 ('FOIA').

6. Following an internal review, during which the Council obtained further evidence from RACL, the Council wrote to Mr Driver on 19 September 2018 saying that it had reconsidered his request under the Environmental Information Regulations 2004 ('EIR'). As a result of the review, the Council said it was withholding the information under the exceptions in EIR for commercial confidentiality (regulation 12(5)(e)) and the interests of the information provider (regulation 12(5)(f)).

7. On 18 December 2018, Mr Driver complained to the Information Commissioner (the 'Commissioner') about the Council's handling of his request.

8. During the Commissioner's investigation, the Council disclosed to Mr Driver a redacted version of the requested information, namely Annex A of the Council's June 2018 report. The redactions were of the total amount of contributions to the Project, and the amount of contributions from RACL, the Department of Transport and Network Rail (by then no longer treated as a funder of the Project).

9. The Council asked Mr Driver if he was willing to withdraw his complaint. Mr Driver declined: while he did not object to his request being dealt with under EIR rather than FOIA, he wished to pursue his complaint. His motivation, he told the Panel, is to find out if RACL paid a proportionate contribution to the Project, given the lucrative nature of the Open and the wealth of RACL.

10. On 18 June 2019, the Commissioner issued Decision Notice FER0809509 upholding the Council's decision to apply regulation 12(5)(e) and withhold the requested information. Having upheld the Council's decision on the basis of regulation 12(5)(e), the Commissioner did not go on to consider the application of regulation 12(5)(f).

### *Appeal to the Tribunal*

11. On 14 July 2019, Mr Driver sent a Notice of Appeal to the Tribunal.

12. With the Tribunal's permission, Mr Driver's detailed grounds of appeal were submitted on 10 September 2019, and later amended by him on 20 October 2019.

13. Mr Driver's grounds were, in summary:

- (a) Lack of evidence of adverse effect were the information disclosed;
- (b) The nature, likelihood and severity of prejudice were the information disclosed;
- (c) The wide accessibility of the information in the public domain;
- (d) The public interest in withholding the information being outweighed by the public interest in disclosing it; and
- (e) Regulation 12(5)(f) not applying because the information was contained in a jointly negotiated contract (which the Commissioner's guidance says falls outside the scope of the exception)

14. The Commissioner's Response dated 28 October 2019 maintained the analysis set out in the decision notice.

15. The Tribunal convened an oral hearing which was held remotely using HMCTS's Cloud Video Platform.

16. The papers available to Panel and the parties are set out on the front-sheet of this decision.

17. During the hearing, there was a brief closed session from which Mr Driver was excluded pursuant to GRC Rule 35(4)(c) and the Tribunals' Practice Note about

Closed Material in Information Rights Cases. During the closed session, the Panel asked Mr Perry about three missing pages from the Closed Supplementary Bundle. These pages had been removed by the Tribunal's Registrar pursuant to her Case Management Directions dated 6 March 2020. However, on 28 October 2020 Judge Moira MacMillan had made further Case Management Directions, setting aside the Registrar's directions. Despite the March 2020 Case Management Directions, the Closed Bundle provided to the Panel omitted the three pages which had previously been removed by the Registrar. Arrangements were therefore made during the hearing for the missing three pages to be provided to the Tribunal on a 'closed' basis under GRC Rule 14(6).

18. The three missing pages from the Closed Supplementary bundle comprised a letter from RACL to the Council dated 29 June 2018; a further letter from RACL to the Council dated 29 August 2018; and an email from RACL to the Council dated 1 May 2019. During the hearing, this correspondence (the 'RACL correspondence') continued to be held by the Panel under GRC Rule 14(6). The gist of them was supplied to Mr Driver in the following terms:

*'The three redacted correspondence were all provided by [RACL] to [the Council] and to the [Commissioner] to demonstrate why the sum of investment cannot be disclosed. They explain why the detail must be maintained as commercial in confidence and explain in detail why disclosure would damage the commercial interests of [RACL]. They refer to other commercial investments of [RACL].'*

### ***The Law***

#### ***Section 1(1) FOIA: general right of access to information held by public authorities***

19. Public authorities' duty to disclose information is set out in s.1(1) FOIA:

*'1 (1) Any person making a request to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if this is the case, to have that information communicated to him.'*

#### ***Regulation 5 EIR: access to environmental information held by public authorities***

20. Regulation 5 EIR sets out a specific duty by public authorities to make environmental information available on request.

21. There are exceptions to this duty. Those pertinent to this appeal are set out in Regulation 12, the relevant parts of which provide:

*'12 (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –*

*(a) an exception to disclosure applies under paragraphs (4) or (5); and*

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

...

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

(f) *the interests of the person who provided the information where that person –*

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

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

(iii) *has not consented to its disclosure...'*

22. In *Bristol City Council v. Information Commissioner and Portland and Brunswick Squares Association (EA/2010/0012)*, the First-tier Tribunal said that the exception in regulation 12(5)(e) can be broken down into four parts:

- (1) The information is commercial or industrial in nature
- (2) Confidentiality is provided by law
- (3) The confidentiality is protecting a legitimate economic interest
- (4) The confidentiality would be adversely affected by disclosure.

23. The First-tier Tribunal confirmed in *Elmbridge Borough Council v. Information Commissioner and Gladedale Group LTD (EA/2010/0106)* that the issue in the third limb of the *Bristol City* analysis is whether disclosure would adversely affect a legitimate public interest of the person the confidentiality is designed to protect.

24. A public authority is permitted to withhold the requested information under the exceptions in regulation 12(5) *only* if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

### ***The powers of the Tribunal***

25. The powers of the Tribunal in determining appeals against the Commissioner's decisions for the purposes of EIR are set out in FOIA, as follows:

*‘s.57 Appeal against notices...*

*(a) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice...*

*s.58 Determination of appeals*

*(1) If on an appeal under section 57 the Tribunal considers -*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

*(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.’*

***The burden of proof***

26. The burden of proof rests with Mr Driver in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion.

***Evidence***

27. Before the hearing, both parties had submitted written evidence which was contained in the two Open Bundles and (in the case of the Commissioner) in two further Closed Bundles. The parties and Panel members also had an agreed bundle of authorities and a bundle of Case Management Directions. With the exception of RACL correspondence described at paragraph 18 above, no further evidence or other materials were produced at the hearing.

***Submissions***

28. The Panel had read both parties’ written submissions in advance of the hearing. The parties were therefore invited to confine their oral submissions to new matters, and issues to which they wished to draw the Panel’s particular attention.

29. Noting that Mr Driver was unrepresented, the Panel considered his submissions well-researched and presented. Mr Driver put his case in the following way:

(1) The case is about a large international sporting event which he is concerned is being subsidised through public funds. Mr Driver is seeking the requested information in order to establish whether RACL made a fair and reasonable contribution to the costs of the Project to facilitate the Open being held in Sandwich.

(2) RACL, as the sole provider of the Open, claims that those hosting the Open will enjoy huge economic benefits. However, those financial benefits may be exaggerated: they were based on research using secret methodology. The research was not independent as it was commissioned by RACL. The Council did not challenge the research and was hoodwinked or at least influenced if not dominated by RACL.

(3) The Commissioner, Mr Driver says:

(a) made an error of law in finding that disclosing the requested information would adversely affect a legitimate economic interest of RACL; and

(b) should have exercised her discretion differently when weighing the public interest in favour of withholding the information rather than disclosing it.

***Legitimate economic interest***

(4) Mr Driver argues that RACL does not have a legitimate economic interest. He says that RACL has an ‘unassailable’ position and uses misleading economic forecasts as well as threats to withdraw the Open when negotiating with potential host venues. This enables RACL to get what it wants at the lowest possible cost to itself from public bodies such as the Council in this case. Mr Driver points in particular to the following issues:

***Monopolistic position***

(5) RACL and the 10 host golf clubs of the Open operate in a monopolistic/cartel-like manner and would not suffer any adverse effect were the information disclosed.

(6) Mr Driver further argues that, as very few changes have been made in recent years to the 10 clubs which host the Open, this shows they are effectively a closed and exclusive group with very powerful influence over local authorities of host venues.

(7) With his written submissions, Mr Driver drew attention to the Aarhus Implementation Guide (p.88) which states that ‘*it would be difficult for an enterprise operating in a monopolistic manner ...to assert a claim of commercial confidentiality, since there are no competitors that could gain an advantage by access to the information.*’ Further, at p.89, the Guide says, ‘*Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist competitors...*’.

(8) The Commissioner's own guidance on reg. 12(5)(e) makes clear at paragraph 41 that *'illegitimate economic interests are not covered. For example, ...a market position achieved by anti-competitive practices (e.g. price-fixing or a cartel).'*

(9) Based on the Aarhus Guide and the Commissioner's guidance, Mr Driver therefore says that an organisation which is able to control or manipulate a market through monopoly, cartel or some other form of market domination and faces little or no competition from rivals cannot rely upon the exception in regulation 12(5)(e) to protect its economic interests.

#### *Misleading economic forecasts*

(10) Mr Driver also draws on academic papers by economists about North American sports leagues securing subsidies or even blackmailing host venues to undertake infrastructure projects such as the construction of stadiums and arenas to maximise the leagues' own profits. The academic argument is that such leagues abuse their monopolistic position and prestige status by coercion and threats that they will relocate their lucrative and prestigious events elsewhere, thereby creating an unfair balance of power over public authorities. The research says that promises of huge economic benefits to authorities who agree to host such sporting events makes them powerless to resist the leagues' demands because they fear losing the sporting events and thus the income which would be generated. Mr Driver argues that such a dynamic applies to RACL when negotiating with local authorities of potential host venues for the Open.

(11) In support of his argument, Mr Driver quotes from a report by Kent & Medway Economic Partnership ('KMEP') to SELEP's Accountability Board in January 2017 that, *'[RACL] has indicated that should these [transport] difficulties not be overcome, [RGC] will lose this opportunity to host the Open in 2020 and ...would be highly unlikely to return until such time as the appropriate transport improvements were undertaken...'* Another reference to this 'threat' or exercise of bargaining power is, he says, in the SELEP Transport Business Case Report dated 3 October 2017 which says, *'If the Project is not supported, the Open will not be held in Kent and the economic benefits will not be delivered for East Kent or[wider] Kent.'*

(12) Mr Driver says that the much-hyped but doubtful economic benefits the Open is claimed to generate, which cannot be provided by a rival, leave the *'cash-strapped host local authorities in Kent...with no alternative but to capitulate to the demands of an extremely wealthy [RACL]'*.

#### *Adverse effect*

(13) Mr Driver argues that he can conclusively demonstrate that harm to RACL by disclosure of the requested information is nowhere close to the 50% chance required by law because there is a lack of evidence, or even 'general idea' of why RACL believes it could be harmed by disclosure. Mr Driver also argues that because RACL is the only provider of this lucrative and prestigious event, it is in a very powerful negotiating position compared with the Council which owes a fiduciary duty to local taxpayers. He says that disclosure of the financial



information sought would have no, or very little, harmful impact upon RACL's economic interests given its willingness to *'play hard ball...by threatening to withdraw the Open'* and that RACL's *'bargaining power is more than sufficient to protect RACL's economic interests and mitigate against any threat to these interests.'* Mr Driver points to the following issues:

*Public domain*

(14) The Council's Report of September 2017 to KMED included the initially proposed contribution from RACL towards the cost of the Project. This report was posted on both KMED's and SELEP's websites in error. According to the Commissioner's decision notice, these *'figures were inadvertently placed in the public domain and a third party sought the sum invested to be removed. This information was not trivial.'*

(15) Mr Driver argues that even today, nearly four years after the erroneous posting, information about RACL's contribution to the Project is still on SELEP's website. He argues that if it was information which could have an adverse effect on RACL's interests, RACL would have taken more steps to have it removed. The fact it has not done so indicates that the proposed figure has not had an adverse impact on its economic interests so why should any other amount do so either?

(16) Moreover, despite the unwanted disclosure – and that RACL was aware of the possibility that the Council could be obliged to disclose information under FOIA or EIR – RACL nevertheless continued with the deal and was happy for it to be announced by the local media.

(17) In summary, this information – though regarded as *'not trivial'* by the Commissioner – has been published yet has caused no damage to RACL. Therefore, Mr Driver argues, the real final figure (especially if close to the proposed figure) would likewise have no effect. In addition, the fact the deal was concluded shows that the Council's ability to engage effectively with commercial partners has not been harmed in any way by the possibility that financial details of the Project might have to be disclosed.

*Reputational damage*

(18) If it were revealed that RACL made no or little contribution to the Project, Mr Driver says it may well be criticised given the millions of pounds profits it makes every year. This may cause RACL reputational damage – but RACL already manages its reputation on other issues, he says, such as the lower prize money for female golfers who are excluded from the all-male Open competition.

*Time has moved on*

(19) Mr Driver argues that negotiations by RACL with other host venues which might have been affected at the time of the request in 2018 have now been concluded. As a result, those negotiations cannot now be affected by release of the requested information which in 2021 is several years out of date. Moreover, RACL and the 10 host clubs have such dominance of the event that they could readily mitigate any harm from information being released now four years later.

### ***Balancing the public interest***

(20) Mr Driver argues that in favour of disclosure is the enhanced public interest in knowing whether cash-strapped local authorities have been required to pay a greater proportion of the costs of the Project than originally envisaged because RACL contributed less than the originally proposed amount. Mr Driver further argues that the public interest in withholding the information is not ‘weighty’ as the Commissioner says because the forecast economic benefits are doubtful, as is the alleged harm to RACL. He points to the following specific issues:

#### *Position of local authorities*

(21) Mr Driver says budget cuts to local authorities have led to growing public interest and scrutiny of the efficiency and effectiveness of local authorities’ management of their reduced resources. Disclosure of the amount of RACL’s contribution to the Project would demonstrate not only transparency, accountability and ‘equity’ in terms of the respective contributions made by the various funding partners but also how effectively local authorities managed their negotiations with RACL, whether they struck a good bargain and whether they secured value for money.

#### *Related or similar information in the public domain*

(22) Mr Driver drew the Panel’s attention to the Commissioner’s guidance on information in the public domain. In particular, he cited paragraph 60 of the guidance which says, ‘*Depending on the facts of the case, related information in the public domain could either increase or reduce the likelihood and severity of prejudice, the public interest in maintaining an exemption, and the public interest in disclosure...*’

(23) Mr Driver argues that ‘*related information in the public domain*’ exists as a result of his information request in November 2019 of the Department for Communities in Northern Ireland. He had asked whether RACL had made any contribution to the £17M Portrush Regeneration Programme which included the construction of a new railway station in preparation for the 2019 Open at Royal Portrush Golf Club. The Department’s response, given within two days, was that neither RACL nor any of its associated companies had made any financial contribution.

(24) Mr Driver argues that the fact RACL paid nothing in the case of Portrush, is in the public domain – and this information relates to RACL’s contribution to railway works in preparation for hosting of the Open. This, he says, has a bearing on the public interest balancing exercise in this case.

(25) The Commissioner’s guidance says (at paragraph 61) that ‘*...if information of a similar nature is already in the public domain, evidence that it was (or was not) harmful may indicate that this disclosure would (or would not) be similarly harmful...*’ and further that ‘*...there will always still be some public interest in disclosure of the full picture...*’ This too is relevant, Mr Driver argues, because both the Portrush response and the requested information about the Project are ‘similar information on a similar subject’, namely the full picture about

contributions by RACL to railway infrastructure works in preparation for the hosting of the Open by a nearby golf club.

(26) Mr Driver argues that the ‘inadvertent disclosure’ referred to at (14) above is also ‘*closely related and very similar to*’ the withheld information, and this too should have a bearing on whether the requested information should be disclosed or not.

(27) While there are many other documents and reports about the Project already in the public domain, as well as local media coverage about the hosting of the Open by RGC, Mr Driver says this is irrelevant because the requested information is simply how much RACL paid towards the Project – and that is unknown. To gain the ‘full picture’, the question is how much in pounds and percentage terms RACL contributed to the Project. Mr Driver urges the Tribunal to consider the important public interest in local taxpayers knowing whether their local authority achieved a good deal with their taxes.

*Economic benefits deriving from the Project – and hosting of the Open*

(28) Mr Driver challenges the Commissioner’s view (at paragraph 40 of the decision notice) that ‘...*given the potential economic benefits identified in this case, she considers this carries significant weighting in favour of maintaining the exception...*’. He argues that it is not necessarily true that the Open generates income for the host area.

(29) Mr Driver notes that these income projections are produced by Sheffield Hallam University’s Sport Industry Research Centre (‘SIRC’). Mr Driver questions the objectivity and impartiality of these projections, given that SIRC has been commissioned by RACL over many years to carry out this research. Citing further research from the USA about large sporting and other events, Mr Driver argues that the overwhelming consensus of economists is that there is little to no short-term economic impact on host areas of sporting and other large scale events: analyses suggesting the contrary overstate by a significant margin the economic benefits.

(30) In this case, Mr Driver argues that the economic forecasts persuaded the Council to subsidise the event. However, the Council simply accepted SIRC’s research without considering the displacement effect (how many visitors are put off coming to the area when it is full of golfers?) or noting that much of the hospitality spend would occur on the golf course or at large chains rather than local businesses. The academic research from the USA says the assessment of economic impact from large events may not be what it seems – and hence the projected income from RGC hosting the Open may not be true: it may have been overstated to exert leverage on local authorities.

(31) Mr Driver also cites sports economists, such as Andreff and Szymanski in their *Handbook on the Economics of Sport*, who say that ‘*economic impact analysis is frequently used to justify expenditure on sports...infrastructure but...these analyses frequently overstate the true economic benefits of professional sport by a significant margin..*’ Mr Driver quotes another academic economist, Roger D Blair, as saying in his publication *Sports Economics*

*'...When economists do an ex post analysis, the ex ante claims are almost always never confirmed...Thus one is forced to the conclusion that the bloated claims of those with a vested interest cannot be trusted...the economic benefits appear to be largely illusory...'*

(32) Accordingly, Mr Driver says, the Tribunal Panel should discount the purported economic benefits in this case - and hence the public interest in maintaining the exception - when considering whether the public interest balancing exercise carried out by the Commissioner was conducted appropriately.

30. In response on behalf of the Commissioner, Mr Perry submits that:

*Legitimate economic interest*

(1) There is an important difference – drawn out in the Commissioner’s guidance – between ‘legitimate’ and ‘illegitimate’ economic interests. The latter include, for example, anti-competitive practices such as abuse of a dominant market position. It is important to distinguish between a commercial business which could theoretically engage in illegitimate practices – because of its dominance in the market, for instance – and its actual practice in respect of which the requested information relates.

(2) Here, it is submitted that it was entirely legitimate for RACL to contribute to an infrastructure project, and there is nothing to suggest that this would breach competition law. Nor does either the Aarhus Convention or the EIR exclude protection of the legitimate economic interests of large or even dominant commercial enterprises.

(3) While it may be more difficult for a dominant business to demonstrate harm to such interests by the disclosure of information (depending on the facts of the case), there is no reason in principle why the EIR exceptions do not apply to such businesses nor why their commercial confidences should not be respected, subject to an appropriate public interest balancing exercise.

*Monopolistic position*

(4) The argument that RACL is ‘monopolistic’ and thus has no competitors, implies that RACL cannot have a *legitimate* economic interest, and there is therefore no prospect of regulation 12(5)(e) applying and/or, even if it does, any adverse effect is insufficiently weighty to engage the exception.

(5) The Aarhus implementation guide has been cited by Mr Driver in support of his submission that assistance of competitors is an important feature of assessing the adverse effect of disclosure. However, the *Solvay & others v. Region Wallone [2012] 2 C.M.L.R. 19*, confirmed that the implementation guide has no binding force and is merely an explanatory document.

(6) There are other ways in which disclosure might harm a commercial party's economic interests, for example by affecting its bargaining position in current or future negotiations. Disclosure might also cause undue and significant reputational damage, for example if the information were misleading.

(7) In short, there is no one category of legitimate economic interests which might be harmed. The regulations are deliberately general to capture various kinds of harm. There is nothing in the Convention itself or the Guide to suggest that it is impossible for a large, dominant or even monopolistic enterprises to enjoy the protection of regulation 12(5)(e).

#### *Misleading economic forecasts*

(8) The evidence does not bear out the suggestion the SIRC economic forecasts of the impact of hosting the Open by RGC are an ex post facto justification of a decision. On the contrary, the evidence shows that the forecasts were derived from SIRC's independent research carried out in advance of the decision. The research was even cited in the various reports to various bodies involved in making the decision.

(9) The academic papers from the USA to which Mr Driver referred question the integrity of economic impact assessments and describe 'mischievous practices. However, there is no suggestion or evidence of any bad faith in this case.

#### *Adverse effect*

(10) Mr Perry contests Mr Driver's argument that the severity of any impact on RACL's economic interests is reduced because of its dominant position. Mr Perry says that, as the Tribunal found in *Hogan v ICO and Oxford City Council (EA/2005/0026 and 0030)*, the threshold for 'would be adversely affected' is de minimis. There is no presumption or rule that the larger the commercial enterprise, the lower the impact on their economic interests. In each case, the facts must be examined. In this case, RACL's position has been described as 'unassailable', so it is significant that RACL made a contribution to the Project at all.

(11) Mr Perry points out that Mr Driver accepts in his grounds of appeal that '*using Sandwich as a precedent*', other hosts of the Open could seek to argue that RACL should make a contribution to infrastructure projects in their local area. Though he describes this as 'unlikely', in fact RACL has provided evidence of just that in the RACL correspondence.

(12) In considering whether there would be an adverse effect of disclosure, the Commissioner was entitled to adopt a realistic approach to the evidence available – and was entitled to conclude that, on the balance of probabilities, the evidence showed that there *would* be such an effect.

### *Public domain*

(13) The inadvertent disclosure in 2017 of RACL's proposed contribution should not be overstated because:

- (a) It was an error, not a calculated decision;
- (b) It was only a proposed contribution, not the actual one; and
- (c) The Panel can consider for itself the similarity or not between the proposed figure and the actual figure.

(14) The failure to remove this information from the public domain should also not be misinterpreted. The incident prompted RACL to ask for the information to be removed, and for its contribution **not** to be placed in the public domain. The Council undertook to comply with RACL's requests.

(15) From this it is clear that RACL did not want the information disclosed, and was unhappy that it had been, albeit inadvertently.

### *Time has moved on*

(16) Mr Perry drew attention to the case of *APPGER v. ICO and FCO [2015] UKUT 0377(AAC)* which confirmed the 'orthodox approach' previously taken by the Tribunal, namely that the timing of the assessment of the public interest is the date of the public authority's refusal to disclose the requested information (not the date of the Commissioner's decision notice, nor the date on which the Tribunal or any appellate body may hear the case and determine the public interest balance for itself).

### ***Balancing the public interest***

#### *Position of public authorities*

(17) Budget cuts and pressures on local authorities cut both ways. While they may increase the need for scrutiny and accountability, they render local authorities more dependent on the private sector – and thus heighten their need to demonstrate their trustworthiness in protecting commercial confidences.

(18) In this case, trustworthiness and protection of commercial confidence was essential to the hosting of two further Opens at RGC after 2020 – hence preserving the prospect of further significant economic benefits for the Council and surrounding areas.

(19) Giving confidence to the private sector in transacting with public bodies must have been in the minds of the creators of the exceptions to the EIR regime in the first place.

(20) The Council recognises that it cannot contract out of the EIR, recognises the presumption in favour of disclosure and notes that disclosing RACL's funding contribution would allow the public to see how much public money was being spent on the Project.

(21) However, the public interest is served by withholding the requested information in two ways: first to protect the commercial confidences of RACL and secondly to maintain the commercial confidence of the Council to be able to work with partners like RACL.

*Related or similar information in the public domain*

(22) Comparison with the response received from the Department for Communities on Portrush does not assist for several reasons: first, the Tribunal is not bound by the decisions of other public authorities; secondly, the scale of works and therefore the costs at Portrush was very different: thirdly, there is a big difference between *no* contribution as in Portrush, and *a* contribution as in this case; finally, it is unclear whether the works at Portrush were a pre-condition of hosting the Open or part of wider government plans in the area unlike this case where the works were specifically designed for and can only be used during the Open while it is being held at RGC.

*Economic benefits deriving from the Project – and hosting of the Open*

(23) Whatever the methodology used for the 2020 economic forecasts, in 2011 SIRC studied the economic impact of the 2011 Open held at RSG using robust empirical evidence and multipliers supplied by Tourism South East (a body independent of SIRC).

(24) SIRC's forecasts for 2020 projected an overall economic benefit of nearly £80M. Even if this figure overstated the economic impact by 50%, this would still dwarf the total indicative costs of the Project by a factor of 10.

(25) Numerous reports, projections and other materials about the Project are already in the public domain so, even without the precise quantum of RACL's contribution, meaningful public debate is possible about the Project and its value for money.

***Discussion***

31. The Tribunal first considered Mr Driver's submission about the unfairness of withholding certain materials from him.

***Unfairness of evidence being withheld from Mr Driver***

32. Although Mr Driver did not pursue at the hearing his written submission that it was unfair to withhold certain evidence from him, the Panel considered this carefully. Mr Driver had been provided with only redacted versions of various letters from the

Council to the Commissioner explaining why the requested information had been withheld. Mr Driver had also wished to see the RACL correspondence on which the Commissioner had relied to find that disclosure of the requested information would have an adverse effect and thus engage the protection of regulation 12(5)(e). As mentioned above, at the hearing the Panel was provided with the RACL correspondence and Mr Driver was provided with the dates of this correspondence and the gist of it.

33. The dates of the correspondence showed that the Council had obtained evidence from RACL about the effect of disclosing its confidential information *before* responding to Mr Driver's request for information. The Council had obtained more evidence from RACL during its internal review. Contrary to Mr Driver's speculation, therefore, the RACL correspondence was not obtained *after* the decisions had already been taken.

34. The Panel considered the Tribunal's Practice Note on Closed Material, a copy of which was shared with Mr Driver. This explains that, where disclosure of the disputed information - and/or supporting evidence - would defeat the object of the exercise, the law permits the Tribunal to deviate from the normal rule about all material seen by the Tribunal being available to all parties. However, such deviation is permissible only so far as is necessary to ensure that the purpose of the proceedings is not defeated.

35. The Panel accepts that there is inevitably *some* prejudice in material being withheld from a party requesting it, but considers that this prejudice is mitigated by:

- (a) The Tribunal's expertise, and exercise of an investigatory rather than adversarial function;
- (b) The Commissioner being an independent, expert regulator who does not take sides. On the contrary, the Commissioner's role is to point out the strengths and weaknesses of both parties' cases in assessing the correct application of the law and regulations;
- (c) Informing parties excluded from a closed session as soon as possible after it has taken place as much as possible of what transpired, with maximum possible candour – and likewise in the written reasoned decision afterwards;
- (d) In this case, the Open Bundle containing an explanation of the reason for withholding the information. For example, the Council's letter to Mr Driver dated 12 July 2018 explained that disclosing the requested information '*...could result in rail infrastructure funding requirements for the Open becoming the norm across all ten venues, all of which are rail-served.*' It went on to say that this would damage the business of commercial investors, and limit development funding to golfing from Championship to community level.
- (e) The gist of the RACL correspondence being shared with Mr Driver at the hearing.



36. We are therefore satisfied that the withholding of the requested information, and evidence of the detailed reasons for doing so, was done only to the extent necessary to ensure the purpose of the proceedings was not defeated. Moreover, the prejudice to Mr Driver's case - mitigated as described above - was justified in the interests of justice overall.

***The four elements of regulation 12(5)(e) set out in the Bristol City case***

37. The Panel went on to consider the four elements set out in the *Bristol City* case.

*Information is 'commercial' in nature*

Mr Driver expressly accepted in his submissions that the requested information is 'commercial' in nature, so there is no dispute about this element.

*Confidentiality is provided by law*

38. Mr Driver does not expressly dispute that the requested information is subject to confidentiality provided by law. On the evidence provided, the Panel agrees with the Commissioner's findings of fact that the information was not trivial, was not in the public domain and was shared in circumstances creating an obligation of confidence and hence had the necessary quality of confidence for the common law duty of confidence to apply.

39. Further, the Council gave undertakings to RACL to keep the information confidential and not make it public, and these assurances were later embodied in a contractual confidentiality clause between the Council and RACL. Hence confidentiality is also provided by a contractual obligation.

40. The Panel is satisfied that the Commissioner made no error of law in concluding that confidentiality is provided by law in this case.

*Confidentiality is protecting a legitimate economic interest*

41. Mr Perry points out that the legitimate economic interest must – according to the *Elmbridge* case cited above – be that of the person the confidentiality is designed to protect. In this case, that person is RACL.

42. We are not persuaded by Mr Driver's argument that a 'monopolistic' or 'cartel-like' entity cannot have *any* legitimate economic interest which attracts the protection of regulation 12(5)(e).

43. We accept that, as indicated in the Aarhus guidance, it is more difficult for monopolies to demonstrate a legitimate economic interest because this is generally conceived in terms of competition with rivals.

44. However, we do not accept that RACL is a 'monopolistic' or cartel-like in the way Mr Driver submits and observe that there is no suggestion that RACL has achieved its dominant position in the field of golf competitions through unlawful anti-competitive practices.

45. We note too that Mr Driver appears to accept that RACL may suffer *some* adverse effect of disclosure but argues that its dominance and wealth enable it to mitigate such damage. The Panel observes that nowhere in either EIR or the Aarhus Convention is protection of the legitimate economic interests of large, dominant or even monopolistic entities *excluded* from protection or subject to special conditions such as a requirement to mitigate. In the Panel's view, the ability to mitigate does not undermine the legitimacy of the economic interest sought to be protected, nor should it be regarded as negating any adverse effect arising as a result of disclosure of confidential information.

46. Further, we consider that a large or even dominant entity is entitled to confidentiality of their commercial information both at common law and contractually even when that entity is interacting or transacting with a public authority. Of course, we acknowledge that public authorities are subject to a duty to disclose under the EIR regime but observe that such duty is not absolute but instead qualified by the public interest balancing exercise required by regulation 12(1)(b).

47. Finally, the Panel accepts Mr Perry's submission that the term 'legitimate economic interest' is a broad concept which includes the commercial entity's ability to negotiate unhindered elsewhere. Mr Driver concedes this in principle – and implicitly accepts that, in this case, there was a 'deal' to be done with RACL rather than a 'take-it-or-leave-it' position. However, Mr Driver argues that there is no evidence of RACL being involved in negotiations elsewhere nor is there any realistic prospect of any.

48. We disagree. On the basis of the evidence before us, we find as a matter of fact that on the balance of probabilities the nature of the legitimate economic interest that RACL was concerned to protect was (according to the Council's response to Mr Driver dated 19 September 2018 cited in paragraph 5 above) '*...a commercial negotiating position in the context of [RACL]'s existing or future negotiations.*' This was consistent with the RACL correspondence, the gist of which shared with Mr Driver and is quoted in paragraph 18 above. This refers to RACL's '*other commercial investments*' (emphasis added).

49. The Panel is satisfied that RACL has genuine economic interests at stake here, these interests are legitimate, and the Commissioner was not wrong in law to reach such a conclusion in the decision notice.

*Confidentiality would be adversely affected by disclosure.*

50. In the decision notice, the Commissioner explains that once the first three elements laid out in *Bristol City* are established, she considers '*it is inevitable that this [fourth] element will be satisfied*'.

51. We recognise the close connection between the third and fourth elements of the *Bristol City* analysis. For the purposes of this decision, however, we have considered separately the *adverse effect* of disclosure as opposed to the *legitimate economic interest* being protected.

52. As Mr Driver himself recognises in his written submissions, disclosure of the information might create an expectation that RACL is likely to contribute towards the cost of any works to support and facilitate the hosting of the Open at other venues – and that *‘such an expectation would, of course, be likely to have an adverse impact upon [RACL’s] economic interests’*.

53. However, Mr Driver suggests that an adverse effect is unlikely because the spectator capacity and management problems at Sandwich railway station resulted from the recent introduction of the HS1 train services on the Sandwich line. He points out that none of the other Open hosts is served by HS1. We consider this too narrow an approach: it is not difficult to imagine that RACL negotiates with other host venues, both new and existing, on a variety of matters for a range of reasons beyond the service of a railway station by HS1. Indeed, Mr Driver recognises that disclosure of the requested information could raise the *‘general principle of [RACL] contributing towards the costs of any other significant [Open]-related infrastructure project undertaken by event hosts’* – but he says that neither RACL nor the Council in their evidence to the Commissioner appear to have identified the need for any forthcoming infrastructure works of a similar scale and cost as the Project.

54. On the basis of the evidence before us, however, particularly the RACL correspondence, it is clear that RACL’s contemporaneous concerns about the adverse effect of disclosure of the requested information were explicitly set out to the Council before it responded to Mr Driver’s request for information. In the Panel’s view, such concerns were not remote or unlikely nor abstract, theoretical or wholly in the future. On the contrary, on the basis of the RACL correspondence we are satisfied - as a matter of fact - that more likely than not the disclosure of the requested information *would* adversely affect RACL’s ability to conduct both current as well as future negotiations with other potential hosts of the Open and thus directly impact RACL’s other commercial investments.

55. We note Mr Driver’s argument that ‘related’ or ‘similar’ information was already in the public domain and would therefore limit the adverse effect of disclosure of the requested information. For example, Mr Driver cites the inadvertent disclosure in September 2017 of the proposed amount of RACL’s contribution to the Project; and the disclosure in November 2019 by the Department for Communities in Northern Ireland that RACL made no contribution to the regeneration works and new railway station in preparation for the 2019 Open at Portrush.

56. The Panel does not agree that either of these matters has a bearing on the adverse effect that would be suffered by RACL were the requested information to be disclosed. As regards the inadvertent disclosure of RACL’s proposed contribution, we consider that there is fundamental difference between a ‘proposed’ figure and an ‘actual’ figure. In other words, the adverse effect of disclosing the actual figure would be qualitatively different from revealing the proposed figure, whether or not the proposed and actual figures were similar. Likewise, we consider that there is an infinite difference between ‘no’ contribution at Portrush and ‘a’ contribution at Sandwich. We therefore consider that no conclusion about the adverse effect of

disclosing RACL's contribution to the Project can be drawn from the disclosure of its non-contribution to the station at Portrush.

57. As for Mr Driver's argument that the requested information is now historic and would therefore have limited (if any) adverse impact on other negotiations, we note – and accept - Mr Perry's submission that the relevant time for assessing the public interest is the date of the Council's decision to withhold the information. We consider that this was therefore the appropriate time to consider whether or not there would be an adverse effect in disclosing the information.

58. We are satisfied that the Information Commissioner was not wrong in law but correct to conclude that, in the circumstances of this case, the confidential information sought by Mr Driver's request engaged the exception in regulation 12(5)(e).

### ***Balancing the public interest***

59. Having found that the exception in regulation 12(5)(e) is engaged, the Panel has gone on to consider the manner in which the Commissioner weighed up - in accordance with regulation 12(1)(b) - the competing public interests in favour of withholding the information on the one hand, and of disclosing it on the other.

60. We accept Mr Driver's emphasis on the presumption in favour of disclosure under the EIR regime. We also accept his argument that there is a public interest in disclosing the expenditure of local authorities on infrastructure projects. We consider this a strong argument where, as here, the immediate beneficiary of the Project was apparently the Open – an international sporting event – owned and operated by a commercial entity, RACL, rather than the taxpayers of the host area or the public more generally.

61. We have already explained above our conclusions about the adverse effect that disclosure of the requested information would have on RACL's legitimate economic interests. We consider this carries some weight in the balance in favour of withholding that information.

62. Further, we note and accept the Council's evidence in the Open Bundle, the effect of which is captured in the following passage:

*“...[The Council] needs to be able to enter into agreements with commercial companies in order that [the Council] can, in this instance, support the growth of the county's economy as well as drive a wider societal benefit...If information impacting commercial companies' finances and commercial information are placed into the public domain as a result of doing business with [the Council] as a public body, it could damage [the Council's] ability to do business with other commercial companies and seek investment from them, thereby impacting on [the Council's] ability to reduce the cost on taxpayers and deliver outcomes in line with our legitimate purpose.”*

63. These considerations weigh in favour of withholding the information because of the detrimental impact on the Council's ability to obtain investment from commercial

entities if it is unable to keep details of such deals confidential. This, in turn, would directly and adversely affect the Council's ability to reduce the financial burden on taxpayers in Kent by obtaining external investment which is projected to unlock significant economic gains for the area over a sustained period. We note too the importance of less quantifiable benefits such as those that arise from increased interest in visiting the area by tourists beyond the duration of the Open itself.

64. We are not persuaded by Mr Driver's argument that the Council was unduly influenced or even coerced by economic forecasts which he says are misleading. We note that the 2011 study by SIRC about the economic impact of the Open hosted by RSG was based on *actual* attendance and empirical evidence such as surveys rather than forecasts. We consider that this research was not only, as Mr Perry contended, robust but also that the Council and other local authorities in Kent are much better placed than either of the parties in this case to assess whether or not the economic impact of the 2011 Open was reliably assessed by SIRC in its report.

65. While SIRC's forecasts for 2020 may have been incapable of precise verification before the event, we consider it understandable for the Council and other funding partners of the Project to have placed on those forecasts such reliance as they saw fit in light of their direct experience of having hosted the same event less than a decade previously. We also note that RACL's commitment to holding the Open at RGC extended to two further occasions before 2036, bringing the prospect of significant additional economic benefits stretching into the future.

66. Finally, we consider that there is ample material already in the public domain – in the form of numerous reports from the Council, KMED and SELEP, as well as local media coverage – to facilitate public debate about the Project and whether it represented value for money to the funding partners, including the Council. We see no reason to believe that the disclosure of the precise amount of RACL's contribution to the Project would realistically enhance that debate to any significant degree.

67. In conclusion, Mr Driver has not satisfied us that the Commissioner should have exercised her discretion differently when balancing the competing public interests. We agree with the Commissioner that in all the circumstances of the case, on balance the public interest favours the protection of the confidentiality of commercial information of RACL which disclosure would adversely affect.

68. Accordingly, we find that the Commissioner correctly decided that the public interest favours withholding the information sought by Mr Driver, and maintaining the exception from disclosure in regulation 12(5)(e).

***The application of the Malnick decision – and the exception in regulation 12(5)(f)***

69. For completeness, the Panel considered the application of the Upper Tribunal decision in *ICO v Malnick and ACOBA [2018] UKUT 72 (AAC)(3)* to cases such as this where the public authority has relied on two exceptions and the Commissioner decides that one applies so does not consider the second.

70. In this case, the Panel agrees with the Commissioner's conclusion regarding regulation 12(5)(e) so is not obliged to consider whether regulation 12(5)(f) applies. However, it is still open to the Panel to consider whether regulation 12(5)(f) applies – or at least make observations in order to assist the parties in assessing the prospects of appeal or, in the event of an appeal, assisting the Upper Tribunal. Having considered the matter carefully, the Panel declines to reach a conclusion whether regulation 12(5)(f) is engaged in this case. Our reason is that the parties' evidence and submissions on regulation 12(5)(f) are scant and - without requiring the parties to adduce further evidence, and make additional submissions, and hence delay the hearing and outcome of Mr Driver's appeal - the Panel considers there is currently insufficient basis on which to make a reasoned decision about the application of regulation 12(5)(f) in this case.

***Conclusion***

71. For the above reasons, we uphold the Commissioner's decision notice and dismiss the appeal.

**(Signed)**

**ALEXANDRA MARKS CBE**

**DATE: 8<sup>th</sup> April 2021**