



Appeal Number: EA/2021/0105

**First-Tier Tribunal
(General Regulatory Chamber)
Information Rights**

**Heard on the Tribunal CVP.
On: 7th January 18th & 19th May 2022 &
Deliberations on 5th July 2022.**

Panel: Brian Kennedy QC, Marion Saunders, and Suzanne Cosgrave.

Between:

Laurence Elks

Appellant:

and

The Information Commissioner

First Respondent:

and

The Lee Valley Regional Park Authority

Second Respondent:

Representation:

For the Appellant: Laurence Elks as a Litigant in Person.

For the 1st Respondent:

Eric Metcalfe, of Counsel (in the written Response of 17th July 2019).

For the 2nd Respondent:

James Goudie QC and Ronnie Dennis of Counsel.

Decision

The tribunal allows the appeal and finds that the Information Commissioner erred in finding that the information the Public Authority holds that falls within the Scope of part 1 of the Request is exempt under Regulation 12 (4) (e) EIR. (Internal Communication) as stated in the Decision Notice (Reference IC -42522-R5W4). However, the Tribunal finds that the same information is exempt under Regulation 12 (5) (e) and the public interest favours maintaining the exemption.

Action Required:

The Tribunal do not require any action on the part of the Second Respondent.

REASONS

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) as modified by regulation 18 of the Environmental Information Regulations 2004 (“the EIR”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice dated 29 March 2021 (reference IC-42522-R5W4), which is a matter of public record.

Factual Background to this Appeal:

[2] Full details of the background to this appeal, the Appellant’s request for information and the Commissioner’s decision are set out in the Decision Notice (“DN”) and not repeated here, other than to state that, in brief, the appeal concerns the question of whether Lee Valley Regional Park Authority, (“the PA”) have correctly engaged regulation 12(4)(e) EIR.

History and Chronology:

[3]

31 January 2020 The Appellant wrote to the PA and requested the following information:

A list sufficiently identifying all those parcels of land (or “sites”) which have been identified by the Authority’s Land and Property Review Working Group (“LPRWG”) for potential disposal as areas of land (“sites”) which could be considered as land not required for Regional Park purposes.

In relation to each such site the analysis (contained either in the minutes of the LPRWG or in any working paper presented to the LPRWG) setting out the basis of its identification for potential disposal as an area of land or site which could be considered as land not required for Regional Park purposes.

29 February 2020 The PA responded to the Appellant stating that the information was withheld under regulation 12 (4)(e) and that the public interest favoured maintaining this exception.

28 May 2020 The PA conducted an internal review and upheld its position.

Relevant Law:

[4]

Regulation 5 EIR - Duty to make available environmental information on request:

(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

(5) Where a public authority makes available information in paragraph (b) of the definition of environmental information, and the applicant so requests, the public authority shall, insofar as it is able to do so, either inform the applicant of the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information, or refer the applicant to a standardised procedure used.

(6) Any enactment or rule of law that would prevent the disclosure of information in accordance with these Regulations shall not apply.

Regulation 12 EIR - Exceptions to the duty to disclose environmental information

(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.

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

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

(a) it does not hold that information when an applicant's request is received.

(b) the request for information is manifestly unreasonable.

(c) the request for information is formulated in too general a manner and the public

authority has complied with regulation 9.

- (d) the request relates to material, which is still in the course of completion, to unfinished documents or to incomplete data; or
- (e) the request involves the disclosure of internal communications.

(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—

- (a) international relations, defence, national security, or public safety.
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature.
- (c) intellectual property rights.
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.
- (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; or
- (g) the protection of the environment to which the information relates.

(6) For the purposes of paragraph (1), a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

(8) For the purposes of paragraph (4)(e), internal communications include communications between government departments.

(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 paragraphs (5)(d) to (g).

(10) For the purposes of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information.

Commissioner's Decision Notice:

[5] In relation to regulation 12(4)(a), the Commissioner outlined that the PA are entitled to refuse to disclose information to the extent that it does not hold that information when the Appellant's request is received. Part 2 of the request concerns analyses associated with parcels of land (or sites) that had been identified as being suitable for potential disposal as land not required for park purposes which for the basis of Part 1 of the request. The PA confirmed that at the time the request was received they do not hold the information.

[6] The PA informed the Commissioner that, in its view, the analyses that the Appellant is seeking does not exist as written analysis as to why a discussion occurred concerning a parcel of land (or site) and its potential disposal is not set out.

[7] The PA therefore concluded, relying on regulation 12(4)(a) that it is confident that it does not hold the information requested in Part 2 of the request. Further, that there is no information which would constitute an analysis of any kind the Appellant is seeking in his request.

[8] The Commissioner agreed with the PA that whilst minutes show that the LPRWG might review and discuss potential disposals, these discussions cannot be categorised as an analysis. The Commissioner accepted that analyses of the kind that the Appellant requested do not exist and that minutes cannot be categorised as analyses of why those parcels or sites may be suitable for disposal. Further, the Commissioner upheld the PA's decision to rely on regulation 12(4)(a) for part 2 of the request.

[9] The Commissioner raised that regulation 12(4)(e) of the EIR allows a Public Authority to refuse to disclose the information to the extent that the request involves the disclosure of internal communications. This regulation is subject to the public interest test under regulation 12(1)(b). The Commissioner referred to her published guidance in order to define 'internal' for the purposes of this request.

[10] In relation to Part 1 of the request the Commissioner is satisfied that the term 'internal' can be applied to the complete list of sites that might be considered for disposal.

[11] Turning to 'communications', the Commissioner referred to her published guidance in order to define this term for the purposes of this request. The Commissioner is satisfied that the list of sites for potential disposal can be categorised as a 'communication'. The Commissioner determined that the issue is whether the complete list of proposed sites for disposal by the PA held at the time of the request is an internal document and is a communication. The Commissioner is satisfied that the list meets both of those criteria. The Commissioner went on to consider the public interest test.

[12] Considering the complainant's arguments for disclosure, the Commissioner considered the public interest test under regulation 12(1). The Commissioner appreciates that there is a public interest in transparency and the EIR's presumption is in favour of disclosure.

[13] When deciding whether to maintain the regulation 12(4)(e) exception, the Commissioner considered the PA's concern regarding both the LPRWG minutes and

the list of sites and considered that there is some crossover between a meeting, at which individual parcels of land with the potential for disposal on the list are discussed, and the complete list of such parcels or sites. Having reviewed the submissions of the PA, the Commissioner is persuaded that whilst many individuals have strong views about the natural environment and land, the publication of the complete list would generate a high volume of correspondence and queries from the public and such communications would not be in the public interest as it would take the officers away from their day-to-day duties.

[14] The Commissioner appreciates the Appellant's concern about the process for members of the public to make representation about parcels of land or sites; however, the Commissioner reminded the Appellant that there is such a process and as such the public interest favours maintaining the exception under regulation 12(4)(e).

Grounds of Appeal:

[15] The Appellant challenges the DN and puts forward four grounds of appeal. The Appellant argued that the list of sites is not an 'internal communication' within the meaning of regulation 12(4)(e). The Appellant asserts as The LPRWG terms of reference included "*to review the land and property portfolio*" and "*develop a land and property acquisition strategy*" that the LPRWG are a working group who undertook reviews of potential areas of land and that the identification of the sites was intended to precipitate specific further action by the officers,

[16] The Appellant states that the balance of the public interest favours the disclosure of the requested information, which refutes the application of the exception under regulation 12(4)(e) applied by the PA and upheld by the Commissioner. The Appellant referred to section 12 of the Park Act to argue that the PA was set up by an Act of Parliament having the overriding statutory duty to develop, improve, preserve, and manage the Park and having regard to this duty, the public interest favours disclosure of the requested information.

[17] The Appellant states that the argument against disclosure that officers are too busy is a; "*stock argument available to any public authority seeking to preserve*

secrecy” and is not itself an argument against disclosure. Further, that the PA offered no evidence to support the claim that complaints are anticipated or likely. The Appellant averred that the Commissioner gave no weight to the argument to ensure that members of the public are aware of the PA’s plans or proposals. The Appellant contends that the Commissioner failed to recognise that when identification of land for potential disposal is contentious, there is a strong public interest in disclosure and that there is a strong case for understanding how decisions are arrived at.

[18] The Appellant, within his Grounds of Appeal challenges, what he says are two findings of fact by the Commissioner, namely:

- a. The LPRWG does not identify parcels of land; and
- b. The LPRWG does not generate any analysis of parcels of land, nor does any analysis provided to it by officers.

Commissioner’s Response:

[19] In response to Ground 1: the Commissioner contends that the Appellant has not demonstrated any error on the part of the Commissioner in her assessment. The Commissioner asserts that there is no suggestion that the information is not in fact an ‘internal communication’ nor that the information in question had left the PA’s ‘internal sphere’. The Commissioner argues that this ground of appeal is made without merit.

[20] In response to Ground 2: the Commissioner denies each point put forward by the Appellant. The Commissioner refers to paragraph 50 of her DN and states that there is no basis for the claim that these factors were not taken into account. Paragraph 50 reads as follows:

“The complainant’s arguments for disclosure can be summarised as follows:

- *LVRPA has a statutory duty to preserve, develop and manage the Park. Where, it is possible that parcels of land are to be redesignated for development, and because the majority of the land identified for potential disposal is Green Belt/Metropolitan Open Land, there is a public interest that information about potential development is disclosed.*

- *There is a clear public interest that where the LVRPA effectively decides to go against its own published Area Proposals to promote Park compliant uses, this is made known to members of the public.*
- *Members of the public should have the opportunity to make their own representations at the time that those authorities are carrying out consultations. If LVRPA's representations to redesignate land for development are not known and publicised, interested parties may be out of time to make representations.*
- *Part 1 reports (which contain proposals to dispose of land) may be published five days before a public meeting but LVRPA's affairs are not actively followed by the majority of people within the Park. If a proposal appears on the LVRPA's agenda that a specific parcel of land be approved for disposal, the chances are small that interested parties would notice the agenda in time to make representations."*

[21] The Commissioner maintains that she recognised that some decisions may well be controversial or contentious, however, there is nothing in the Commissioner's DN to show that she failed to take into account that these factors were factors in favour of disclosure. In response to the assertion that the management of the Park by the PA has a great deal of public interest, the Commissioner reiterates that she was entitled to conclude that the public meeting process satisfies that interest. Further, the CJEU's decision in *Land Baden-Wurtemberg* supports her finding.

[22] The Commissioner denies both grounds of appeal. In relation to the first ground, the Commissioner refers to paragraph 5 of her DN whereby she states, "*Members take key decisions, e.g. a decision in principle that land owned by LVRPA may be disposed of, at a public meeting*". The Commissioner contends that the Appellant is cherry-picking and ignoring the broader context of the evidence which the Commissioner took into account. The Commissioner refers to *Berend v Information Commissioner and LB Richmond* (EA/2006/0049, 12 July 2007) in response to the Appellant's second objection which states that requests are "*applicant and motive blind and as such public authorities are not expected to go behind the phrasing of the request*". The Commissioner maintains that she took full account of the various points raised by the Appellant and invites the Tribunal to dismiss the appeal.

Appellant's Reply:

[23] The Appellant refutes the Commissioner's response and provided attachments to support his assertions. The Appellant states that the Commissioner has avoided the argument that the decision of the LPRWG constituted an internal communication or something more substantial by adopting the PA's submission without any enquiry or analysis. The Appellant submits that the Commissioner erred in her finding of fact pursuant to section 58(2) FOIA.

[24] The Appellant added further detail in relation to his second ground of appeal. The Appellant states that only one or two members out of the 28 members of the PA will be familiar with the issues raised by the proposal to sell off any particular piece of land. The Appellant states that whilst the PA are democratically accountable, the force of accountability concerning issues of local concern are diluted by indirect and geographically diffuse representative arrangements.

[25] In relation to whether the Commissioner was entitled to conclude that the requested information was not held, the Appellant states that he requested: *"a list of parcels of land identified by the LPRWG as land not required by the Park Authority; and in relation to each such parcel of land the analysis (contained either in the minutes of the LPRWG or in any working paper presented to the LPRWG) setting out the basis of its identification."* The appellant asserts that the PA has attempted to keep information concerning the role of the LPRWG out of the public view. Further, that the Commissioner is inviting the Tribunal to *"go on a hunt"* for the precise meaning of analysis when it is clear, that the process outlined constitutes analysis by the LPRWG of the utility of the parcels of land identified by officers in serving the purposes for which the Regional Park was created. At the hearing in this Tribunal on 7th January 2022, the Appellant made an application to join the PA as a Second Respondent. The Tribunal granted this application and provided clear and specific Directions illustrating the issues identified as requiring evidence from the PA (see Tribunal Decision and Case Management Directions dated 10th January 2022).

Second Respondent's Submissions:

[26] The PA referred to the witness statement of Mr Shaun Dawson (at OHB4 pages 028 to 053) whereby he sets out the background to and context surrounding the Appellant's request for information as follows:

"1. A list sufficiently identifying all those parcels of land which have been identified by the Authority's Land and Property Review Working Group for potential disposal as areas of land which could be considered as land not required for Regional Park purposes.

2. In relation to each such parcel of land the analysis (contained either in the minutes of the Land and Property Review Working group or in any working paper presented to the Land and Property Review Working Group) setting out the basis of its identification for potential disposal as an area of land which could be considered as land not required for Regional Park Purposes."

[27] The PA maintained that it does not hold any information within the scope of the second request, for the reasons explained in Mr Shaun Dawson's statement (§94-102). The PA argued that the LPRWG is not a decision-making body. It does not receive working papers setting out the basis for identifying land for potential disposal. Nor do any of its minutes contain any such analysis. This is because it is not the role of the LPRWG to make that assessment or take any decision in that regard. Its role is limited to sharing information about plots of land and receiving updates on the progress of any disposal.

[28] The PA state that it does hold information within the scope of the first request, in the form of a list of sites; *"the List"*, for potential disposal prepared by officers and discussed with the LPRWG. The PA had previously refused to disclose any part of the List, relying on the exemption for internal communications under Reg. 12(4)(e) EIR. However, the PA reviewed its position in light of this Tribunal's Case Management Directions, and in particular the European Court of Justice's decision in *Land Baden-Württemberg v D.R.* [2021] Env. L.R. 23, where the Court ruled that:

“Article 4(1)(e) of Directive 2003/4 of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313 must be interpreted as meaning that the term “internal communications” covers all information which circulates within a public authority and which, on the date of the request for access, has not left that authority’s internal sphere—as the case may be, after being received by that authority, provided that it was not or should not have been made available to the public before it was so received.”

[29] The PA outlined that the remainder of the List has been redacted, for two reasons. Firstly, the PA has redacted the names of those plots of land identified for potential disposal, where the fact the land has been so identified has not left the PA’s internal sphere. In respect of those plots, the PA maintained that the exemption for internal communications applies, and that the public interest in maintaining the exemption outweighs the public interest in disclosure, for the reasons explained in Mr Shaun Dawson’s statement (**§64-93**). Relying on the evidence provided by Mr Shaun Dawson the PA contended that the disclosure of that information would have, and indeed has had, a chilling effect on discussions between Members and officers about potential land disposals. Members and officers are reluctant to discuss parcels of land for potential disposal if any such proposal, however tentative, provisional, and far-removed from any actual decision, could be revealed to the public. This chilling effect is already demonstrated by the fact the LPRWG has not met since the Appellant’s request was received, on 31 January 2020. They argue that the public interest in maintaining that exemption outweighs the public interest in disclosure, notwithstanding the presumption in favour of disclosure under Reg. 12(2) EIR.

[30] Secondly, the PA averred that in the version of the List now provided to the Appellant, the PA has redacted information that falls outside the scope of the request. In particular:

- a. Reference to one plot of land that was identified for potential disposal, but not on the basis that it was “*not required for Regional Park purposes*”. That particular plot was identified for potential

disposal but on the basis, it would continue to be used for Park purposes (**§67-68**); and

- b. The information contained in the List that goes beyond identifying the relevant parcels of land (the subject of the Appellant's first request) and does not constitute "analysis" of the kind sought by the Appellant in his second request, for the reasons explained in Mr Dawson's statement (**§94-104**).

[31] The PA state that If the Tribunal were to find that any of the information withheld as out of scope or under Reg. 12(4)(e) is in fact in scope and/or not covered by that exemption, the PA would respectfully request a further opportunity at that stage to consider whether any other exemption applies, and – if so – where the balance of public interest lies. The PA acknowledged that any such assessment can only be made with reference to the particular information concerned.

[32] Concerning the PA's duty to advise and assist the Appellant in refining his request, it was submitted that under regulation 9 EIR, the PA did not seek to frustrate the second request by adopting a strict interpretation and further the Appellant's request could not be refined in order to obtain any other analysis.

[33] With reference to the Tribunal's questioning of the PA concerning the mechanism that exists to enable public involvement in such key EIR issues, the PA argued that it was open to scrutiny in a variety of ways. The decision to sell land is taken at a public meeting of its members which is signalled in advance. the PA is not a Planning Authority so any decision to change the status of LVRPA land from Green Belt or Metropolitan Open Land would be taken by a relevant Planning Authority which would be required to consult publicly on such a change.

[34] The PA stated that the specialist/technical issues relating to land are addressed in Mr Shaun Dawson's statement. The PA acknowledged the European Court's judgment in *Land Baden-Wurttemberg* and provided the Appellant with a redacted version of the list. In response to the Tribunal seeking to probe further the issue of the role of the Working Group, the PA averred that the LPRWG discusses land identified by officers for possible disposal, and the progress of potential disposals.

[35] The PA did not dispute that there may be circumstances in which it considers disposing of land that has been identified as potentially suitable for a different purpose in the plan it has adopted under section 14(1) of the Lee Valley Regional Park Act 1966. Further, the PA argued that it is not under any legal obligation to consult members of the public prior to any disposal of land, or indeed the adoption of any Park, plans under section 14(1). The PA welcomed the opportunity to address the exemption under 12(4)(e) EIR. The PA carefully and conscientiously balanced the public interest in maintaining the exemption for internal communications against the public interest in disclosure and held that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Appellant's Reply to the Second Respondent's Submissions:

[36] The Appellant did not contest that there may be legitimate considerations justifying the sale of land due to a change of circumstances or some other substantive reason. Further he concedes that it is reasonable for the PA to take into account the constraints on resources at their disposal. However, the Appellant argued that the central issue in the proceedings before the Tribunal is the public interest in disclosing the withheld information. The Appellant stated that he had considered two of the nineteen sites identified by LPRWG in detail and two of the fifteen sites disclosed as they are crucial to test the interpretation/application of the strategy and sufficiency of the LVRPA's procedure to ensure that its intentions are transparent to both members and the public at large. The Appellant averred that the two sites show a change of direction brought about by the abandonment of the purist approach, which he categorised as the Authority shifting its position on the potential development of land for residential housing and he referred to this as a, " - - *seismic shift from the position laid out in the Park Plan 2000.*", the difficulties of accommodating the intended disposals; and the PA's lack of transparency.

Appellant's Application:

[37] The Appellant lodged an application with the Tribunal in relation to the LPRWG. The Appellant required disclosure of non-privileged documents detailing the role and/or purpose of the LPRWG. In relation to internal communications the Appellant referred to the Tribunal decision in *Cabinet Office v The Information Commissioner*

and Greenpeace UK (EA/2018/0270, 28 October 2019) to argue that the communications can be characterised as internal communications.

[38] The Appellant requested that the PA provide an explanation as to how the further exemption applies.

Second Respondent's Response:

[39] In response to specific disclosure requested by the Appellant in his application dated 11 March 2022 [OHB_093] which was;

“The Appellant requests that the Authority disclose

(a) any written brief provided to Executive Committee members at or prior to the meeting of the Executive held on 17th December 2015;

(b) the text of any non-privileged document read or referred to [by] officers in any oral briefing given to Executive Committee members concerning the proposed purpose and/or remit of the LPRWG at that meeting and

(c) any other “non-privileged document in its possession setting out the role and/or purpose of the LPRWG”;

- the PA confirmed that it does not hold any documents in category (a) or (b). Further, that the PA does not hold any other documents in category (c).

[40] The PA referred to the case of *Land Baden-Wurtemberg v D.R.* [2021] Env. L.R. 23, whereby the European Court of Justice defined internal communication as follows:

“Article 4(1)(e) of Directive 2003/4 of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313 must be interpreted as meaning that the term “internal communications” covers all information which circulates within a public authority and which, on the date of the request for access, has not left that authority’s internal sphere - as the case may be, after being received by that authority, provided that it was not or should not have been made available to the public before it was so received.”

[41] The PA stated that as per the Lee Valley Regional Park Act 1966 (“the 1966 Act”), the local Authority members whilst acting in their capacity as members of the PA, they are within the authority’s “internal sphere” (**OB 094 Para 8**). The Authority provided Appendix E adopted under the Schedule to the 1966 Act, para 8(1) “the standing orders” which states:

“Potential areas of conflict

These conflicts arise because although the Member does not stand to gain any benefit, the Member’s decision making at the Authority could be influenced by their other interest.

Conflict of interest:

Conflict of loyalty:

- *is a set of circumstances that creates a risk that an individual’s ability to apply judgement or act in one role is, or could be, impaired or influenced by a secondary interest. The perception of competing interests, impaired judgement or undue influence can also be a conflict of interest.*
- *is when a Member’s loyalty or duty to another person or organisation could compete with or prevent them from making a decision only in the best interests of the Authority.*

The test is always that there is a conflict of interest if the Members’ other interest could, or could be seen to, interfere with the Member’s ability to decide an issue only in the best interests of the Authority, independently of any competing interest. ...

... Consideration should include all the circumstances of the particular decision, but with the guiding principle that at PA meetings the best interests of the PA, independent of any competing interest, are paramount ...” [OB/C323-4]

[42] The PA argued that this analysis is undisturbed by the FTT’s decision in *Cabinet Office v The Information Commissioner and Greenpeace UK* (EA/2018/0270, 28

October 2019). The PA provided the Appellant with Open Exhibit SD1 (“the Open List”), however, the LPRWG does not identify any land as not required for Regional Park purposes: it has no decision-making power of that or any other kind. The information was provided on the basis that it falls within the scope of his first request.

[43] In relation to the further exemptions, the PA informed the Tribunal that the remaining information which has not been provided to the Appellant has been withheld on the basis that it falls outside the scope of the request under regulation 12(4)(a) EIR. The information concerns five plots of land or sites that have been redacted in the Open List. The names of the five plots or sites are also covered by the exemption for commercial confidentiality under regulation 12(5)(e) EIR. The PA invited the Tribunal to consider the public interest arguments in favour of maintaining the exemptions for both internal communications (regulation 12(4)(e) EIR) and commercial confidentiality (regulation 12(5)(e) EIR) when considering this information. The PA referred the Tribunal to the four-stage test to be applied as held in *Bristol City Council v Information Commissioner & Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010):

“... a public authority may refuse to disclose information to the extent that its disclosure would adversely affect... the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest. Thus, in order to come within the terms of the exemption it must be shown that:

- (1) The information in question is “commercial or industrial”;*
 - (2) The information is subject to confidentiality provide by law (see further *Coco v AN Clark Engineers Ltd* [1969] RPC 41);*
 - (3) Such confidentiality is provided to protect “a legitimate economic interest”;*
 - (4) The disclosure of the information would adversely affect such confidentiality.*
- There was no issue on (1); we will consider (2) to (4) in turn. Was the information subject to confidentiality provided by law?”*

[44] The PA referred to the statement of Mr Shaun Dawson of 4th February 2022 at paragraphs 89-92 to argue that there is limited public interest in disclosure. Mr Dawson’s statement is as follows:

“89. However, we consider that the public interest in disclosure of the information sought is reduced by three factors.

90. First, the LPRWG has no powers in respect of land disposal. It is simply a forum for internal discussions. A disposal will only ever be approved at a public meeting of the Executive Committee or the Authority. Proposals discussed at LPRWG meetings may not progress at all. Others may progress but then be abandoned without ever being presented to a public meeting for a discussion. The Authority considers that there is less public interest in revealing information about land disposals that are proposed but may not ultimately be progressed.

91. Secondly, the fact that land has been identified for potential disposal is usually revealed to the public in advance of any Executive Committee or Authority meeting to approve the disposal in principle; and again, in advance of any subsequent meeting to approve the disposal on the agreed terms. Those proposals are published at least 5 clear days in advance of the meeting where they are to be considered. Further, the dates of Executive Committee and Authority meetings are published far in advance. It is therefore easy for a member of the public to diarise upcoming meeting dates and check closer to the time whether any land disposal proposals are on the agenda. They may then make representations at the meeting.

92. Thirdly, the public have no legal right to be consulted on proposed land disposals by the Authority. The Authority accepts that there will always be some interest in transparency. However, we consider that the interest in (early) transparency is much stronger where transparency may aid the exercise or protection of a legal right to consultation enjoyed by the public”.

Appellant’s Reply to the Second Respondent’s Response:

[45] The Appellant referred to the Tribunal decision in *Cabinet Office v The Information Commissioner and Greenpeace UK* (EA/2018/0270, 28 October 2019) to argue that, as the exemptions are to be interpreted restrictively, the communications between the

PA and LPRWG are not internal communications. The Appellant acknowledged receipt of the plans and noted that the PA recapitulates its position in relation to the function of the LPRWG, which the Appellant argued is a matter to be determined by the Tribunal.

[46] The Appellant proffered propositions in which he believed that the PA would rely on. Further, the Appellant argued that the determinations do not relate to a commercial activity, and they do not have the requisite quality of confidence. With reference to the confidential parcels, the Appellant stated if they are protected by Green Belt/MOL designation, the PA has determined that it would be financially beneficial for them to sell the land subject to the encumbrance of protections or designations which would leave the purchaser with the burden of altering such designations. The Appellant stated that the PA would contend that the public interest is protected, however, this would prevent the transaction from being properly scrutinised. The Appellant submitted that the public interest favours disclosure, especially in cases concerning Green Belt or MOL designation.

The Evidence:

[47] The Tribunal were greatly assisted by the witness statements and the oral evidence Shaun Dawson, the Chief Executive and Head of Paid Services of the PA, ("the Chief Executive"). He has provided the Tribunal with comprehensive evidence on most of the issues to be determined before us. He presented as a competent, responsible, and conscientious executive of the utmost integrity. We refer to his detailed witness statement at OHB4 pages 028 to 051 and an addendum at OHB4 at pages 052 – 053. We also had the benefit of his oral evidence under detailed and forensic cross examination and in his answers to questions raised by the Tribunal.

Conclusion:

[48] The Tribunal are persuaded on the evidence before us that the LPRWG cannot in any way be deemed to be a decision-making body within the PA. (see PA's detailed Submissions dated 12th May 2022 and supporting Authorities Bundle). Their work in the LPRWG exclusively provides information, and even on occasions advice, on

issues for consideration by those within the PA who do make use of such compiled information and advice in their capacity as Decision Makers, (whether by their own analysis or otherwise). The LPRWG do not make any analysis, they only provide information that may feed into an analysis or Decision-making process. Members of the PA are provided with outline/summary information, not the granular detail and full analysis undertaken by the officers and executive Decision Makers. Such information is provided for the purpose of Decision Making, which is not within the scope sought through the Request herein. We accept the evidence that the PA hold no such “analysis” as envisaged and sought by the Appellant in part 2 of his request even if only because of the precision of his request. The PA has said that no such analysis is held (i.e., his request was for “*contained either in the minutes of the Land and Property Review Group or in any working papers presented to the - - - Working Group*”) A position accepted by the Commissioner in relation to Part 2 of the request. The Chief Executive provided this Tribunal with evidence about the process and responsibility for analyses, if any, in support of property disposal decisions. The Appellant’s view, for example, was that a site visit by the working Group members was part of the analysis and would therefore in his opinion suggest such documents do exist. There is no evidence that this is the case and the evidence from the Chief Executive was that the LPRWG acts as a sounding board and hence it is not thought likely that site visits would have given rise to recorded information that in any way met the description of the “*analysis*” as had been requested.

Out of Scope:

[49] Throughout the course of this appeal (over a six-month period) further disclosure has been provided to the Appellant by the PA. The remaining element of withheld information under part 1 of the Request now relates to 5 sites. One site is withheld as out of scope as it does not relate to a property considered; “ - *as land not required for Regional Park purposes.*” The Tribunal accept this interpretation and find this item of the withheld information to be out of scope.

Reg. 12 (4) (e) EIR – Not engaged:

[50] The evidence before us was insufficient to persuade us that the exemptions claimed for internal communications was sufficient to establish the information relating the remaining 4 sites had not left the internal sphere as required to apply the exemption claimed under Reg 12(4)(e) EIR. There are doubts (based on information in the closed material) and oral evidence in the closed session about whether the site information remained within the internal sphere of the PA. There seems to be evidence in three of the sites in question that it may not have been still within the internal sphere and hence would not engage the Exemption for Internal Communications. The question of what might or might not have been said about property 4 is not clear and in any/each case it seems impossible to find tangible evidence of what has or had been spoken about and to whom after this length of time – e.g., notes about property 4 refer to something happening in Spring 2016 which could suggest a departure from the internal sphere and it is not possible for us to make a definitive finding in each case.

Reg.12 (5) (e) EIR is Engaged:

[51] In relation to the alternative exemption of Commercial Confidentiality claimed under Reg 12 (5) (e) EIR (see Page 4 above), the Tribunal accept that this exemption is engaged and would apply to each of the 4 remaining sites due to the prejudice, to the current, (at the time of the request AND now_– our emphasis,) commercial interests engaged. This applied in all 4 remaining sites (some with tenants some vacant) at the time of the refusal to disclose on foot of the request. We considered the issue of the engagement of commercial confidentiality relating to the vacant properties, as we are considering releasing information for the 4 sites, some of those sites contain multiple properties and, in each case, there are tenants in at least one property on the site under consideration, so the Commercial confidentiality of the Third parties would be an issue for tenants on each site.

[52] We heard compelling evidence on the issues pertaining to the damage that would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest, from the Chief Executive in closed session. We accept there would be a detrimental effect on

the PA through the significant chilling effect as described to us and for the reasons provided by the Chief Executive in his detailed evidence on the effects of such a breach of Commercial Confidentiality, and further as expressed in the PA' Response to the Appellant's Application of 11th March 2022 - at OHB4 pages 098 to 102 dated 1st April 2022. In all the circumstances and on the evidence before us, the Tribunal accept, despite the premise in favour of disclosure under EIR, the premise that disclosure of the withheld information would be to the detriment of the PA and would not be in the Public Interest.

Public Interest balance Test in favour of non-disclosure:

[53] On the public Interest balance test, we note the Appellant makes an impassioned case for the public interest in favour of the withheld information being released but this is with little evidence of harm other than his own interest in the subject matter. This is in contrast to the plethora of evidence of damage that would be caused to the PA as described by the Chief Executive in his evidence to the Tribunal and as set out at length in the substantive, poignant and specific demonstration of the nature and extent of damage caused or likely to be caused by disclosure within the compelling Closing Submissions made by Counsel on behalf of the PA dated 25th May 2022 on this subject. We find the weight of the evidence of a chilling effect as described by the Chief Executive by disclosure to be a weight in favour of the Public Interest being in favour of non-disclosure of the withheld information. Further we accept and adopt the specific reasoning as set out under "Ground 5 – Safe Space" at Pages 10, 11 and 12 of the PA's Skeleton Argument dated 12th May 2022 which includes the chilling effect so well described by the Chief Executive in his oral evidence.

[54] The Appellant clearly is passionate about the selling of the PA land/s for residential development but the evidence before us of the powers of the PA, which are under the Park Act 1966, are broad and enabling and make it clear they can do so. The evidence of their Chief Executive was that their behaviour since the Parks foundation has been to expand and improve the Park and has not been (to paraphrase the Appellant's phrasing)

"– selling off swathes of land for residential building".

[55] The Appellant was greatly concerned about the ability of the public to engage in the debate about the use and disposal of land for new uses but as has been explained in considerable detail by the Chief Executive, the PA process is much more flexible and available to the public than the Appellant has expressed and further as explained by the Chief Executive, the local Authorities and Planning considerations, would be key to achieving the necessary “*change of use*” rulings on Park Land which is 95% Green Belt or Metropolitan Open Land provide a route for voicing concern are much more likely at that local level to be engaging and engaged with local residents who have such concerns. Once again there was no evidence provided to support the concerns the Appellant presented were so widely felt about the PA.

Decision:

[56] On the evidence before us and for the above reasons, the tribunal allows the appeal and finds that the Information Commissioner erred in finding that the remaining withheld information the Public Authority holds that falls within the Scope of part 1 of the Request is exempt under Regulation 12 (4)(e) EIR. (Internal Communication) as stated in the impugned Decision Notice (Reference IC -42522-R5W4). However, the Tribunal finds that the same information is exempt under Regulation 12(5)(e) EIR and the public interest favours maintaining the exemption for the above reasons.

[57] The Tribunal has not been addressed on any other exemptions that might apply and have not considered others but that is without prejudice to any reliance by the PA on such other exemptions that may apply.

Brian Kennedy QC

14th July 2022.