



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2009/0001 (STAGE 2)
Information Commissioner's Ref: FER0138940

Heard at Procession House, London
On 20 November 2009

Decision Promulgated
11 January 2010

BEFORE

CHAIRMAN

ANNABEL PILLING

and

LAY MEMBERS

MICHAEL HAKE
ANDREW WHETNALL

Between

MERSEY TUNNELS USERS ASSOCIATION

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

HALTON BOROUGH COUNCIL

Additional Party

Subject matter:

EIR Reg. 2 – Definitions, Environmental information
EIR Reg. 12(4)(d) – Exceptions, Request relates to unfinished material
EIR Reg. 12(5)(b) – Exceptions, Course of justice
EIR Reg. 12(5)(e) – Exceptions, Confidential information
EIR Reg. 12(5)(f) – Exceptions, Interests of an individual

Cases:

Bowbrick v Information Commissioner and Nottingham City Council EA/2005/0006
DBERR v Information Commissioner and Friends of the Earth EA/2007/0072
Kirkaldie v Information Commissioner and Thanet District Council EA/2006/0001
Burgess v Information Commissioner and Stafford Borough Council EA/2006/0091
R v Derby Magistrates' Court ex parte B [1995] 4 All ER 526
Three Rivers District Council and Others v Governor and Company of the Bank of England [2004] UKHL 48.
Rudd v Information Commissioner and the Verderers of the New Forest EA/2008/0006
Creekside Forum v Information Commissioner and Department for Culture Media and Sport EA/2008/0065
Kessler v Information Commissioner and HMRC EA/2007/0043
Pugh v Information Commissioner and MoD EA/2007/0055
Calland v Information Commissioner and FSA EA/2007/0136
North Western and North Wales Sea Fisheries Committee v Information Commissioner EA/2007/0133
South Gloucestershire Council v Information Commissioner and Bovis Homes Limited EA/2009/0032

Representation:

For the Appellant: John McGoldrick, Secretary Mersey Tunnels Users Association
For the Respondent: Richard Bailey, Solicitor
For the Additional Party: Jane Collier, Counsel

Stage 2 Decision

This Decision must be read in conjunction with the earlier Decision¹ issued 23 June 2009, in which the Tribunal allowed the appeal and issued a substituted Decision Notice in place of the decision notice of the Information Commissioner dated 3 December 2008.

The Tribunal issues the following Supplementary Decision Notice.

¹ At Annex 1

Information Tribunal

Appeal Number: EA/2009/0001 (Stage 2)

SUPPLEMENTARY DECISION NOTICE

Dated 8 January 2010

Public authority: Halton Borough Council

**Address of Public authority: Municipal Building
Kingsway
Widnes
Cheshire
WA8 7QF**

Name of Complainant: Mersey Tunnels Users Association

The Supplementary Decision

For the reasons set out in the Tribunal's following determination:

In relation to the disputed information the Council did not comply with its duty to make environmental information available on request and did not disclose within 20 working days all the information it holds falling within the scope of the Request.

As identified on the Annexed Schedule, some of the information falls within exceptions in Regulation 12(4)(d), Regulation 12(5)(b) or Regulation 12 (5)(e) EIR and the public interest in maintaining the exception outweighs the public interest in disclosure. The Council is therefore entitled not to disclose that information.

As identified on the Annexed Schedule, in relation to some of the information falling within the exceptions the public interest in maintaining the exception does not outweigh the public interest in disclosure.

Action Required

The Council must now disclose to the Mersey Tunnels Users Association the information identified within 35 calendar days from the date of this Supplementary Decision.

Dated this 8 January 2010

Signed

A handwritten signature in cursive script that reads "Annabel Pilling".

Annabel Pilling

Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. This is an Appeal by the Mersey Tunnels Users Association (the 'MTUA') against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 3 December 2008.
2. This Decision must be read in conjunction with the earlier Decision² issued 23 June 2009, in which the Tribunal allowed the appeal and issued a Substituted Decision Notice in place of the Decision Notice of the Information Commissioner dated 3 December 2008. This earlier Decision('Stage 1'), issued 23 June 2009, deals with the information and issues that were before us at the hearing on 19 May 2009. Stage 2, which is this determination, deals with the information that had not yet been disclosed to the MTUA or has been located subsequently.
3. The Decision Notice relates to a request for information under the Freedom of Information Act 2000 (the 'FOIA') made to the Halton Borough Council (the 'Council') by the MTUA on 6 June 2006.
4. The Tribunal has already concluded that all the information falling within the scope of the Request amounted to environmental information and therefore the Council should have dealt with the request under the requirements of the Environmental Information Regulations 2004 (the 'EIR') and not FOIA.
5. We have already commented that the on-going disclosure by the Council of information relating to the Request at all stages throughout the Commissioner's investigation and this Appeal has caused considerable difficulty, in addition to wasted time and resources.

² At Annex 1

6. We have prepared a Schedule to this Decision³ which identifies each piece of disputed information, the exception from disclosure claimed by the Council and our decision in respect of it.

Background and Chronology

7. A detailed background and chronology of events can be found in the earlier decision and it is not necessary to repeat them here.
8. The need for this Appeal to be dealt with in two stages has arisen after the Council provided additional material to the Tribunal, without notice or application, a matter of days before the scheduled hearing date in May 2009. This material amounted to a supplemental witness statement from the Council's one witness containing schedules of additional documents that had been located following further searches; some of which were to be disclosed to the MTUA that day and some which were said to be exempt from disclosure under FOIA or the EIR. This was accompanied by Supplemental Submissions on behalf of the Council, which ran to 18 pages and raised additional exemptions for the first time in respect of the undisclosed information; section 42 FOIA or Regulation 12 (5)(b) EIR (documents protected by legal professional privilege), Regulation 12(5)(e) EIR (commercially sensitive information), Regulation 12(4)(d) EIR (incomplete documents) and Regulation 12(5)(f) EIR (information provided in confidence). The Council also provided a substantial further bundle of authorities.
9. At the hearing in May 2009, the Tribunal had not been provided with copies of the information not yet disclosed and in respect of which exceptions were claimed by the Council. It was not possible therefore for us to consider, in each case, whether the exception claimed was engaged and, if so, whether the public interest in maintaining the exception outweighed the public interest in disclosure. The position was unsatisfactory, but in view of the time since MTUA's initial request we decided not to adjourn the hearing on 19 May 2009 and decided to deal with the matter in two stages.

³ At Annex 2

The questions for the Tribunal at Stage 2

10. The Tribunal has concluded that the relevant issues are as follows:

- (i) Can the Council rely upon exceptions not previously relied upon?
- (ii) Is the exception under Regulation 12(4)(d) EIR engaged in relation to the information for which it is claimed?
- (iii) If the exception under Regulation 12(4)(d) EIR is engaged, does the public interest in maintaining the exception outweigh the public interest in disclosure?
- (iv) Is the exception under Regulation 12(5)(b) EIR engaged in relation to the information for which it is claimed?
- (v) If the exception under Regulation 12(5)(b) EIR is engaged, does the public interest in maintaining the exception outweigh the public interest in disclosure?
- (vi) Is the exception under Regulation 12(5)(e) EIR engaged in relation to the information for which it is claimed?
- (vii) If the exception under Regulation 12(5)(e) EIR is engaged, does the public interest in maintaining the exception outweigh the public interest in disclosure?
- (viii) Is the exception under Regulation 12(5)(f) EIR engaged in relation to the information for which it is claimed?
- (ix) If the exception under Regulation 12(5)(f) EIR is engaged, does the public interest in maintaining the exception outweigh the public interest in disclosure?

11. We remind ourselves that Regulation 5(1) EIR creates a duty on public authorities to make environmental information available upon request.

12. Regulation 12 EIR provides that a public authority may refuse to disclose environmental information if one of the exceptions to disclosure provided for in Regulation 12(4) or 12(5) applies. Even if one of these exceptions applies, the information must still be disclosed unless “in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information”⁴. This must be assessed having regard to the overriding presumption in favour of disclosure⁵. The result is that the threshold to justify non-disclosure is a high one.

13. Inevitably there can be a significant passage of time between the initial request for information and the Tribunal's decision on an Appeal. The passage of time can, of itself, often be an important factor in assessing the public interest. Having due regard to previous decisions of this Tribunal, we consider that the relevant time for the application of the public interest test is the time of the initial request and refusals by the public authority not the time when the Tribunal hears the Appeal.

Can the Council rely upon exceptions not previously relied upon?

14. In *Bowbrick v Information Commissioner and Nottingham City Council*⁶, a differently constituted panel of this Tribunal concluded that a failure to raise an exemption within the timeframe of section 17 of FOIA resulted in the public authority being in breach of the requirements of the Act, but that the Act does not provide that failure to specify a relevant exemption prevented the public authority from thereafter relying on the exemption.

15. This issue has been addressed in a number of other appeals before this Tribunal. We consider that the Tribunal has the discretion to allow a public authority to rely upon exceptions not previously relied upon and agree with what was said in *DBERR v Information Commissioner and Friends of the Earth*⁷, that the Tribunal “may decide on a case by case basis whether an exemption can be claimed outside

⁴ Regulation 12(1)(b) EIR

⁵ Regulation 12 (2) EIR

⁶ EA/2005/0006

⁷ EA/2007/0072

the limits set by [sections] 10 and 17 depending on the circumstances of the particular case.”

16. The Appellant submits that, given all the circumstances of the late discovery of the disputed information, there “should be an even stronger presumption than usual that the information should be released.”
17. We do not consider that there is any provision, either explicit or implicit, within the EIR, or indeed FOIA, that would require the Tribunal to refuse to allow a public authority during an appeal to rely upon an exception under the EIR, or an exemption under FOIA, that had not been relied upon previously. The consequences of such a provision or interpretation might result in the Tribunal ordering disclosure of information that should properly be exempt from disclosure. Nor do we think that the Tribunal should refuse an application to rely on exceptions or exemptions not raised previously purely to “punish” the public authority for the way in which it had conducted itself as appears to be suggested by the Appellant. We do not wish to be seen to encourage such situations; reliance on exceptions or exemptions not previously relied upon can be problematic, risks delay and other parties may feel disadvantaged as in this case.
18. In this case, we have already described how there has been a process of continual discovery of information falling within the scope of the Request. The disputed information at this Stage 2, is information that was not located until after the Commissioner had issued his Decision Notice.
19. We therefore accept that the Council could not have previously raised the exceptions now relied upon in relation to the disputed information. While we acknowledge that the Appellant feels disadvantaged by the length of time it has taken the Council to deal with his Request, we do not consider that we should penalise the Council by refusing to allow it to rely upon relevant exceptions from disclosure and we have concluded that we must consider these exceptions when deciding whether to order disclosure of the disputed information.

Is the exception under Regulation 12(4)(d) EIR engaged in relation to the information for which it is claimed?

20. Regulation 12 (4)(d) provides as follows:

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

....

(c) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data;

21. The Council claims that there are three documents falling within this exception because they are draft documents and amount, therefore, to information in the course of completion or unfinished documents.

22. The Commissioner accepts the finding of a differently constituted panel of this Tribunal in *Secretary of State for Transport v Information Commissioner*⁸ that a “Draft report is, by its very name and giving the words their logical meaning, an unfinished document.” In that case, the Commissioner had argued that a draft of a document lost its unfinished status once a final version had been completed.

23. We agree that a draft document is an unfinished document and therefore that the exception is engaged in relation to the three identified documents.

If the exception under Regulation 12(4)(d) EIR is engaged, does the public interest in maintaining the exception outweigh the public interest in disclosure?

24. The Council has not put forward any arguments to support its assertion that it would be in the public interest to withhold these documents.

25. In assessing the public interest in disclosure, the Commissioner has identified the relevant factors as the accountability for the spending of public money and competition issues. The Commissioner accepts that disclosure of these draft

⁸ EA/2008/0052 (A panel with the same Chairman)

documents would provide the public with a greater understanding of some of the considerations for the funding of the Mersey Gateway project but considers that there is also a competing public interest in ensuring that the public get value for money. He concluded that, on balance, the stronger public interest is that in ensuring the Council's position is not prejudiced regarding the procurement exercise that will follow the Public Inquiry; the information contained in these documents would not have been in the public domain at the date of the Request and could at that time have prejudiced the position of the Council.

26. The Appellant submits that any document that refers to tolling should be disclosed as there is great public interest in understanding the process by which the decision was made to i) build a new tolled crossing and ii) place a toll on the existing, previously free, crossing. We accept that the decision is controversial and that there are arguments as to the fairness and economic effects of tolling, whether there are any alternatives to building a new bridge, the amount of land that will be required and the effects of increased traffic on the Central Expressway which runs through the middle of Runcorn and which is to take most of the traffic.
27. We consider that there may be little, if any, public interest in disclosing a draft which is an unfinished document, particularly if a finished or final version has been or is likely to be made public (although we do not know if a finished or final version of any of these particular documents has been or is likely to be made public). Presenting work in a draft form before a final decision is made allows a public authority to consider matters at an early stage and to comment upon the final form such a report would take.
28. We do not consider that disclosure of these draft documents would provide the public with any greater understanding of the way in which the Council had dealt with the relevant issues.
29. We have concluded that, in respect of each document for which the exception in Regulation 12(4)(d) EIR is engaged and that the public interest in maintaining the exception outweighs the public interest in disclosure. The Council is therefore entitled to withhold these documents from disclosure.

Is the exception under Regulation 12(5)(b) EIR engaged in relation to the information for which it is claimed?

30. Regulation 12(5)(b) provides as follows:

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

(b) the 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;

31. The Council claims that this exception is engaged in relation to 21 separate documents that have been located from either the Council's own files or from files held by the Council's then solicitors, Herbert Smith LLP.

32. The Council relies on the decisions of this Tribunal in *Kirkaldie v Information Commissioner and Thanet District Council*⁹ and *Burgess v Information Commissioner and Stafford Borough Council*¹⁰ as authority for the proposition that Regulation 12(5)(b) EIR covers legal professional privilege ('LPP').

33. In *Kirkaldie*, the Tribunal stated in relation to Regulation 12(5)(b);

"The purpose of this exception is reasonably clear, it exists in part to ensure that there should be no disruption to the administration of justice, including the operation of the courts and no prejudice to the rights of individuals or organisations to a fair trial. In order to achieve this, it covers legal professional privilege, particularly where a public authority is, or is likely, to be involved in litigation."

34. The Commissioner agrees with the Council's analysis and proposition and, having considered the withheld information, is satisfied that the documents, which contain the content of communications between the Council and Herbert Smith, counsel

⁹ EA/2006/0001

¹⁰ EA/2006/0091

and third parties such as the Department for Transport, would be legally privileged as they evidence or refer to legal advice that was given to the Council.

35. We have also considered the words of Lord Taylor of Gosforth CJ in the case of *R v Derby Magistrates' Court ex parte B*¹¹, in which he reviewed a number of authorities on legal professional privilege and the waiver of that privilege:

“The principle which runs through all these cases...is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyers will never be revealed without his consent. Legal professional privilege is thus more than the ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.”

36. The circumstances in which legal professional privilege can be claimed have been analysed fully in *Three Rivers District Council and Others v Governor and Company of the Bank of England*¹². The House of Lords had to consider the extent of legal professional privilege and whether it went further than just *litigation* privilege. Lord Scott, at paragraph 34, stated:

“None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients’) consent, there will be cases in which the requisite candour is absent...”

¹¹ [1995] 4 All ER 526

¹² [2004] UKHL 48.

37. The Appellant accepts that in previous decisions of this Tribunal, Regulation 12(5)(b) EIR has been interpreted as covering information in respect of which “legal professional privilege” could be claimed. He submits that most of those previous cases are in relation for requests where either there was an associated court case or one was in prospect, and the Tribunal concluded that disclosure of the requested information “would adversely affect” the case. He submits that this implies that those Tribunals only considered that one of the two types of legal professional privilege were covered by Regulation 12(5)(b), that is, the “documents created by or for lawyers for the “dominant” (main) purpose of litigation” and not “communications between lawyers and their clients for the purposes of obtaining legal advice.” He goes on to submit that, in relation to his request, there is no associated court case, nor is there one in prospect, and therefore the “documents created by or for lawyers for the “dominant” (main) purpose of litigation” does not apply and that Regulation 12 (5)(b) may not apply.

38. Legal professional privilege is a key element in the administration of justice which is, in our view, and following the decision in *Burgess*, encompassed by the phrase “course of justice” in Regulation 12 (5)(b) EIR, and advice on the rights, obligations and liabilities of a public authority are key to that, whether or not litigation is in progress or anticipated.

39. A question has arisen before this Tribunal as to whether the exception in Regulation 12(5)(b) EIR is “the same” as section 42 FOIA, or section 31 FOIA (law enforcement). In the case of *Rudd v Information Commissioner and the Verderers of the New Forest*¹³, the Tribunal noted that although there is no direct reference to legally privileged documents within the EIR, conversely there is no express prohibition on privileged information being included within the exemption. The Tribunal further noted that the

““course of justice” is wider than legal professional privilege and includes matters beyond legal advice. In light of the importance attributed by the Courts to the ability of parties to seek and receive frank legal advice in confidence, it

¹³ EA/2008/0006

would be surprising if the EIRs had intended to prevent consideration of legal professional privilege when identifying the course of justice.”

40. This approach was followed in *Creekside Forum v Information Commissioner and The Department for Culture, Media and Sport*¹⁴. The Tribunal observed that the EIR are more succinctly drafted than FOIA and that although there are parallels between section 31 FOIA and Regulation 12(5)(b) EIR, they are not identical:

“Equally whilst regulation 12 does not explicitly name legal professional privilege, its function and substance fall under the umbrella of “the course of justice”. (paragraph 26)

41. We do not consider it necessary to reach a conclusion as to whether the exception in Regulation 12(5)(b) EIR is “the same” as the exemption in section 42 or section 31 of FOIA. We agree with the reasoning set out in *Rudd* and followed in *Creekside Forum* and are satisfied that information protected by legal professional privilege falls within the scope of the exception in Regulation 12(5)(b) EIR.

42. However, the exception is not engaged unless the Tribunal is satisfied that disclosure of each document *would* adversely affect the course of justice. (This is an additional requirement within the EIR that does not exist within FOIA.) We adopt the approach as set out in *Archer v Information Commissioner and Salisbury District Council*¹⁵; an adverse effect has to be identified and the Tribunal must be satisfied that disclosure “would” have that adverse effect, not that it “could” or “might”. In *Hogan and Oxford City Council v Information Commissioner*¹⁶, the definition of “would” in the context of the words “would prejudice” was considered. In that case, “would” was defined as “more probable than not.” The Tribunal has held in *Maiden v Information Commissioner and Borough Council of West Norfolk*¹⁷, that the *Hogan* definition of “would” is transferable to “would adversely affect” and hence applicable to Regulation 12(5)(b). We adopt this approach.

¹⁴ EA/2008/0065

¹⁵ EA/2006/0037

¹⁶ EA/2005/0026 and 0030

¹⁷ EA/2008/0013

43. Neither the Commissioner nor the Council specifically addresses what the adverse effect of disclosure would be.

44. We agree with the point made in other cases that disclosure of legal advice is likely to lead to prejudice to public authorities in obtaining advice on their legal rights, obligations and liabilities. Confidentiality is crucial to the effective working of the relationship between lawyer and client, whether the client is a private individual or a public authority. Advice from counsel is, of course, a professional opinion on a particular set of facts and circumstances and may differ. Disclosure of such advice would prejudice the public authority from adopting a more favourable or an alternative position. We also note that disclosure under the EIR, or FOIA, is effectively made to the general public as a whole, as disclosure cannot be made subject to conditions governing the subsequent use of the disclosed information. We also remind ourselves of the presumption in favour of disclosure.

45. The question for us therefore, is whether the exception is engaged in relation to each of these particular documents. On the Schedule we outline our conclusion in respect of each document: whether it falls within the scope of legal professional privilege and whether its disclosure would adversely affect the course of justice.

If the exception under Regulation 12(5)(b) EIR is engaged, does the public interest in maintaining the exception outweigh the public interest in disclosure?

46. The mere fact that legal professional privilege applies to information is insufficient to justify non-disclosure. The fact that disclosure of such information would adversely affect the course of justice is also insufficient to justify disclosure. A public authority is only entitled to refuse to disclose such information if the public interest in maintaining the exception outweighs the public interest in disclosure.

47. The Appellant has drawn our attention to a number of decisions of this Tribunal ordering disclosure of legal advice or other information falling within the legal professional privilege exception, or exemption under FOIA. We agree with his submission that there is no absolute exemption from disclosure for information

falling within the scope of legal professional privilege and we must therefore consider where the balance of the public interest lies in respect of each document.

48. There is now a considerable body of case law from this Tribunal on the issue of legal professional privilege, both under the EIR and FOIA. The Panel Members of this Tribunal have sat on a number of these cases and are familiar with the arguments advanced by each party. It is not necessary or helpful for us to set down in this Decision a detailed review of those cases. We consider that the following principles, drawn from relevant case law, are material, both generally and with particular reference to Regulation 12(5)(b) EIR to the correct approach to the weighing of competing public interest factors. We note that the principles established by these cases do not form a rigid code or comprehensive set of rules and we are, of course, not bound by decisions of differently constituted Panels of this Tribunal. We regard them as guidelines of the matters that we should properly take into account when considering the public interest test but remind ourselves that each case must be decided on its own facts.

- (i) There is an explicit presumption in favour of disclosure in Regulation 12 (2) EIR.
- (ii) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information unless the public interest in maintaining the exception outweighs the public interest in disclosing the information; if the balance rests equally, the Tribunal should order disclosure (see, for example, *Department for Education and Skills v IC and Evening Standard*¹⁸).
- (iii) The balance of public interest factors must be assessed “in all the circumstances of the case” (Regulation 12(1)(b) EIR). This will involve a consideration of both direct and indirect consequences of disclosure.
- (iv) Since the public interest must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.

¹⁸ EA/2006/0006 (*DfES*) at paragraphs 64-65

- (v) The public interest factors in favour of maintaining an exception are likely to be of a general character. The fact that a factor may be of a general rather than a specific nature does not mean that it should be accorded less weight or significance. *“A factor which applies to very many requests for information can be just as significant as one which applies to only a few. Indeed, it may be more so.”* (per Keith J at paragraph 34, *Home Office and Ministry of Justice v Information Commissioner* [2009] EWHC 1611 (Admin)).
- (vi) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their importance as these considerations are central to the operation of freedom of information regimes and are likely to be relevant in every case where the public interest test is applied. However, to bear any material weight each factor must draw some relevance from the facts of the case under consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances (*Department for Culture Media and Sport v Information Commissioner*¹⁹).
- (vii) The “public interest” signifies something that is in the interests of the public as distinct from matters which are of interest to the public (*Department of Trade and Industry v Information Commissioner*²⁰).
- (viii) Although the body of precedent from the higher courts identifies that there is a strong in-built weight in favour of maintaining the exception, there is no absolute exception (or exemption) from disclosure for information that is protected by legal professional privilege, and care should be taken not to accord it higher status. There will be occasions when the public interest in disclosure will outweigh the public interest in maintaining the exception (or exemption). (see *Kessler v Information*

¹⁹ EA/2007/0090 (‘DCMS’) at paragraph 28

²⁰ EA/2006/0007 at paragraph 50

*Commissioner and HMRC*²¹ and *Pugh v Information Commissioner and MoD*²²)

- (ix) Some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential (*Calland v Information Commissioner and FSA*²³).
- (x) The age of the legal advice contained in the information is relevant. The passage of time would, as a general principle, favour disclosure. Legal advice is, however, still “live” if it is still being implemented or relied upon as at the date of the request or may continue beyond that date to give rise to legal challenges by those unhappy with the course of action adopted.

49. We have identified the factors in favour of disclosure in this case as:

- i) transparency of decision making;
- ii) accountability of the Council for making the controversial decision to impose tolling;
- iii) informing the public that the Council sought and obtained legal advice and acted appropriately in the circumstances;
- iv) providing the public with information that decisions have been lawfully reached;
- v) providing the public with the information to enable them to challenge decisions;
- vi) any ensuing debate would improve the quality of future decision making;
- vii) there is significant local public interest in this matter.

50. We also consider that if the information protected by legal professional privilege showed any evidence of malfeasance or fraud or corruption, then there would be a very strong public interest argument in favour of disclosure. (Having examined

²¹ EA/2007/0043

²² EA/2007/0055

²³ EA/2007/0136

each of the relevant documents forming the disputed information we can state that this is not the position in this case.)

51. The Appellant submits that the real public interest is that the public are “given all the facts”. He draws our attention to the fact that this is the first instance in modern times that a toll will be imposed on a previously free crossing. He asks, rhetorically, how it is that when a Council undertakes what some may consider is a dubious course it is in the public interest that “the prejudice caused by the disclosure of the withheld documents should be given greater weight”. In his view it is more likely to be in the public interest that all the facts are available even if the result is that a particular course of action is not followed whether it be a Council building a bridge or the Government destroying one in a war. In responding to the submissions of the Council, he accepts that while the “outcome” of the Council’s decision may be scrutinised at a public inquiry, it is impossible to examine properly the process through which that outcome was reached if this information is withheld.

52. We have identified the factors in favour of maintaining the exception as:

- i) there is a strong public interest in maintaining legal professional privilege;
- ii) a public authority should be able to give to and receive from its legal advisors full information, including matters that might adversely affect the authority’s position;
- iii) the confidentiality of interaction between a lawyer and client is crucial to the effective working of that relationship;
- iv) at the time of the request, the legal advice was “live” and it was reasonable for the Council to have expected that a public inquiry into the Mersey Gateway project would take place at some point in the not too distant future;
- v) the procurement exercise had not yet begun.

53. Applying the public interest balancing exercise in relation to each of the documents for which the exception in Regulation 12 (5)(b) is engaged, we have concluded that in respect of the majority of the documents the public interest in maintaining the exception outweighs the public interest in disclosure. In respect of the remaining

documents, we have concluded that the public interest in maintaining the exception does not outweigh the public interest in disclosure. Our reasons in respect of each document are outlined on the Schedule.

Is the exception under Regulation 12(5)(e) EIR engaged in relation to the information for which it is claimed?

54. Regulation 12 (5) (e) provides as follows:

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;

55. This exception can be analysed as containing three elements:

- (i) the confidentiality of commercial or industrial information;
- (ii) the confidentiality is provided by law to protect a legitimate economic interest;
- (iii) disclosure would adversely affect the confidentiality.

56. The Council submits that this exception is engaged in respect of 17 documents. It draws our attention to the case of *North Western and North Wales Sea Fisheries Committee v Information Commissioner*²⁴ in which the question of commercial confidentiality and Regulation 12(5)(e) EIR was considered and in which the Tribunal agreed with the decision in *Office of Communications v Information Commissioner*²⁵, that for the exception under Regulation 12 (5)(e) to be engaged ;

“a party relying on it must establish that it has a right to protect the information in question under the law of confidentiality. This requires it to establish that the information has the necessary quality of confidence, that it was communicated to a third party in circumstances which gave rise to a reasonable expectation

²⁴ EA/2007/0133

²⁵ EA/2006/0078

that confidentiality would be maintained and that unauthorised disclosure is either threatened or had occurred.”

57. The Council submits that Regulation 12(5)(b) would also apply in broader circumstances, such as this case where the documents are being withheld because disclosure of the contents would prejudice the Council's negotiating position in any subsequent procurement exercise, or could prejudice negotiations with the private sector. It relies upon guidance issued by DEFRA that the information does not have to have been obtained from another party, nor is it necessary for there to be an “actionable” breach of confidence for this exception to apply: “Where disclosure of information would prejudice the commercial interests of an individual or body, or of the public authority itself, bodies may restrict access to information on those grounds.”

58. The Commissioner agrees that there is no requirement for there to be an actionable breach of confidence for this exception to be engaged, but submits that the Council's interpretation that Regulation 12(5)(e) EIR applies whenever disclosure of information which is commercially sensitive would prejudice the commercial interests of the *Public Authority* is too wide. He submits that Article 4.2 of Directive 2003/4/EC requires that the grounds under which a request for environmental information may be refused should be restrictively interpreted. He regards confidentiality “provided by law” to mean confidentiality based on the common law rules of confidence rather than as may be imposed under a contract and that, on the facts of this case, confidentiality would be provided by the common law rules of confidence if, and only if, the Council owed a duty to a third party not to disclose information, or the confidentiality was protected by statute.

59. We have been assisted by the recent decision of this Tribunal in *South Gloucestershire Council v Information Commissioner and Bovis Homes Limited*²⁶ in which this difference of interpretation of the scope of Regulation 12(5)(e) EIR was addressed. In that case, the Tribunal concluded, at paragraph 41:

²⁶ EA/2009/0032

*“We are unable to see either in the express words of exception 12(5)(e) or in the policy of the exception any justification for the contention that the exception applies only where a confidentiality obligation is owed **by** the public authority and not where a confidentiality obligation is owed **to** the public authority. Wherever, because of the sensitive nature of the information, the law recognises the confidentiality of the information as deserving of legal protection, the confidentiality is provided by law. This exception stands in contrast with the exemption in FOIA s41, which is expressly directed to information received in confidence by a public authority, where disclosure by the public authority would amount to an actionable breach of confidence.”* (our emphasis)

60. We adopt the approach taken in the *South Gloucestershire* case. We agree with the Council that the Commissioner’s approach would leave a significant gap in the EIR, meaning that in many cases there would be no exception from disclosure to protect the legitimate economic interests of a public authority

61. We therefore conclude that the exception in Regulation 12(5)(e) could be engaged in the circumstances of the information in this case. The question for us therefore, is whether the exception is engaged in relation to each of these particular documents. On the Schedule we outline our conclusion in respect of each document.

62. We should add that we were not persuaded by the argument advanced by the Council that the exception would be engaged merely because a document includes a warning that it is confidential and intended solely for the addressee; in the case of an e-mail this is standard practice and makes no reference to content of individual e-mails.

If the exception under Regulation 12(5)(e) EIR is engaged, does the public interest in maintaining the exception outweigh the public interest in disclosure?

63. The Appellant reiterates his submissions made in respect of Regulation 12(5)(b) and also submits that information that is at least 3 years old is not likely to be commercially sensitive. With respect to the Appellant, who conducted this Appeal

himself with no legal representation in an admirable and thorough manner, the relevant time for considering the sensitivity of the information is the time of the request not the time of the Appeal. We accept that this particular information was not located by the Council until after May 2009 but consider that it would be an improper application of the timing of the public interest balancing exercise to suggest that the relevant time is some three years after the original request was made. This could lead to irreconcilable conclusions as to the public interest in relation to information that was found at different times.

64. We have identified the factors in favour of disclosure in this case as:

- i) the accountability and transparency in respect of the Council's decision to spend public money;
- ii) providing the public with the information to enable them to challenge decisions;
- iii) increasing the public understanding of some of the considerations for the funding of the Mersey Gateway project;
- iv) there is significant local public interest in this matter.

65. We have identified the factors in favour of maintaining the exception as:

- i) the procurement exercise had not yet begun; the justification for non-disclosure on the grounds of risk of prejudice to a public authority's commercial position may weaken once procurement decisions have been made;
- ii) potential for loss to the public purse was very significant;
- iii) ensuring effective conduct of negotiations for financing the Mersey Gateway project.

66. The Appellant submits that as this scheme is likely to be a Private Finance Initiative (PFI) there will be "competitive dialogue" where both the Council and the bidders exchange a considerable amount of information and that, therefore, the procurement process would not be affected, adversely or otherwise, by the disclosure of this information. While we accept that the Mersey Gateway project is likely to be delivered through a PFI, we acknowledge that this is a commercial process and that there may be a limited pool to draw from. We also accept the Council's evidence that disclosure would harm the Council's negotiating position

and that it would adversely affect the competitive process to disclose the Council's view of the assessment of risk and commercial pricing. The process of tendering was not concluded at the time of the request and remains under negotiation as at the time of this Appeal. We consider that the information such as values and cost predictions is significant information that could affect the Council's ability to negotiate with individual parties and its ability to fulfil its obligation to secure the best value. It follows that we consider this to be a significant factor in favour of maintaining the exception.

67. Our decision and reasons in respect of each document are outlined on the Schedule.

Is the exception under Regulation 12(5)(f) EIR engaged in relation to the information for which it is claimed?

68. Regulation 12 (5) (f) provides as follows:

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

(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;

69. The Council claims this as an additional exception from disclosure in relation to a number of documents. In respect of these documents we have already concluded that the other exception is engaged and that the public interest in maintaining the exception outweighs the public interest in disclosure. The Council is therefore entitled to withhold these documents and we are of the opinion that it is not

necessary for us to consider whether the exception provided for in Regulation 12(5)f) EIR is engaged.

If the exception under Regulation 12(5)(f) EIR is engaged, does the public interest in maintaining the exception outweigh the public interest in disclosure?

70. Because we have not needed to consider whether the exception is engaged, we have not gone on to consider whether the public interest in maintaining the exception outweighs the public interest in disclosure.

Other Matters

71. We acknowledge that as the documents that formed the disputed information in Stage 2 of this Appeal were disclosed for the first time to the Commissioner on 15 May 2009, they were not considered by the Commissioner at the time of his Decision Notice, and did not therefore form part of the Commissioner's original investigation. We are grateful to the Commissioner for providing detailed submissions on exceptions that had not been raised previously in relation to material that had not been before him.

72. We commented in our original decision, and we repeat the comment here, as it appears to us that the Council has acted in a manner that suggests a degree of misunderstanding about the FOIA and EIR disclosure requirements. The Council has made much of the fact that it has made significant disclosure during the Appeal process and that some of the information disclosed would not have fallen within the original request in any event. The implication seems to be that the Council has complied with its duty to make environmental information available on request. Whilst the Council may have been trying to be helpful and make up for shortcomings, we do not see how disclosing information that falls outside the scope of a request for information under the EIR (or FOIA) can be regarded as demonstrating that either the actual request, made three years earlier, has been dealt with in accordance with the legislation, or that the Council has complied with its duty to advise and assist under Regulation 9 EIR (or section 16 of FOIA).

Conclusion and remedy

73. For the reasons set out in detail above, we have concluded that:

- (1) the Council is entitled to withhold the disputed information for which the exception under Regulation 12(4)(d) is engaged and the public interest in maintaining the exception outweighs the public interest in disclosure;
- (2) the Council is entitled to withhold the disputed information for which the exception under Regulation 12(5)(b) is engaged and the public interest in maintaining the exception outweighs the public interest in disclosure;
- (3) the Council is entitled to withhold the disputed information for which the exception under Regulation 12(5)(e) is engaged and the public interest in maintaining the exception outweighs the public interest in disclosure, but must disclose that information in respect of which we have concluded that the public interest in maintaining the exception does not outweigh the public interest in disclosure;
- (4) we do not need to consider whether the exception in Regulation 12(5)(f) is also engaged

Signed



Annabel Pilling

Deputy Chairman

Date 8 January 2010

SCHEDULE – ANNEX 2**DISPUTED INFORMATION**

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
A:1	KPMG report Mersey Crossing (draft)	Reg.12(4)(d) and/or Reg. 12(5)(e)	<p>This is a draft document and, following our analysis as set out in the Decision, the exception in Regulation 12(4)(d) is engaged.</p> <p>For the reasons given in the Decision, we have concluded that the public interest in maintaining the exception outweighs the public interest in disclosure.</p>
A:3	KPMG report New Mersey Crossing PFI Funding Option – Financial Model Data (draft)	Reg.12(4)(d)	<p>This is a draft document and, following our analysis as set out in the Decision, the exception in Regulation 12(4)(d) is engaged.</p> <p>For the reasons given in the Decision, we have concluded that the public interest in maintaining the exception outweighs the public interest in disclosure.</p>
A:4	KPMG report Funding Options, Briefing Paper 2, PFI	Reg.12(5)(e)	<p>This document contains very limited commercial information and is, in our opinion, a general briefing on PFI as an option for funding the Mersey Gateway project.</p> <p>We consider that only the figures included in this document would fall within the exception in Regulation 12(5)(e). Disclosure of these figures would adversely affect the Council's ability to secure the best value and the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p> <p>We observe that KPMG may have a legitimate economic interest in the confidentiality of its commercial information however there is no evidence before us on this issue and we cannot form any assessment of whether KPMG would be at a commercial disadvantage if this document is disclosed.</p> <p>This document should therefore be disclosed with the figures redacted.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
A:5	Major Scheme Appraisal – Volume 2 – Commercial Submission	Reg.12(5)(e)	<p>This is the Council's presentation to the Department for Transport submitted in November 2004. It is divided into chapters, each dealing with different topics. We consider that this document does fall within the scope of the request, albeit that it relates to a broader consideration of matters relevant to the Mersey Gateway project than just tolling; the project can only proceed with tolling and therefore it is integral to the project.</p> <p>The bulk of this document is commercially sensitive and we consider that the exception is engaged.</p> <p>The factors put forward by the Appellant in support of disclosure are not insignificant, however we consider that at the time of the request, no contract had been entered into and any funding deal was still at a stage of brokerage. We therefore conclude that the public interest in maintaining the exception outweighs the public interest in disclosure.</p>
A:6	Email Jonathan Turton (KPMG) to Dick Tregoe (Council)	Reg.12(5)(e)	<p>This relates to financial modelling information and contains a number of figures. We consider that this falls within the exception in Regulation 12(5)(e).</p> <p>Again, the factors put forward by the Appellant in support of disclosure are not insignificant, however we consider that at the time of the request, no contract had been entered into and any funding deal was still at a stage of brokerage. We therefore conclude that the public interest in maintaining the exception outweighs the public interest in disclosure.</p>
A:7	Note of meeting between KPMG and DfT	Reg.12(5)(e)	<p>We agree with the Council and are of the opinion that this document does not fall within the scope of the request for information.</p> <p>As this falls outside the scope of the request, it is not necessary for us to decide whether the exception is engaged.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
A:8	New Mersey Crossing Procurement Group – Agenda Item No 1 – paragraph 99(c) redacted	Reg.12(5)(b)	<p>This document has been disclosed with paragraph 99(c) redacted. It is acknowledged that the Council did seek and receive legal advice on the topic of tolling. We consider that the description on the Schedule SN/3 provided by Stephen Nicholson effectively discloses the content of this paragraph and any legal professional privilege that could be attached to this has in our opinion been waived. Even if it had not been waived, we do not consider that disclosure of this paragraph would adversely affect the course of justice. It is a short summary of the factual position with no opinion or advice being sought or given.</p> <p>We therefore conclude that the exception is not engaged.</p>
A:9	Letter Neil Scales (Merseytravel) to David Parr (Council) enclosing letter	Reg.12(5)(b) and Reg.12(5)(f)	<p>This is a covering letter and the enclosed document is legal advice. We consider that this falls squarely within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, we have taken account of all the matters previously identified and have concluded that the public interest in maintaining the exception in Regulation 12 (5)(b) outweighs the public interest in disclosure.</p>
A:10	Instructions to QC	Reg.12(5)(b)	<p>We consider that this clearly falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, we have taken account of all the matters previously identified. We consider that there is minimal public interest in disclosing instructions to Counsel to advise and have concluded that the public interest in maintaining the exception in Regulation 12 (5)(b) outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
A:11	Herbert Smith narrative	Reg.12(5)(b)	<p>This is said by the Council to be outside scope of the Request. We agree as it cannot be said to relate to the original request for information but is a summary of professional charges incurred. As this falls outside the scope of the request, it is not necessary for us to decide whether the exception is engaged.</p>
A:12	Email from Herbert Smith to Council attaching note from Counsel	Reg.12(5)(b)	<p>We consider that this is part of a sequence of documents that either reveal or lead to speculation about the content of legal advice. We are of the opinion that this “jigsaw disclosure” falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, we have taken account of all the matters previously identified. We have concluded that the public interest in maintaining the exception in Regulation 12 (5)(b) outweighs the public interest in disclosure.</p>
A:13	Note of consultation with Counsel	Reg.12(5)(b)	<p>We consider that this falls squarely within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, we have taken account of all the matters previously identified. We consider that there is minimal public interest in disclosing the notes of a consultation with Counsel and have concluded that the public interest in maintaining the exception in Regulation 12 (5)(b) outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
A:14	Email KPMG to Herbert Smith	Reg.12(5)(b) and Reg.12(5)(e)	<p>We consider that this is part of a sequence of documents that either reveal or lead to speculation about the content of legal advice. We are of the opinion that this “jigsaw disclosure” falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, we have taken account of all the matters previously identified. We have concluded that the public interest in maintaining the exception in Regulation 12 (5)(b) outweighs the public interest in disclosure.</p> <p>In light of this decision, we have not continued to consider whether the exception in Regulation 12 (5)(e) is also engaged.</p>
B:1	Mersey Gateway discriminatory pricing issues – local discount for non-business users	Reg.12(5)(e)	<p>This is said by the Council to be outside the scope of the Request. We disagree as it is information on the topic of tolling.</p> <p>Although this document is unsigned, from our consideration of other documents in this case, we are satisfied that this is a document generated Herbert Smith LPP. We are therefore satisfied that it is covered by legal professional privilege and falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, we have taken account of all the matters previously identified. We have concluded that the public interest in maintaining the exception in Regulation 12 (5)(b) outweighs the public interest in disclosure.</p> <p>In light of this decision, we have not continued to consider whether the exception in Regulation 12 (5)(e) is also engaged.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:2	Mersey Gateway Commercial Submission on Statutory Procedures	Reg.12(5)(b)	<p>It is not clear whether this document was produced by the Council or by the solicitors, although from its appearance we would assume the latter.</p> <p>We consider that this does fall within the scope of the exception because it amounts to a legal analysis of the legislation. This document falls within the scope of the Request and goes to the heart of matters that MTUA are concerned about.</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, although it is undated, we assume from its contents that this document was prepared during the period covered by other advice and consultation with Counsel. While it could be argued that there is public interest in disclosure, we consider that argument only carries significant weight in relation to Counsel's concluded opinion upon which the Council relies. Although it is artificial, we have to put out of our minds the fact that there has been subsequent disclosure. Giving due weight to the in-built weight of protecting documents covered by legal professional privilege, the overall nature of the Mersey Gateway project and the obligation on the Council to achieve cost-effective delivery, we have concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:3	New Mersey Crossing, Review of the Toll Operating Costs	Reg.12(5)(e)	<p>This is said by the Council to be outside the scope of the Request. We disagree as it is a review of the toll operating costs and we fail to understand how it can be said to not relate to tolling.</p> <p>We consider that this falls within the exception in Regulation 12(5)(e).</p> <p>Again, the factors put forward by the Appellant in support of disclosure are not insignificant, however we consider that at the time of the request, no contract had been entered into and any funding deal was still at a stage of brokerage. The information contained within this document would prejudice the Council's negotiating position and was not in the public domain at the time of the request.</p> <p>We therefore conclude that the public interest in maintaining the exception outweighs the public interest in disclosure.</p>
B:6	New Mersey Crossing, Report No 1, Transport and Works Application, Pre-Application Procedures	Reg.12(5)(b)	<p>This represents a consolidation of the advice given by solicitors to the Council and deals with a number of matters in detail. We consider that this does fall within the scope of the exception. This document goes to the heart of matters that MTUA are concerned about.</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to confidently and confidentially think through these topics with the benefit of legal advice.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:7	Email from Herbert Smith to Giffords	Reg.12(5)(b)	<p>We consider that this does fall within the scope of the exception. This is another document that goes to the heart of matters that MTUA are concerned about.</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>
B:8	Briefing note from Herbert Smith	Reg.12(5)(b)	<p>We regard documents B:8-B:12 as a sequence of correspondence forming a single whole. Again, they address matters falling within the scope of the Request. We consider that they are protected by legal professional privilege and therefore fall within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of each or all of these documents would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:9	Fax from Herbert Smith to Giffords	Reg.12(5)(b)	<p>We regard documents B:8-B:12 as a sequence of correspondence forming a single whole. Again, they address matters falling within the scope of the Request. We consider that they are protected by legal professional privilege and therefore fall within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of each or all of these documents would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>
B:10	Letter from Herbert Smith to Council	Reg.12(5)(b)	<p>We regard documents B:8-B:12 as a sequence of correspondence forming a single whole. Again, they address matters falling within the scope of the Request. We consider that they are protected by legal professional privilege and therefore fall within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of each or all of these documents would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:11	Letter from Herbert Smith to Council	Reg.12(5)(b)	<p>This is said by the Council to be outside scope of the Request. We agree as it is a covering letter only that reveals nothing in relation to the topic of tolling. As this falls outside the scope of the request, it is not necessary for us to decide whether the exception is engaged.</p>
B:12	Letter from Herbert Smith to Council	Reg.12(5)(b)	<p>We regard documents B:8-B:12 as a sequence of correspondence forming a single whole. Again, they address matters falling within the scope of the Request. We consider that they are protected by legal professional privilege and therefore fall within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of each or all of these documents would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>
B:13	Email correspondence between various parties including KPMG and Herbert Smith	Reg.12(5)(b)	<p>This is also said by the Council to be outside scope of the Request. We disagree with that submission as it clearly is a communication referring to tolling. We do not consider that this is a document protected by legal professional privilege; this is not a document generated from the Council to its legal advisors or from the legal advisors to the Council. Because a document has been copied to legal advisors does not automatically afford it the protection claimed by the Council.</p> <p>We therefore do not consider that the exception is engaged and therefore the Council is not entitled to refuse to disclose it.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:16	New Mersey Crossing procurement group minutes	Reg.12(5)(b)	<p>The relevant information is contained in paragraphs 69 and 70 only.</p> <p>This is also said by Council to be outside scope of the Request. We disagree as it clearly relates to tolling.</p> <p>We consider that the information is legal advice from the Council's legal advisors and therefore falls within the scope of the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of each or all of these documents would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to analyse the advice it has received privately and that it can, and should, explain its decision when it has been made.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:17	New Mersey Crossing VAT paper	Reg.12(5)(b)	<p>This is also said by Council to be outside scope of the Request. We disagree as it clearly relates to tolling.</p> <p>This is a Paper prepared by the Council's legal advisors and we consider that it therefore falls within the scope of the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of each or all of these documents would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to analyse the advice it has received privately and that it can, and should, explain its decision when it has been made.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:18	New Mersey Crossing – Discriminatory Pricing Issues	Reg.12(5)(b)	<p>This is also said by Council to be outside scope of the Request. We disagree as it clearly relates to tolling.</p> <p>This is a Paper prepared by the Council's legal advisors and we consider that it therefore falls within the scope of the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of each or all of these documents would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to analyse the advice it has received privately and that it can, and should, explain its decision when it has been made.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>
B:19	Tolling and value for money analysis	Reg.12(5)(e)	<p>This is said by the Council to be outside the scope of the Request. We disagree and we fail to understand how it can be said that a document dealing with tolling and value for money analysis does not relate to tolling.</p> <p>We consider that this falls within the exception in Regulation 12(5)(e).</p> <p>Again, the factors put forward by the Appellant in support of disclosure are not insignificant, however we consider that at the time of the request, no contract had been entered into and any funding deal was still at a stage of brokerage. We therefore conclude that the public interest in maintaining the exception outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:20	Fax from Herbert Smith to Giffords	Reg.12(5)(b)	<p>There is an overlap between this document and that at B:2, although this document is a “working” copy and is dated 1 December 2004.</p> <p>We consider that this does fall within the scope of the exception because it amounts to a legal analysis of the legislation. This document falls within the scope of the Request and goes to the heart of matters that MTUA are concerned about.</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, while it could be argued that there is public interest in disclosure, we consider that argument only carries significant weight in relation to a concluded opinion upon which the Council relies. Although it is artificial, we have to put out of our minds the fact that there has been subsequent disclosure. Giving due weight to the in-built weight of protecting documents covered by legal professional privilege, the overall nature of the Mersey Gateway project and the obligation on the Council to achieve cost-effective delivery, we have concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>
B:21	Email correspondence between Council and Herbert Smith	Reg.12(5)(b)	<p>This is part of a chain of correspondence forming a single whole. Again, it addressed matters falling within the scope of the Request. We consider that it is protected by legal professional privilege and therefore fall within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence. We consider that there is very little, if any, public interest in disclosing this particular document.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:22	Council's Mersey Gateway briefing note statutory procedures and consents (annotated)	Reg.12(5)(b)	<p>We consider that these are protected by legal professional privilege and therefore fall within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence. We also have had regard to the fact that the briefing note has been disclosed.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>
B:23	Instructions to Counsel	Reg.12(5)(b)	<p>We consider that this clearly falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, we have taken account of all the matters previously identified. We consider that there is minimal public interest in disclosing instructions to Counsel to advise and have concluded that the public interest in maintaining the exception in Regulation 12 (5)(b) outweighs the public interest in disclosure.</p>
B:24	Notes of consultation with Counsel	Reg.12(5)(b)	<p>We consider that this falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, we have taken account of all the matters previously identified. We consider that there is minimal public interest in disclosing the notes of a consultation with Counsel and have concluded that the public interest in maintaining the exception in Regulation 12 (5)(b) outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:25	Email correspondence between various parties, including KPMG, the Council, Giffords and Herbert Smith	Reg.12(5)(b)	<p>We consider that these are protected by legal professional privilege and therefore fall within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>
B:26	Note on use of the traffic regulation orders	Reg.12(5)(b)	<p>We consider that this is protected by legal professional privilege and therefore falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence. We would expect the Council to disclose the final position taken in due course.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:27	Opinion on tolling mechanisms	Reg.12(5)(b)	<p>We consider that this is protected by legal professional privilege and therefore falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence. We would expect the Council to disclose the final position taken in due course.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>
B:28	Note on options for tolling powers for Mersey Gateway and Silver Jubilee Bridge	Reg.12(5)(b)	<p>We consider that this is protected by legal professional privilege and therefore falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence. We would expect the Council to disclose the final position taken in due course.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:29	Instructions to Counsel	Reg.12(5)(b)	<p>We consider that this clearly falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, we have taken account of all the matters previously identified. We consider that there is minimal public interest in disclosing instructions to Counsel to advise and have concluded that the public interest in maintaining the exception in Regulation 12 (5)(b) outweighs the public interest in disclosure.</p>
B:30	Note on options for tolling powers for Mersey Gateway and Silver Jubilee Bridge	Reg.12(5)(b)	<p>We consider that this is protected by legal professional privilege and therefore falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence. We would expect the Council to disclose the final position taken in due course.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:31	Email correspondence between various parties, including Giffords, Herbert Smith and KPMG (redacted)	Reg.12(5)(b)	<p>We consider that this is protected by legal professional privilege and therefore falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence. We would expect the Council to disclose the final position taken in due course.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>
B:32	Mersey Gateway shadow bid model (June 2005)	Reg.12(5)(e) or Reg.12(5)(f)	<p>We were not provided with the full document, merely alternate pages. This is another example of the unsatisfactory way in which the Council has dealt with this Appeal.</p> <p>This, along with that at B:44, is a document created by KPMG and contains assumptions about private sector risk, cost profiles, PFI efficiencies, toll revenues and financing assumptions. We agree with the Council that this information would be relevant to bidders in any procurement exercise and would adversely affect the Council's position in securing best value. We therefore consider that the exception in Regulation 12(5)(e) is engaged.</p> <p>The factors put forward by the Appellant in support of disclosure are not insignificant, however we consider that at the time of the request, no contract had been entered into and the information contained in this document would prejudice the Council's negotiating position.</p> <p>We therefore conclude that the public interest in maintaining the exception outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:33	Instructions to Counsel	Reg.12(5)(b)	<p>We consider that this clearly falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, we have taken account of all the matters previously identified. We consider that there is minimal public interest in disclosing instructions to Counsel to advise and have concluded that the public interest in maintaining the exception in Regulation 12 (5)(b) outweighs the public interest in disclosure.</p>
B:34	Note of consultation with Counsel (14.7.05)	Reg.12(5)(b)	<p>We consider that this falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, we have taken account of all the matters previously identified. We consider that there is minimal public interest in disclosing the notes of a consultation with Counsel and have concluded that the public interest in maintaining the exception in Regulation 12 (5)(b) outweighs the public interest in disclosure.</p>
B:35	Email correspondence from Herbert Smith to various parties	Reg.12(5)(b)	<p>We consider that these are protected by legal professional privilege and therefore fall within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence. We would expect the Council to disclose the final position taken in due course.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:36	Draft instructions to Counsel (12.05)	Reg.12(5)(b)	<p>We consider that this clearly falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, we have taken account of all the matters previously identified. We consider that there is minimal public interest in disclosing instructions to Counsel to advise, even less in draft instructions, and have concluded that the public interest in maintaining the exception in Regulation 12 (5)(b) outweighs the public interest in disclosure.</p>
B:37	Note of consultation with Counsel (16.12.05)	Reg.12(5)(b)	<p>We consider that this falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, we have taken account of all the matters previously identified. We consider that there is minimal public interest in disclosing the notes of a consultation with Counsel and have concluded that the public interest in maintaining the exception in Regulation 12 (5)(b) outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:38	Email correspondence from within Herbert Smith	Reg.12(5)(b)	<p>We consider that these are protected by legal professional privilege and therefore fall within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence. We would expect the Council to disclose the final position taken in due course.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>
B:39	Letter to Counsel	Reg.12(5)(b)	<p>We consider that this clearly falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, we have taken account of all the matters previously identified. We consider that there is minimal public interest in disclosing instructions to Counsel to advise and have concluded that the public interest in maintaining the exception in Regulation 12 (5)(b) outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:40	Council's tolling powers briefing update	Reg.12(5)(b)	<p>We consider that this is protected by legal professional privilege and therefore falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence. We would expect the Council to disclose the final position taken in due course.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>
B:41	Note of consultation with Counsel (9.1.06)	Reg.12(5)(b)	<p>We consider that this falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>In assessing the public interest, we have taken account of all the matters previously identified. We consider that there is minimal public interest in disclosing the notes of a consultation with Counsel and have concluded that the public interest in maintaining the exception in Regulation 12 (5)(b) outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:42	New Mersey Crossing procurement group progress report	Reg.12(5)(e)	<p>This document was also said by the Council to be outside scope of the Request.</p> <p>We consider that this document does fall within the scope of the Request, albeit that it relates to a broader consideration of matters relevant to the Mersey Gateway project than just tolling; the project can only proceed with tolling and therefore it is integral to the project.</p> <p>We agree with the Council that this information would be relevant to bidders in any procurement exercise and would adversely affect the Council's position in securing best value. We therefore consider that the exception in Regulation 12(5)(e) is engaged.</p> <p>Again, the factors put forward by the Appellant in support of disclosure are not insignificant, however we consider that at the time of the request, no contract had been entered into and any funding deal was still at a stage of brokerage. We therefore conclude that the public interest in maintaining the exception outweighs the public interest in disclosure.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>
B:43	Draft Mersey Gateway Preferred Scheme Costs Report	Reg.12(4)(d) or Reg.12(5)(e)	<p>This is a draft document and, following our analysis as set out in the Decision, the exception in Regulation 12(4)(d) is engaged.</p> <p>For the reasons given in the Decision, we have concluded that the public interest in maintaining the exception outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:44	Mersey Gateway Shadow Bid Model Assumptions Book (February 2006)	Reg.12(4)(d) or Reg.12(5)(e)	<p>The Council submits that this is an incomplete document but we are unable to accept that: we have been provided with the full document but a random selection of photocopied pages. Again this is unsatisfactory and in light of the way in which the Council has conducted itself, we do not feel that we can properly conclude that the exception in Regulation 12(4)(d) is engaged.</p> <p>Although we observed in the Decision that a document cannot acquire confidential status simply because the word “confidential” is written upon it, we consider that it could have a bearing upon our decision. In this instance, we have indicated in relation to B:32 that the information falls within the exception in Regulation 12 (5)(e).</p> <p>Again, the factors put forward by the Appellant in support of disclosure are not insignificant, however we consider that at the time of the request, no contract had been entered into and the information contained in this document would prejudice the Council’s negotiating position.</p> <p>We therefore conclude that the public interest in maintaining the exception outweighs the public interest in disclosure.</p>
B:45	Mersey Gateway Financial Submission	Reg.12(5)(e)	<p>We are satisfied that this document falls within the exception in Regulation 12 (5)(e).</p> <p>Again, the factors put forward by the Appellant in support of disclosure are not insignificant, however we consider that at the time of the request, no contract had been entered into and the information contained in this document would prejudice the Council’s negotiating position.</p> <p>We therefore conclude that the public interest in maintaining the exception outweighs the public interest in disclosure.</p>

DOCUMENT REFERENCE	BRIEF DESCRIPTION	EXCEPTION CLAIMED	ANALYSIS and DECISION
B:46	Letter from English Nature to Giffords regarding Mersey Gateway Ecological Assessment		We agree with the Council and are of the opinion that this letter does not fall within the scope of the Request for information.
B:56	Email from Council to Herbert Smith	Reg.12(5)(b)	<p>We consider that this is protected by legal professional privilege and therefore falls within the exception in Regulation 12(5)(b).</p> <p>Applying the considerations outlined in the Decision, we are of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>While there is public interest in understanding how the Council reached the final decision regarding the Mersey Gateway project, and understanding whether there had been any position changes, we consider that there is greater public interest in a public authority being able to explore and be advised by its lawyers in confidence.</p> <p>We have therefore concluded that the public interest in favour of maintaining the exception outweighs the public interest in disclosure.</p>
B:57	Email from Council to Herbert Smith and Giffords	Reg.12(5)(b)	<p>We accept that this is protected by legal professional privilege and therefore falls within the exception in Regulation 12(5)(b).</p> <p>We consider that this privilege has been waived by the description provided by Stephen Nicolson. If privilege had not been waived, we are not of the opinion that disclosure of this would adversely affect the course of justice.</p> <p>Even if we are wrong about that, we consider that the public interest in favour of maintaining the exception does not outweigh the public interest in disclosure.</p>