IN THE FIRST-TIER TRIBUNAL **Case No. EA/2015/0209**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FER0557463
Dated: 18 August 2015

Appellant: **WORCESTERSHIRE COUNTY COUNCIL**

First Respondent: **THE INFORMATION COMMISSIONER**

Second Respondent: **MERCIA WASTE MANAGEMENT LIMITED**

Heard at: Fleetbank House, Salisbury Square, London EC4Y 8JX

Date of hearing: 19, 20 and 21 October 2016

Date of decision: 10th April 2017

Before
CHRIS RYAN
(Judge)
and
ANNE CHAFER
PAUL TAYLOR

Attendances:

For the Appellant: Robin Hopkins of Counsel
For the Respondent: Michael Armitage of Counsel
For the Second Respondent: Edward Capewell of Counsel

Subject matter:
Environmental information
Definitions, Reg 2

Exceptions, Regs 12(4) and (5)

- Intellectual property rights (5)(c)
- Confidential information (5)(e)

Cases:

DECC v Information Commissioner and Henney [2015] UKUT 0671 (AAC),
Anthony Bailey and anor v Keith Graham and others [2011] EWHC 3098 (Ch)
De Maudsley v Palumbo [1996] FSR 447
Stephen John Coogan v News Group Newspapers Ltd and Glenn Michael Mulcaire [2012] EWCA Civ 48
Coco v A N Clark (Engineers) Ltd [1969] RPC 41
Cabinet Office and HS2 v Information Commissioner and Rukin (EA / 2015 / 0207)
Mersey Tunnel Users Association v Information Commissioner and Halton BC (EA / 2009 / 0001)
Glawischnig v Bundesminister für Sicherieit und Generationen, Case C-316 / 01

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2015/0209**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed in part and the Decision Notice dated 18 August 2015 is substituted by the following notice:

Public Authority: Worcestershire County Council

Complainant: Alan Jones

Decision: For the reasons set out in the Reasons for Decision, the Public Authority is to disclose to the Complainant a copy of the Variation Agreement between the Public Authority and Mercia Waste Management Limited redacted to remove (i) the financial information identified in the original Decision Notice, and (ii) the information identified in Confidential Schedule 1 attached to this Decision.

REASONS FOR DECISION

Summary Conclusion

1. This decision concerns financial, commercial and technical information contained in the main body of, and annexes attached to, a Variation Agreement ("the Variation Agreement") entered into between the Appellant ("the Council") and the Second Respondent Mercia Waste Management Ltd ("Mercia") on 21 May 2014.

2. We have decided that the Decision Notice issued by the Information Commissioner on 18 August 2015 was not in accordance with the law, to the extent that it decided that the Council was not entitled to redact information in the Variation Agreement before its disclosure, beyond the limited amount of financial figures and formulae identified in the Decision Notice. In our view a substantial quantity of additional information may be withheld on the ground that it is covered by regulation 12(5)(e)of the Environmental Information Regulations 2000 ("EIR"), [and to a limited extent regulation 12(5)(c)], and that the public interest in maintaining the exception in each case outweighs the public interest in disclosure.

3. The Confidential Schedules attached to this decision set out each element of information which it has been argued should be withheld. Confidential Schedule 1 identifies those elements of information which we consider should be redacted, for the reasons set out below and, where appropriate, in the Schedule itself. That part of the Schedule should remain confidential unless

and until the Upper Tribunal or Courts determine otherwise on appeal from this decision. Confidential Schedule 2 sets out the information which, in our view, should be disclosed. That part is to remain confidential until either the time for lodging an appeal against our decision has expired, without an appeal being launched, or, in the event that such an appeal is launched, it has either been disposed of or withdrawn.

Introduction and Structure of the Decision

4. The rationale for the Information Commissioner's decision was that:
    a. the Variation Agreement constituted environmental information for the purposes of EIR;
    b. the financial information was the only part of it that fell within the exception from the obligation to disclose requested information under EIR regulation 12(5)(e) (commercial confidentiality); and
    c. for the purpose of EIR regulation 12(1)(b) the public interest in favour of maintaining the exception in respect of that information outweighed the public interest in disclosure.

5. The Information Commissioner identified the information to be withheld in general terms, but in the course of preparing for the hearing of this appeal the parties agreed the precise scope of the redactions permitted under the Decision Notice. We have not therefore been required to give further consideration to that aspect of the matter.

6. The Decision Notice recorded that the Council had failed properly to explain how disclosure of the substantial quantity of non-financial information it sought to withhold would prejudice the interests of itself, Herefordshire Council (another Council involved), Mercia, or any of its subcontractors. The Information Commissioner did record his understanding that it was conceivable that harm could be caused by disclosure, but he did not believe that the case for withholding information had been made out in respect of that category of information.

7. A very different case has been presented on this Appeal, compared with the limited and unparticularised case that the Council made to the Information Commissioner. First, Mercia has been joined as a party to the appeal. Second, a meticulous analysis has been carried out of each element of information capable of being gleaned from the Variation Agreement. And, third, lengthy witness statements have been filed on behalf of both the Council and Mercia in support of that analysis.

8. In the process, the grounds for objecting to disclosure have been expanded and presented in greater detail. First, it is now argued that some parts of the Variation Agreement do not fall within the scope of the EIR and therefore fall to be considered under the, parallel but not identical, provisions of the

Freedom of Information Act 2000 ("FOIA"). Second, it is said that some parts of the withheld information are covered by EIR regulation 12(5)(c) (intellectual property). The significance of that is that the exception would still apply even if, as the Information Commissioner argues, regulation 12(5)(e) may not be applied to those parts, due to the fact that they constitute information on "emissions", for the purposes of EIR regulation 12(9).

9. We have been persuaded, in light of the additional grounds relied on and the argument and evidence in support, that a great deal more of the Variation Agreement should be redacted before disclosure than the Information Commissioner was prepared to allow. In the following paragraphs we explain our reasons, following this structure:
    d. In paragraphs 10 to 14 we describe the Variation Agreement in more detail and explain the circumstances which brought it into existence;
    e. In paragraphs 15 to 24 we record why we have concluded that the whole of the Variation Agreement falls to be considered under EIR and not FOIA;
    f. In paragraphs 25 to 72 we address the application of EIR regulation 12(5)(e) to the proposed-to-be-withheld parts of the Variation Agreement;
    g. In paragraphs 73 to 81 we undertake a public interest balancing exercise, as required by EIR regulation 12(1)(b), and explain the extent to which we consider that the public interest in maintaining the regulation 12(5)(e) exception outweighs the public interest in disclosure;
    h. In paragraphs 82 to 84 we address the Information Commissioner's argument that some parts of the withheld information relate to "emissions" for the purpose of EIR regulation 12(9) and explain why we think it does;
    i. In paragraphs 85 to 93 we apply EIR regulation 12(5)(c) to the information on emissions and explain the extent to which the exception applies and our reasons for concluding that the public interest in maintaining the exception [does or does not] outweighs the public interest in disclosure.

<u>The History and Content of the Variation Agreement</u>

10. In 1996 a process of tendering for the outsourcing of waste disposal services had been undertaken by Hereford & Worcester County Council. By the time the process had been completed that administrative entity had been abolished and replaced by the Council and the County of Herefordshire District Council ("Herefordshire"). Accordingly, both entities were made party to a Waste Management Services Contract ("the WMSC"), which was signed with Mercia on 22 December 1998, with the Council as Lead Council. Its purpose was to create an integrated waste management service, which would include an obligation by Mercia to construct, operate and maintain a Waste Incinerator and Power Generation Plant, commonly referred to as the Waste

to Energy Plant ("WtE Plant") on a particular site. The WtE Plant was to have a life span of 25 years i.e. until 2023.

11. The WMSC has been published on the freedom of information pages of the Council's website. The whole or parts of some sections have been redacted, including provisions concerning performance monitoring, recycling targets, the project plan, recovery targets and recovery rate calculations.

12. In the event, planning permission was refused for the construction of the WtE Plantat the selected site and the WMSC went into an agreed standstill from October 2002. Eventually, in July 2012, planning permission was granted for a site in a place called Hartlebury, near Kidderminster, and on 21 May 2014 the Council and Mercia entered into the Variation Agreement in order to record the changes required to the WMSC in order to reflect the abandonment of the original WtE project and its replacement with the Hartlebury Plant.

13. The WMSC had extended to 1,200 pages of documentation with 3 Annexes, 6 Exhibits and 30 Schedules. The Variation Agreement itself is a shorter document, consisting very largely of a schedule identifying relevant provisions in the WMSC and setting out how each is to be amended. The main body of the agreement and the schedule run to 63 pages. However, there are scheduled to the Variation Agreement 25 separate documents, the whole set of documentation extending to over 4,000 pages. The size is the result of a decision to annex to the Variation Agreement each of the agreements and other documents, the creation and delivery of which was made a condition precedent to the Variation Agreement coming into force. They include:

    i. Statutory and Contract Notices;
    ii. Financing Agreements;
    iii. Plant Maintenance Plans and Operating Agreement;
    iv. A sub-contract between Mercia and Hitachi Zosen Inova ("Hitachi") the principal equipment supplier for the WtE Plant (a document that itself incorporates some 30 schedules dealing with such matters as plant design details, warranties, parent company guarantees, payment/performance bonds and insurance arrangements);
    v. Arrangements to be implemented in the event that Mercia is required to transfer the operation of the Plant to a successor operator;
    vi. Payment and funding arrangements;
    vii. Project and Service Delivery Plans;
    viii. Construction Management Agreement.

14. Construction of the WtE Plant started in June 2014. At the date of the hearing of the Appeal, the Plant was complete and was undergoing commissioning tests which, it is hoped, will lead to it being accepted by the Council. It could therefore be formally handed over to the Council during 2017. At that time, of course, the WMSC will have less than six years to run until its agreed termination date in 2023. After that the Council will be free to enter into a new procurement exercise for its operation or (less likely in view of the age of the plant at that stage) replacement.

EIR or FOIA: Which Regime Applies?

15. Under EIR regulation 2(1) "environmental information" is defined in the following terms:

> *" 'environmental information' has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—*
>
> > *(a)the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
> >
> > *(b)factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
> >
> > *(c)measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*
> >
> > *(d)reports on the implementation of environmental legislation;*
> > *(e)cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
> >
> > *(f)the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);"*

16. There is no dispute between the parties that the construction and operation of a WtE plant represent activities that are capable of having a significant impact

on the environment. However, the Council, supported by Mercia, argued that some parts of the withheld information have no significant relevance to the potential environmental impact of the project and therefore fall outside the scope of EIR.

17. Counsel for the Information Commissioner invited us to apply an inclusive interpretation. He reminded us that the EIR represents the implementation under national law of the Directive referred to in the definition, namely, Council Directive 2003/4/EC on Public Access to Environmental Information, which itself implemented the regime for wide access to environmental information created under the Aarhus Convention[1]. He drew our attention, in particular to a document entitled "*The Aarhus Convention: An Implementation Guide*", which provides, at page 50, that:

> *"The clear intention of the drafters … was to draft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation."*

18. That guidance was quoted by the Upper Tribunal in *DECC v Information Commissioner and Henney* [2015] UKUT 0671 (AAC), which said, in effect, that we are entitled to have regard to its guidance, even though it does not have binding force.

19. The Upper Tribunal Judge in *Henney* went on to say:

> *"…although the expression 'environmental information' must be read in a broad and inclusive manner, one must still guard against an impermissibly and overly expansive reading that sweeps in information which on no reasonable construction can be said to fall within the terms of the statutory definition. The CJEU, dealing with the earlier Directive 90/313, held that it was not intended 'to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision' (Glawischnig v Bundesminister für Sicherieit und Generationen, Case C-316/01)."*

20. Reference was also made, on both sides of the argument, to two First-tier Tribunal decisions (*Mersey Tunnel Users Association v Information Commissioner and Halton BC* (EA/2009/0001) and *Cabinet Office and HS2 v Information Commissioner and Rukin* (EA/2015/0207 and 0208)). Neither binds us on any points of principle that our colleagues may have expressed and each case was decided on facts unique to it. We therefore derive no direct assistance from them. However, *Mersey Tunnel,* was commented on by the Upper Tribunal Judge in *Henney.* He noted that the disputed information in that case was the tolling analysis undertaken in respect of a proposed Mersey Tunnel

[1] The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998

redevelopment. He expressed the view that the decision by the First-tier Tribunal, that this was an integral part of a project having a significant impact on the environment, "*seems eminently sustainable on the facts.*"

21. In his closing submission Mr Hopkins for the Council explained that the only materials that he wished to argue fell outside the scope of the EIR were the following:

Annex 5	Financing Agreements.
Annex 8	Exit Plan.
Annex 11	Compensation on Termination.
Annex 12	Agreement between the Council, Herefordshire, Mercia and the Law Debenture Corporation plc.

22. The Council argued that none of the information in those Annexes had any bearing on the environmental impact of the project. They did not even deal with how Mercia would be paid for its contribution (which it was accepted did fall within EIR), but with how the Council would raise finance. Annexes 5 and 12 related only to the loan arrangements under which the Council lent to Mercia money (which it had itself borrowed) in order to fund construction work. The loans happened to have been made in order to finance the WtE Plant, but the form and content of the agreement would be much the same, whatever the project for which the money was raised. Annex 8 provided for the transfer of services at the end of the WMSC, but the withheld information within it was very limited and had no relevance to the environment. Finally, Annex 11 governed financial arrangements if the WMSC was terminated. It was therefore, again, too far removed from the environmental aspect of the WtE project to fall within the definition

23. The Information Commissioner disagreed. He argued that the four documents recorded significant arrangements made for the specific purpose of enabling the WtE Plant to proceed. He relied on evidence provided by the Council's witness as to the importance of the financing arrangements to the success of the project as a whole. The annexes in question could not therefore simply be "hived off", on the basis that they could have been created in the context of any project and were remote from the potential environmental impact of this one.

24. We have concluded that the EIR is the appropriate regime to apply to the whole of the Variation Agreement. The construction and operation of the WtE Plant is clearly a measure that is likely to affect the state of elements of the environment, either directly or through one or more of the factors identified in paragraph (b) of the statutory definition. In our view the various financial arrangements put in place to enable the plant to be built and put into operation form a central part of the project. The fact that they may reflect financing techniques that may be applied to other projects or commercial activities does not alter the fact that they formed an essential feature of the package of measures devised by the Council and Mercia to bring this particular project to fruition.

25. Is EIR regulation 12(5)(e) engaged?

The relevant part of EIR regulation 12 reads:

> *"(1) Subject to paragraphs (2), (3) and (9), a pubic authority may refuse to disclose environmental information requested if-*
>
> *(a) an exception to disclosure applies under paragraphs (4) or (5); and*
>
> *(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*
>
> *(2) A public authority shall apply a presumption in favour of disclosure.*
>
> *(3) …*
>
> *(4) …*
>
> *(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –*
>
> *(a) …*
>
> *…*
>
> *(e)the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest"*

26. In his Decision Notice the Information Commissioner addressed the exception by considering the following four criteria (paragraph 16):

> *"(i)The information has to be commercial or industrial in nature;*
>
> *(ii) The information has to be subject to a duty of confidence provided by law;*
>
> *(iii) The confidentiality has to be required to protect an economic interest; and*
>
> *(iv) That economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of information"*

27. It is accepted on all sides that the first and second criteria are satisfied on the facts of this Appeal. However, as to (iii) and (iv), there was disagreement as to whether the adverse effect should be to the confidentiality of the information under consideration or the economic interest that the confidentiality is designed to protect. The Council argued that it was sufficient to show that confidentiality of the information would be adversely affected, but argued that the higher threshold, adverse effect on economic interests, was comfortably met, in any event, on the facts of the case.

28. Our attention was drawn to conflicting decisions on the point at First-tier Tribunal level and to the language of Article 4(2) of the Directive which provides that exceptions *"shall be interpreted in a restrictive way, …".* However, it seems to us that it is not necessary to adopt a particularly restrictive approach in order to conclude that a substantial part of the withheld information falls within the exception. A balanced, but purposive, approach to the language of the exception leads away from the circularity involved in the interpretation urged on us by the Council. In our view, the purpose of the language used is to ensure that the exception does not extend to

information which, while falling within the law of confidentiality and being capable of being characterised as of a commercial or industrial nature, is in fact innocuous. The words "*where such confidentiality is provided…*" require us to consider the circumstances that may arise if disclosure is ordered (the loss of protection for a legitimate economic interest) and not just the nature of the information (commercial/industrial secret). We acknowledge that in reaching this conclusion we are, in effect, interpreting the word "where" as meaning "to the extent that". It is an interpretation which we believe leads to the correct, purposive, interpretation of sub-paragraph (e), read as a whole.

29. Put another way, the language of the regulation has the effect of setting the threshold for imposing an obligation of confidence at a higher level than that provided by the common law in all other circumstances. It is well established that the law of confidence does not extend to trivia. In the defining case of *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, Megarry J made it clear that *"…equity ought not to be invoked to protect trivial tittle tattle, however confidential"*[2]. The words of the regulation *"where such confidentiality is provided by law to protect a legitimate economic interest"* defines a higher threshold. The effect is that not all information protected under the law of confidence will fall within the exception. The information must be of sufficient significance that economic loss would be suffered by its disclosure.

30. We therefore approach this part of the case by assessing, by reference to each element of information to which the Council and Mercia have sought to apply the exception, the economic interest which would be protected by maintaining confidentiality and the damage which would be caused to such interest if disclosure were ordered.

31. We remind ourselves, in this connection, that the Variation Agreement was signed on 21 May 2014 and the information request was submitted to the Council on 2 July 2014, approximately six weeks later. At that time construction work had either not started, or it was in its very early stages, and the commencement of plant operation (even on a commissioning test basis) lay some two years into the future.

32. The evidence on the harm which the Council and Mercia fear they would suffer as the result of disclosure was contained in witness statements from:

    a. Javier Peiro, a director of Mercia
    b. Joanna Charles, a senior executive with the Council; and
    c. Richard Woodward, the Council's Waste Services Manager.

    Each of those witnesses appeared at the hearing of the Appeal and answered questions. They each answered with openness and clarity and we are grateful for the assistance they provided towards our understanding of the Variation Agreement and the WtE project as a whole.

[2] See also the cases of *De Maudsley v Palumbo* [1996] FSR 447 (the concept of a night club with separate areas for dancing and socialising in an enclosed, acoustically designed dancing area lacked originality and was too vague to qualify as protectable confidential information) and *Anthony Bailey and anor v Keith Graham and others* [2011] EWHC 3098 (Ch) (imprecise recipe information not capable of being protected).

33. Mr Peiro is a director of Mercia. In that capacity he was involved in the negotiations for the Variation Agreement and subsequently served as the Project Director for the Construction of the WtE Plant. He also liaised with the Council in relation to the information request, explaining to it the concerns of both Mercia and its two main sub-contractors (Hitachi and Fichtner Consulting Engineers Ltd) in relation to the possible disclosure of information that they considered to be sensitive.

34. According to Mr Peiro, the Waste Management Services Market is very competitive and he provided information about those involved, their attempts to secure contracts from local authorities and the role played by energy from waste technology (and other systems) in those contracts. The design and construction of the WtE Plant involved a range of different components, which the main contractor must bring together, in the correct size and configuration, in order to match the specific requirements of a particular project, including the expected composition of the waste that will provide the feedstock for the Plant, in particular the calorific value of the waste.

35. Against that background Mr Peiro described the types of sensitive information capable of being obtained from an unredacted Variation Agreement. These included technical information, concerning the design and operation of an WtE Plant, as well as information about available options in negotiations. Even information that appeared to be innocuous could be of considerable significance to a competitor. During the course of being questioned on his evidence at the hearing Mr Peiro elaborated on the point in relation to technical information, explaining that it is sometimes only when a design originator subsequently loses out to a competing design for a project that it becomes apparent that secrecy has been lost. As to the detail of the withheld information Mr Peiro's evidence largely supported that of Mr Woodward in identifying the various categories of information and describing the economic disadvantage that he feared would be suffered by Mercia and its sub-contractors.

36. Ms Charles is Head of Commercial with the Council. She has a career background in public sector management and her duties include the management of the Council's procurement processes across all fields of enterprise. In that role, she claimed to have wide oversight of the potential impact of disclosure on the Council's whole commissioning and contracting activity, including its relationship with providers. She was concerned that a direction for disclosure in this case would discourage providers from trusting the Council with commercially sensitive information in the future. In the context of any procurement exercise carried out in the five years preceding the end of the WMSC in 2023, it would also undermine the Council's release of selected information to potential bidders at a time of its own choosing. This would undermine its negotiating position. This applied to both technical information and information that disclosed the stance which had been maintained, or the concessions which had been made, in the negotiations over the Variation Agreement.

37. Ms Charles suggested that the commercial arrangements in respect of both financing the WtE Plant and risk allocation might be deployed in the context of other contracts outside the field of waste management. This reflected a general move towards the outsourcing of services. In this respect, also, disclosure in response to the information request would undermine the Council's commercial position in negotiations. She identified five projects, which have been in the course of being negotiated during the period since July 2014, which might have been affected in this way.

38. In the final section of her witness statement Ms Charles provided information about the degree to which all of the Council's contracts, including the Variation Agreement, are subject to public scrutiny, particularly through the oversight provided by the full Council of elected members during the course of public meetings. The process included training for Councillors on the balance to be achieved between an appropriate level of engagement by members of the public, on the one hand, and the preservation of commercial secrets, on the other.

39. Mr Woodward has been responsible for waste management for both the Council and Herefordshire for the last eight years. He described the history of the WtE Plant and explained that, after a standstill period of 12 years, the Variation Agreement was required to include, in addition to the proposed arrangements for the WtE Plant, the removal from the WMSC of other services that were no longer required, the introduction of alternative solutions for sorting waste and provisions to take account of changes in law. Before the Variation Agreement was signed an extensive public consultation had taken place into the Council's entire waste management strategy, including the WMSC. Details had been made available on the Council's website, following their release in response to a freedom of information request.

40. Mr Woodward explained that there were a small number of companies who competed vigorously with Mercia for public authority waste management contracts of this kind. Disclosing information that would undermine Mercia's competitive edge in respect of those competitors would be harmful to Mercia and would undermine the working relationship between it and the Council. Those competitors could become involved in the Project in at least two ways. First, when the WMSC comes to an end in 2023 the Council will have to undertake a new procurement exercise in respect of waste disposal services. In reality, the process is expected to require a decision on whether to extend the WMSC with Mercia or enter into a new contract with one of its competitors. At that stage the Council will go into the exercise (the planning of which is likely to start in 2018) with the commercial advantage of being the owner of a plant that will be just 7 years old at the time of termination. That position would be undermined, it fears, if information about the WtE Plant and the Variation Agreement were to fall into the hands of those with whom it may find itself negotiating. The second situation, which was not mentioned in the witness statement but emerged during the hearing, was that the Council might have found itself negotiating for another company to take over the WtE project during the construction or commissioning phase, due to any breach or other failure by Mercia. That situation could have arisen at any

time after the Variation Agreement had been signed, possibly within months of the date of the information request.

41. Mr Woodward went on in his witness statement, and in answering questions during the hearing of the Appeal, to comment on the different categories of information contained in the Variation Agreement. He referred to each one as a "theme" and explained, with the help of a detailed schedule of disputed information, his reasons for believing that each item of relevant information was covered by one, or more than one, of such "themes".

42. In the following paragraphs, we have adopted Mr Woodward's approach of commenting on each document in dispute (not all are) by reference to the theme or themes claimed to apply to it. In the Confidential Schedules to this decision we then apply those general conclusions to each item of information contained in each document, with an explanation to form a link back to our general conclusions. We have sought to include in the main body of the decision as much detail as we can without disclosing information that must be kept confidential at this stage.

The Main Body of the Variation Agreement

43. The history of the contractual arrangements between the parties, as summarised in paragraphs 10 to 14 above is set out in lengthy recitals that also record that a number of interim measures had been implemented for the management of waste during the standstill period. Most importantly the purpose of the agreement is stated to be to record agreed modifications to the WMSC to provide for the design, construction and financing of a WtE Plant that was materially different to that originally contemplated. In reality the operative provisions go further, in that they also:
    a. ratify various ad hoc arrangements that had been put in place during the standstill period to compensate for the absence of any WtE Plant at that stage (see the reference to Annex 4 below); and
    b. make adjustments to previously-agreed financial arrangements affected by changes in law.

44. The information which is proposed to be redacted would disclose the Council's likely negotiating position and its risk appetite in relation both to any new negotiations related to the WtE Plant and other commercial negotiations. While we do not think that the particular provisions that the Council seeks to redact would have any effect on the perception of the Council in the minds of anyone negotiating a contract in a different commercial context, we do have sympathy for the Council's position in relation to any negotiations in the waste management field that might have taken place after the date of the information request (including any leading up to the end of the WMSC term in 2023). We have set out in the Confidential Schedules to this decision our more detailed justification for the decisions we have reached in each case.

Schedule 1 to the Variation Agreement

45. As previously indicated this lists each provision of the WMSC that was to be varied, with the text of the proposed change alongside. The Council argued that some parts of it disclose design and technical information, including a provision that would disclose information about the intended balance to be achieved between power output and the consumption of certain materials. We are satisfied that this would disclose information of a technical nature relating to the Plant and its operation and that this would harm the economic interests of Mercia and, to a lesser extent, the Council. Other parts were said to disclose commercial information regarding factors affecting the calculation of Mercia's remuneration. We believe that the harm resulting from the disclosure of information about the cost incurred by the Council, and the reward secured by Mercia, will have limited impact on either of them, bearing in mind the level of public disclosure that already exists, but the particular factors referred to would enable other companies in the waste management field to obtain an insight into the finances and allocation of risk between the original parties, which could impact the Council's negotiating position in the event that it had to renegotiate any part of the WMSC and Variation Agreement at any date after August 2014. The exception is therefore engaged in respect of that information.

46. The Schedule also included a number of provisions which, it was said, reveal secrets about the detailed terms agreed between the parties on payment/funding mechanisms and to cover certain eventualities, including the timescale for remedying them or ameliorating their consequences. Some of these could be characterised as of minor significance, but we accept that negotiations in complex projects involve give and take by both sides on a very large number of issues and that there may be harm caused by disclosing to the public individual parts of the overall package of points conceded or gained. The public will, of course, include other companies in the waste management field who, with greater familiarity with the contractual terms commonly used and the significance of a particular adjustment agreed by Mercia and the Council, might well have secured an advantage in post-August 2014 negotiations.

47. The exception to our general approach of allowing the redactions sought in this document is a provision setting out the precise day count for determining an insolvency event. We do not accept that harm would be caused (or a competitor's negotiating position improved) by disclosure of the precise time allowed to carry out a particular procedural formality, unless it appeared to be particularly onerous or otherwise unusual. In the case of this provision it does not and we do not therefore think that the Council is entitled to withhold it.

48. The proposed-to-be-withheld information in this document also included certain contractual definitions. Although a definition may, on its own, contain sensitive information, we have concluded that, for the most part, it is unnecessary to consider these in isolation. If they relate to an operative provision which we have decided may be withheld (which in the case of this document they do), then they should similarly be treated as covered by the exception. If left as part of the material to be disclosed they may alert a

competitor operator to the likely terms of the provision in which they are known to be deployed and, although the harm likely to follow from that level of disclosure will be limited, it may not be ignored, in our view, and is sufficient to lead us to conclude that the exception is engaged.

49. Our overall conclusion in respect of Schedule 1 is that, with the exception of a few provisions (identified and explained in Confidential Schedule 2) most of the information may be redacted (as identified and explained in Confidential Schedule 1).

Annex 4: 23 letters recording agreed variations to the WMSC

50. The information proposed to be redacted from these documents is limited. Each letter typically formalises an already implemented change to arrangements for waste disposal, including changes to the operation of a separate Plant falling within the scope of the WMSC. The proposed-to-be-redacted information mainly concerns financial matters, typically, the impact of the agreed change on the overall contract price. It has already been agreed that some of the precise figures may be redacted, in order to comply with the Decision Notice, and it is also agreed that a small amount of personal data may be redacted. For the rest, we are satisfied that the provisions governing how financial arrangements under the WMSC are to be adjusted in order to reflect the variations (i.e. the information appearing under the sub-heading of "Effect on Contract Price") form part of the overall financial arrangements agreed by the parties in the Variation Agreement, the disclosure of which would undermine the future negotiating positions of the Council and/or Mercia. Those provisions, including subsidiary ones regulating invoicing and payment arrangements should therefore be redacted.

51. We deal in the Confidential Schedules with those parts of Annex 4, which are not covered by the general considerations set out in the preceding paragraphs.

Annex 5: Financing Agreements

52. The document in Annex 5 is an unsigned and undated copy of an agreement, entered into in May 2014, under which the Council and Herefordshire made certain funds available, which Mercia could drawdown to meet expenses involved in the development of the WtE Plant. In a normal commercial environment this type of documentation would normally be kept confidential, even if the broad effect of the borrowing and on-lending would be apparent from public records. However, it has been attached to the Variation Agreement and the Council has (generously, in our view) consented to large parts of it being disclosed. The proposed-to-be-redacted provisions consist, in part, of cross references to payment mechanisms set out in Schedule 1, which we have already decided should be redacted. Other elements which the Council wishes to redact concern:
    a. provisions designed to enable Mercia's financial performance to be monitored (including certain periods of time in which related steps should be taken);
    b. information about drawdown and repayment arrangements;

c. detailed information about the insurance to be maintained by Mercia; and
d. certain bank account details.

We are satisfied that, although the proposed-to-be-redacted information constitutes only a very small part of a long and complex financial agreement, the rest of which has been disclosed, each element of withheld information is an item of confidential, commercial information, the disclosure of which would contribute to the harm which the Council and/or Mercia would suffer if competitors had access to it. The information forms part of the overall package of commercial and financial agreements agreed by the parties to enable the WtE project to progress.

Annex 6: Outline Detailed Maintenance Plan

53. The generic parts of this document have been disclosed. The redacted parts, which are claimed to constitute confidential technical and commercial information, comprise:
    a. a list of individual components making up the WtE Plant, with the nature and regularity of maintenance work being set out against each one; and
    b. information about how often the non-confidential features of the site infrastructure would be inspected and faults remedied.

54. We are satisfied that the first category may well provide valuable information to a competitor of Mercia or one or more of its sub-contractors. The value may be increased by the accompanying information about the nature and timing of maintenance work to be applied to each component. It may be that only a competitor that is struggling to overcome a particular problem in its own product offering will see in this information the single piece of information, or combination of pieces of information, which provide the vital clue to developing a solution. In this respect, we accept the evidence of Mr Peiro, which was to the effect that it is in the nature of a trade secret that its significance may not be so obvious to its proprietor as to those seeking to follow or emulate its technical offering. As he put it, the proprietor may only know that a technical secret has been lost when a competitor wins a particular competition for business. And maybe not even then. We are therefore satisfied that disclosure would be likely to undermine any commercial edge enjoyed by Mercia and its subcontractors at the relevant time and that the exception is therefore engaged.

55. Conversely, we are unable to see any risk of harm occurring to any party's interests by the disclosure of the second category of information. The Council suggested that timing information of that nature was commercially sensitive. The item under consideration is disclosed, as is the work to be undertaken in each case. Given the nature of the items under consideration (such as fences, drains and roadways) we do not think that any third party would secure a competitive advantage by knowing about the regularity of the inspections and the time allowed to remedy any problems that might thereby be identified.

56. The application of the decisions we have made to particular items of information in Annex 6 is explained in the Confidential Schedules.

Annex 7: the "EPC Contract"

57. This is a copy of the contract between Mercia and Hitachi for the supply of the incinerator and related equipment. The contract runs to around 3,000 pages and includes 30 substantial schedules covering such matters as a description of the works, quality assurance issues, provisions for training, a description of parts having a limited working life, liquidated damages provisions, performance tests and, in the case of schedule 30, Hitachi's original proposal. The Council and Mercia have agreed to the disclosure of schedules 21-29 inclusive, which deal mostly with financial issues, but claim that the rest of the document should be withheld.

58. The contract is the sort of document, entered into between two commercial organisations, which would normally remain private. It contains an immense amount of technical detail about the equipment to be supplied, the Plant of which it is to be part and the commercial arrangements between the two companies. That information is just the sort of detail that any commercial organisation would understandably wish to be kept from its competitors and we believe that it should be entitled to do so in order to maintain over its competitors any competitive advantage that the withheld information is capable of providing.

Annex 8: Exit Plan

59. This document deals with the transfer of services to a successor operator of the WtE Plant at the end of the WMSC. The only information sought to be redacted related to computer systems security arrangements which appear to be neither novel nor out of the ordinary. No evidence was given addressing this specific piece of information and we are not convinced that its disclosure would cause any harm to any relevant party. It should therefore be disclosed.

Annex 9: Payment Mechanism

60. We have already indicated (in paragraph 46 in relation to the allocation of financial risk and paragraph 52 in relation to the Financing Agreement) that we are satisfied that the Council is entitled to redact information that would give potential rival plant operators an insight into the detailed financial arrangements into which it has entered. The same principle applies to the information in Annex 9, detailing how payments due to Mercia should be calculated and paid. In some cases, this has required us to consider the harm that might or might not arise from the disclosure of what appear on first reading to be elements of information that are small and/or apparently innocuous. However, for the reasons given previously, we have tended to give the benefit of the doubt to the Council and Mercia in this area, because the value to a competitor of a particular piece of information may well be

substantial in providing a crucial insight into an aspect of the overall commercial arrangement they have agreed. We have no way of achieving certainty on this issue without knowing the precise extent of that competitor's existing information or the impact on its overall understanding of a particular item of information which, to an outsider, may appear insignificant or innocuous. We have therefore tried to place each item of information into the context of an overall commercial bargain which the Council and Mercia have struck and to base our decision on our broad assessment of the potential benefit to a competitor operator (and consequent damage to one or other of the competing parties) if the competitor were to be provided with an insight into detailed payment arrangements.

Annex 10: Project Plan

61. As its title indicates, this sets out a precise timeline for the construction of the WtE Plant and we have decided that the exception applies to the totality of the document, for the same reasons we have given in respect of Annexes 6 and 7 above.

Annex 11: Compensation on Termination

62. As disclosed by the part of this annex that the Council has agreed may be disclosed, Mercia may be entitled to a compensation payment in the event that the WMSC is terminated. The payment is to be calculated by reference to one of four possible formulae, depending on the precise circumstances of the termination. The Council claims to be entitled to withhold the whole of the formulae, including the narrative setting out each relevant termination event and identifying the matters, incorporated by abbreviation, included in the relevant formulae. The Information Commissioner has agreed to the redaction of the applicable formulae, but not the narrative elements. However, we are satisfied that the whole of the proposed-to-be-redacted information may be withheld on the basis that, as previously explained, its disclosure would arm competitor operators with a valuable insight into a potentially key element of the overall financial package agreed between the Council and Mercia. We are also satisfied that information on the manner in which any payment falling due is to be paid has sufficient connection with the core obligations set out in this annex that it, too, may be withheld. Other parts of this annex, all of which may be withheld, are dealt with in Confidential Schedule 1 to this decision.

Annex 12: Agreement between the Council and Herefordshire on financing arrangements

63. This is an agreement between the Council, Herefordshire, Mercia and a security agent, which supplements legal obligations undertaken under other parts of the overall financing package for the WtE Plant. It therefore falls to be considered in the same way as other elements of the financing arrangements considered above and, for the reasons given there, may be redacted to the extent claimed by the Council and explained in the Confidential Schedules.

Annex 14: Direct Agreement between the Councils, Mercia and Hitachi

64. The whole of this agreement has been disclosed except for a schedule which lists certain of Hitachi's competitors. The same information had been disclosed elsewhere in material released by the Council but we would not, in any event, have regarded as sensitive and confidential, publicly available information about organisations involved in WtE technology in competition with Hitachi.

Annex 16: Financial Model

65. It was agreed between the parties that a key part of this document, a financial model spreadsheet, should be withheld on the ground that it constituted financial information of the kind contemplated in the Decision Notice. What is left constitutes an appendix which comprises a protocol for the operation of the Financial Model. The Council has agreed to the disclosure of some parts of the protocol but argued that it was entitled to withhold those parts that set out a number of possible variables to the data in the Model or contain an explanation of some of those variables. In our view the withheld information therefore falls within the exception in the same way that, as it is now conceded, the main spreadsheet does. It may therefore, similarly, be withheld from disclosure.

Annex 17: Service Delivery Plan

66. This Annex contains Service Delivery Plans for a number of waste management sites, which the Council agrees may be disclosed in full, together with the equivalent plan for the WtE Plant, some parts of which have been withheld. The withheld sections fall into the same category of information as Annexes 6 and 7 above in that they set out detailed information on organisation roles and a highly detailed description of each element of the Plant. We have already decided that the Council was entitled to withhold a list of the components comprising the Plant and we are satisfied, on the same basis, that the more detailed description of both components and processes set out in Annex 17 may also be withheld.

Annex 18: Operation and Maintenance Agreement

67. This is an agreement between Mercia and an associated company called Severn Waste Services Ltd ("Severn"). It sets out the terms under which Mercia sub-contracted to Severn the operation and management of the WtE Plant. The agreement achieves its aim by re-stating and amending, in a form scheduled to the main body of the agreement, the terms previously agreed between the same parties at the time when the WMSC was entered into. Neither the Council nor any other public authority is a party to the agreement. The agreement was originally withheld in full but by the time the Appeal came to be heard the Council had (generously, in our view) agreed to disclose the whole of the new agreement and much of the re-stated agreement. We identify in Confidential Schedule 1 to this decision the individual passages which the Council claims, by colour coding, it wishes to withhold. As a general statement, for the purposes of this open part of our

decision, we can say that we have applied to this Annex the same principles as we have applied to Annex 6 (Maintenance Plan), Annex 7 (the EPC Contract) and Annex 17 (service delivery plan). That is to say that we have accepted the Council's arguments that the proposed-to-be-redacted passages do contain sensitive commercial and/or technical information, the disclosure of which would harm the Council and/or Mercia.

68. A number of other agreements are scheduled to Annex 18 and minor redactions have been sought in respect of some of them. Largely, these seek to withhold details of the precise period of time within which certain legal obligations either must be complied with or, conversely, may be enforced. We deal with them individually in the Confidential Schedules to this decision but will say, in this open part of our decision, that we consider them generally to represent entirely normal and, indeed, predictable provisions, the disclosure of which will not cause any harm to any party.

Annex 19: Determination of the impact of change in the composition and calorific value of Contract Waste.

69. Annex 19 sets out how the calorific value of waste provided as feedstock to the WtE Plant should be calculated. Most of it has been disclosed, but the Council claims to be entitled to redact from the disclosed document certain information. The first element of such information is a notional calorific value against which the actual value should be compared for the purposes of adjusting rights and obligations under the WMSC, including Mercia's right to remuneration. We are satisfied that the notional value (defined in the WMSC as the "CV Base Value") may be redacted where it appears in this Annex. As Mr Peiro made clear in his evidence it is a key element in calculating the likely profitability of any WtE plant. If a competitor operator knew the number, it would be in a much better position when negotiating to, for example, take over the running of the Plant. It is conceivable, of course, that it would require the Council to disclose the number as part of the due diligence enquiries it would undertake before committing itself to a negotiating position. However, disclosure would remain under the control of the Council in those circumstances and we are satisfied that it would suffer material harm if denied that freedom to deploy information as and when it considered appropriate.

70. The Annex also includes the method by which the actual calorific value of waste feedstock should be calculated. Disclosure of this information would provide potential competitors with information about plant design. It is information which may be redacted, given the view we have taken of other aspects of plant design and operation elsewhere in this decision. We do not, of course, know whether a competitor operator, if shown the information, would consider that the method disclosed is obvious or commonplace. We must make our decision, without that information or any independent expert evidence on the point. The absence of such evidence should not be seen as a criticism of those who prepared the appeal for hearing – they were entitled to assume that it would be disproportionate to introduce, to a tribunal hearing of this nature, the cost and complexity that would be involved in leading independent expert evidence. We must therefore do the best we can with the

written and oral evidence provided to us and conclude, largely on the basis of the evidence on the point given by Mr Peiro and Mr Woodward, that the likelihood of harm resulting from disclosure entitles the Council to redact this item of information.

71. Finally, Annex 19 includes a detailed process for adjusting an element of Mercia's remuneration to take account of variations from the CV Base Value. It has been agreed that certain figures may be redacted but we are satisfied that the narrative parts of the formula set out in the Annex may also be redacted for the same reasons we have given in respect of other elements of the financial bargain which the Council struck with Mercia.

Annex 22: Construction Management Agreement

72. Annex 22 includes an agreement between Mercia and Severn, which amends and re-states an earlier agreement between the two companies governing plant construction. The Annex also includes copies of supporting guarantee and direct obligation agreements designed to reflect the terms of the main agreement for the benefit of relevant third parties. Most of the information within the Annex has been disclosed, even though it essentially records arrangements between two private organisations. We have recorded our decision in respect of each element of proposed-to-be-redacted information in the Confidential Schedules. We are able to say in this public part of our decision that we have concluded, with one exception, that it is appropriate for the Council to redact various items of information which relate, with varying degrees of directness, to the financial arrangements between the parties, for the reasons given above in respect of that category of information.

Does the Public Interest Balance in maintaining the regulation 12(5)(e) exception outweigh the public interest in disclosure?

73. As required by EIR regulation 12(1)(b), information falling within the scope of the exception 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".*

74. We also remind ourselves that EIR regulation 12(2) provides:

> *"A public authority shall apply a presumption in favour of disclosure".*

The burden therefore rests on the Council and Mercia to demonstrate that the balancing exercise should be resolved in their favour.

75. We have already described, here and in the Confidential Schedules to our decision, the harm that disclosure would entail. Although the degree of harm varies, depending on the particular information under consideration, we have concluded that it is for the most part substantial. It carries significant weight in favour of maintaining the exception.

76. With regard to the public interest in disclosure, to be set against the public interest in maintaining the exception, the Information Commissioner decided, by reference to the narrow category of information that he considered fell within the scope of the exception, that, although there were arguments in favour of disclosure (arising from the public interest in the transparency and accountability of public fund spending), they were outweighed by the public interest in preventing other companies in the waste management business from having access to the figures and formulae contained in the Variation Agreement. Not only would this be contrary to the general public interest in maintaining commercial confidences, it would provide competitors with an unfair commercial advantage and would discourage commercial organisations from sharing information with public authorities in the future. For the rest of the withheld information the Information Commissioner found, in effect, that the Council had not made out its case for maintaining the exception. As we have indicated, the case in favour of withholding information has been presented, on Appeal, with much greater rigour.

77. The Council acknowledged that there is a public interest in the transparency of its use of public funds on the WtE Plant, particularly in light of the involvement of private-sector companies and in the environmental aspects of waste management. However, it argued that disclosure of the particular information under consideration in this Appeal would not make any significant contribution to public knowledge on those issues, particularly in light of the information that had already been put into the public domain. This included the conduct in public of the Council's decision making, the disclosure involved in the planning process, as well as information published on the Council's website (including a relatively lightly redacted copy of the WMSC) and the redacted copies of the Variation Agreement provided to the requester. In those circumstances, it was argued, the incremental contribution to public knowledge represented by the redacted information was negligible.

78. Mr Hopkins for the Council specifically addressed a statement from the original requester, which had been filed in support of his (ultimately unsuccessful) application to be joined as a party to the appeal and a copy of which was provided to us during the course of the hearing. It concentrated on the issue of the value for money (or lack of it) which the Council had secured. Mr Hopkins argued that disclosure would not contribute to any public debate on that issue, because the Information Commissioner had agreed to the redaction of much of the financial information both in the decision notice and (with particular reference to the financial model) during the preparations for the hearing of the Appeal.

79. Mr Capewell, for Mercia, supported the Council's position. He stressed that disclosure of the withheld information would not inform the public of anything relevant to the reasons why the WtE Plant was selected (matters that had, in any event, been aired during the planning process and the Environment Agency's assessment of the project), but only how it was to be constructed. Much of that information, it was suggested, would mean nothing to the public, if disclosed.

80. The Information Commissioner also argued that the WtE Plant had given rise to some controversy, as had been confirmed by Mr Woodward during questioning, due no doubt to its size and nature and the fact that it had been built in the green belt. The fact that there had been a public planning and consultation process did not render it unnecessary to disclose the information in dispute.

81. We have concluded that all of the information which we have found falls within regulation 12(5)(e) should be redacted in the copy of the Variation Agreement that is to be made available to the public. We have reached that conclusion on the basis of the body of the proposed-to-be-redacted information, viewed as a whole. The result may be that information that only just satisfied the test for engaging the exception carries as much weight for this purpose as other information of more obvious commercial significance. However, as we have explained, it is not possible to assess, with precision, the likely impact on a competitor of each item of information. We are satisfied that the public interest in protecting the Council and Mercia from the harm that disclosure would cause outweighs the public interest in viewing information which, for the reasons given in argument, will have only very limited impact on any public debate about the WtE plant.

Do some parts of the withheld information relate to emissions?

82. The question of whether parts of the withheld information should be categorised as relating to emissions arises because EIR regulation 12(9) provides that, to the extent that it does, the Council is not entitled to refuse disclosure under regulation 12(5)(e). Very shortly before the hearing date the Information Commissioner's representatives raised the point and provided a table showing the particular passages in the Variation Agreement, which were said to contain relevant information. At the same time the Information Commissioner made it clear that she did not exclude the possibility that the evidence and/or submissions at the hearing might cause her to change her mind in respect of some or all of the information. In the event, that did result in some concessions being made during closing submissions, which reduced the number of relevant passages. Each one formed part of information which we have decided may be redacted, applying regulation 12(5)(e) and taking into account the required public interest balancing exercise.

83. The response of the Council and Mercia was to argue that, if regulation 12(9) did apply to the identified passages, it was still open to them to resist disclosure on the basis that the relevant information consisted of, or formed part of, material protected by at least one category of intellectual property right. If that was the case it would fall within the exception provided by EIR regulation 12(5)(c), which is not referred to in regulation 12(9).

84. We accept that those of the passages which remained in issue by the end of the hearing did relate to emissions, although at least one of them fell on the borderline, in our view. They concern such matters as the possible need to manage polluting or hazardous materials found on site and to maintain

silencers to prevent excessive noise being generated when the plant is in operation

Is EIR regulation 12(5)(c) engaged in relation to the information on emissions and does the public interest in maintaining that exemption outweigh the public interest in disclosure?

85. EIR regulation 12(5)(c), read in context, requires that, for the exception to apply, it must be established that disclosure would "adversely affect…intellectual property rights".

86. Of the categories of IP right that were suggested to us we were not persuaded that either copyright or database right had application. As for copyright, it is certainly the case that the main body of the Variation Agreement, as well as individual documents scheduled to it, would each be a literary work for copyright purposes, provided that it did not contain so much material derived from earlier precedents that it lacked the necessary degree of originality. However, copyright protects the manner in which ideas are expressed, not the ideas themselves. Applying that truism to the documents in question leads to the conclusion that any person to whom they were released under FOIA, although prevented from reproducing them in full, would be free to extract and use a considerable body of information before it could be said that he or she had reproduced a "substantial part" of the form and expression adopted by the draftsperson, for the purposes of section 16(3)(a) of the Copyright, Designs and Patents Act 1988. Disclosure itself would not therefore adversely affect copyright. Nor would it adversely affect any database rights. This is because the documentation lacks the content-driven structure required by the definition of "database" in Article 1(2) of the Directive on the legal protection of databases[3], namely:

> *"…a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means."*

87. However, for the reasons we have given above in respect of regulation 12(5)(e), we are satisfied that the information, of which the emissions material formed part, would be protected under the law of confidence. We are also satisfied that the right to protect commercial or industrial confidentiality may properly be categorised as an intellectual property right.

88. The Agreement on Trade-related Aspects of Intellectual Property Rights, ("TRIPS")[4], was signed by 145 members of the World Trade Organisation in 1994, with China joining later, in 2001. It includes the "protection of undisclosed information" as one of the categories of intellectual property rights to which signatories are required to adopt a standardised approach. Article 39(2) requires signatories to ensure that their national laws provide that:

[3] Directive 96/9/EC
[4] https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm

> *"Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:*
>
> *(a) is secret….;*
>
> *(b) has commercial value because it is secret; and*
>
> *(c) has been subject to reasonable steps … to keep it secret"*

89. No steps have been taken by the UK Government to change its law in order to bring it into compliance with Article 39. The fact that this country's substantive law is apparently therefore considered to be in compliance with the requirements of TRIPS does not, on its own, establish that the categorisation of the law of confidence as an intellectual property right has also been accepted. However, section 72 of the Senior Courts Act 1981, when defining the scope of a limitation placed on the right of privilege against self-incrimination in "*proceedings for infringement of rights pertaining to any intellectual property or passing off",* defined *"intellectual property"* as meaning *"any patent, trade mark, copyright, design right, registered design, technical or commercial information or other intellectual property*". Although the final phrase demonstrates that this was not intended to be a comprehensive determination of the scope of intellectual property rights, it does reflect the approach adopted by practitioners and text book writers, at least to the law of confidentiality as it applies to commercial or technical secrets, (as opposed to personal information)[5].

90. Section 72 was considered by the Court of Appeal in *Stephen John Coogan v News Group Newspapers Ltd and Glenn Michael Mulcaire* [2012] EWCA Civ 48. That was a case involving the hacking of a celebrity's telephone messages and, in which the defendant relied on a claim to privilege against self-incrimination in order to avoid giving evidence. Lord Neuberger, Master of the Rolls, giving the only judgment of the court, considered whether the content of the hacked messages amounted to "*technical or commercial information or other intellectual property".* He said (paragraph 31):

> *"… it seems to me that the expression means confidential information which is technical or commercial in character. As for the confidential aspect, in order to be protected in law, and to be even arguably characterised as 'intellectual property' information must be confidential, or, to use the well-known expression of Megarry J in Coco v A N Clark (Engineers) Ltd [1968] RPC 41, 47, it must 'have the necessary quality of confidence about it'.*

Later, at paragraph 39 Lord Neuberger said:

[5] See Intellectual Property Law by Bently and Sherman (Third Edition, 2009, OUP) and Intellectual Property by David Bainbridge (Ninth Edition, 2012) although Holyoak and Tollemans (Intellectual Property Law (Eighth Edition, 2016, OUP) suggests a possible distinction and Cornish, Llewellyn & Aplin (Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, Eighth Edition, 2013) treat it as an allied or "aspirant" right. See too "Guidebook to Intellectual Property," (Sixth Edition, 2013, Hart Publishing) which, though an entry level text, bears the authority of its principle author, Sir Robin Jacob and states "*Of particular importance [among unregistered intellectual property rights] are: … the right to stop misappropriation of trade secrets ('the action for breach of confidence*")"

> *"In my view, the upshot of this summary of the position as discussed in the cases and the books is that, while the prevailing current view is that confidential information is not strictly property, it is not inappropriate to include it as an aspect of intellectual property. Accordingly, … I am of the view that, given the normal meaning of 'commercial information', the draftsman of section 72 intended confidential information of a commercial nature to be included in the definition of 'intellectual property'."*

91. Although the Court of Appeal was considering the rather difficult language of section 72, rather than addressing the meaning of the expression 'intellectual property' in a vacuum, we believe it has provided guidance, which we should follow, in deciding, as we do, that the body of information in which references to emissions appear is protected under a category of intellectual property right. Given what we have said earlier in respect of regulation 12(5)(e), it must follow that disclosure would adversely affect the Council's right to confidentiality so as to engage the exception.

92. In reaching that conclusion we acknowledge that the result may be seen to create a degree of overlap between regulations 12(5)(c) and (e). However, that is not a reason for abandoning an approach which we think is right in principle. For example, there is also scope for overlap between regulations 12(5)(e) and (f) (adverse effect on a person providing information voluntarily). And, in the context of FOIA, the exemption applying to trade secrets under section 43(1) may cover the same material as section 41 (confidential information obtained from another).

93. We conclude, therefore, that even if regulation 12(5)(e) did not extend to those parts of the withheld information which the Information Commissioner identified as relating to emissions, the regulation 12(5)(c) exception would still be available to justify the Council's refusal to comply with the information request.

94. As to the public interest balance, the commercial damage likely to result from disclosure is the same as that set out above in relation to EIR regulation 12(5)(e). We set against that the public interest in maintaining the exemption, that is to say, in protecting relevant intellectual property rights. The particular intellectual property to be protected is that which is designed to preserve the ability of the Council to negotiate future arrangements on an equal footing and of Mercia to compete on a fair basis. We therefore find ourselves considering the same factors as were taken into account with respect to the application of regulation 12(5)(e) to the information in question and coming to the same conclusion, namely, that the public interest in maintaining the exception outweighs the public interest in disclosure.

Conclusion

95. For the reasons we have given the Council is entitled to refuse to disclose the information identified in Confidential Schedule 1, but should disclose the information identified in Confidential Schedule 2

96. Our decision is unanimous.

Postscript

97. Wedo not shirk from the work involved in assessing each relevant part of materials as extensive as those under consideration in cases of this nature. Nor do we criticise those who have clearly worked hard, and to good effect, in preparing the materials and arguments in a way that has helped us to apply the applicable principles to the facts of the case. We do, however, suspect that those who formulated the legislation and brought it into force, would be surprised to have seen one case absorb so much time and effort in preparing the appeal, attending the hearing and, for the panel, preparing this decision and the Confidential Schedules. The Information Schedule, to which we have referred, and the concept of applying "themes" to different elements of the disputed information, while of assistance, did not enable us to avoid the creation of a sizeable spreadsheet in order to address each item of information contained in the seven substantial ring folders comprising the disputed information. On another occasion, it might be better to limit the Tribunal's determination, in the first place, to a limited number of samples of each category of information, with the parties then attempting to reach agreement on the rest, only returning to the Tribunal for a final determination on any that remained in dispute.

……..

Judge Chris Ryan
10th April 2017