IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2013/0069**

GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

EASTLEIGH BOROUGH COUNCIL

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

Before: Claire Taylor (Judge); Nigel Watson and David Wilkinson

Subject: Regulations 12(4)(d) and (e) EIR

Hearing: Held on 12 September 2013 at Field House.

Decision: The appeal is unanimously allowed, for the reasons set out below. Accordingly, the Council is not required to take any further steps save for disclosing the material referred to in paragraphs 15(d) and 31 below.

Date: 13 January 2014

Promulgated: 14 January 2014

Reasons For The Decision

The Request

1. On 23 April 2012, a request was made to the Appellant as follows:

   "…In the light [of] the non-disclosure of background papers relevant to Cabinet decision in September and October 2011 relating to the Draft Local Plan, please provide copies of –

   a. *All officer prepared reports, notes, other papers and other advice to the Core Strategy Working Group, or to any other working group, insofar as these relate to the potential for sites in the Boorley Green and Allington Lane areas to provide locations for new housing developments;*
   b. *Any other reports, notes, other papers and other advice on the matters referred to in 1 above (for example prepared by any Councillor(s) or person retained by the Council); and*
   c. *The minutes, notes (formal or informal) and any other record of discussions at, conclusions of, and decisions of, the Core Strategy Working Group, or any other working group, relating to the matters referred to in 1 above".*

2. The Cabinet decision referred to in the request related to its resolution of 15 September 2011 for part of Boorley Green to be considered a preferred site for future housing development in preference to a site at Allington Lane.

3. The Appellant refused the request relying on regulation 12(4)(e) of The Environmental Information Regulations 2004 ('EIR'), *(exception for disclosure of internal communications)*, and subsequently regulation 12(4)(d), *(the request involved material in the course of completion)* and claimed that the public interest test favoured non-disclosure.

4. The requester complained to the Information Commissioner's Office ('ICO') who decided that all documents should be disclosed on the basis that:
   a. The exception in regulation 12(4)(e) was engaged for all of the withheld information. However, the public interest balance favoured disclosure.
   b. Regulation 12(4)(d) EIR was not engaged in respect of the other reports, presentations and meeting notes contained within the withheld information.
   c. Regulation 12(4)(d) EIR was engaged for two documents that were drafts and unfinished, but the public interest test, taking into account the aggregated interests of regulations 12(4)(d) and (e), favoured the disclosure.

The Law

5. Subject to exceptions, a public authority that holds environmental information has a duty to disclose it on request. *(See Regulation 5(1), EIR.)*

6. A public authority may refuse to disclose information to the extent that:
   a. "*(d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or (e) the request involves the disclosure of internal communications"." (Regulation 12(4));* and

b. *“in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.” (Regulation 12(1)).*

Grounds of Appeal

7. The Appellant’s grounds for appealing the ICO’s Decision Notice are:

   a. Regulation 12(4)(d) is engaged for all withheld information as being either unfinished documents or material in the course of completion.
   b. The ICO’s assessment of the public interest for regulations 12(4)(d) and (e) was necessarily flawed because it was based on misunderstanding or error in relation to ground one in as much as it related to material in the course of completion.
   c. Since no decision had been made about the preferred developments and instead only a preliminary view had been given, the ICO had given insufficient weight in its Decision Notice to the chilling effect and inhibition of open discussion that disclosure could cause, in considering the competing public interest.

The Task of the Tribunal

8. Our task is to consider whether the decision made by the ICO is in accordance with the law or whether any discretion it exercised should have been exercised differently. The Tribunal may receive evidence that was not before the ICO, and may make different findings of fact.
9. In view of this, we have approached our consideration of the Appellant’s grounds and the appropriate weight to be given to the relevant factors by addressing the two underlying issues:

   a. **Does regulation 12(4)(d) EIR apply to all 22 documents?** (‘Issue 1’). The requested material comprises 22 documents.
   i) Fourteen Documents: The dispute between the parties on Issue 1 concerns fourteen documents, which the ICO maintains relate to material that is already completed.
   ii) Two Unfinished Documents: Both parties agree that regulation 12(4)(d) applies to two documents that were in draft form, and as such ‘*unfinished documents*’, for the purposes of the regulation.
   iii) Six Documents Postdating Consultation: It is no longer in dispute that the regulation applies to documents drafted after the relevant Cabinet decision about Boorley Green. These are considered to relate to the Appellant’s review of its draft plan *as a result* of the public consultation and its sustainability appraisal of the plan. This stage of the process was concluded on 26 July 2012, after the request.

   b. **What is the appropriate weight to be given to public interest in relation to the documents, whether in relation to both 12(4)(d) and (e), or solely regulation 12(4)(e)?** (‘Issue 2’).
   The parties accept that regulation 12(4)(e) applies to all 22 documents because they involved presentations or reports from Council officers to members/officers, or recorded discussions between officers and members/officers and as such are ‘*internal communications*’.

Evidence and Submissions

10. The Appellant and ICO provided submissions including some submitted on a confidential or 'closed' basis; and other documents including the requested information. We have considered all of this, even if not specifically referred to below. In summarising the arguments, we have added our own headings, for ease of reference.

11. We understand that the requester was invited to join the appeal and provide submissions and declined to do so. We have not found it necessary to issue any part of this decision in confidential closed form, such that this is the complete decision.

Appellant's Evidence and Submissions

12. We heard from the Appellant's Chief Executive. Her testimony included:

    a. ***Slides*** from two documents, the papers were completed documents, but the policy process they related to had not been completed. It is important to understand, (1) the nature of the process for creating the Eastleigh Borough Local Development Plan 2011-2029 (*referred below to as the plan*), the stages in its development, and the decision-making that is involved; and (2) the need for a safe space in which officers and members can discuss and think through different ideas and possibilities in an uninhibited way, thereby promoting good governance and decision-making.

    b. The main stages for creating the final plan follow regulatory requirements, and typically take 5 years.[1] Consultation obliges the Council to keep an open mind and be prepared to make changes to the draft. Even where a final plan is decided upon, it is subject to examination and further public scrutiny.

    c. In developing the plan, a Cabinet Working Group was established, and informal meetings took place between 29 June 2009 and 11 July 2012 to fully explore a range of topics. This was often an iterative process, which enabled officers to test out particular issues with Members, sometimes presenting conflicting views, in order to get a steer from Members as to which was their preferred approach. Different ideas were explored in a frank and uninhibited environment, enabling controversial views to be expressed, ideas to be raised and then dropped. Those involved in the discussions did not expect that notes of their discussions, (and certainly not notes which were not definitive, or agreed by all concerned), would subsequently be disclosed to the outside world. Instead, they knew that officers would present the final outcome of their discussions in a report to Cabinet and full Council.

    d. She was concerned that as the meetings had not been formally minuted, or transcribed verbatim, disclosing the documents that reflected the debate without proper control and explanation could lead to the contents of the documents being misinterpreted. This could create upset and anger from residents of the Council's area. They may think that the Council has plans to develop in their areas at some time in the future, thereby affecting property prices. Lots of officer and member time would then have to be spent

[1] See Appendix to this Decision for the chronology of the process in this case.

addressing those concerns, putting the documents into context, filling the gaps in the recorded materials.

e. In addition, disclosure would seriously inhibit the future workings of the Council. If officers thought that this kind of working documentation may have to be disclosed , they would feel less secure about offering their views and opinions with respect to the development of the plan as well as generally, and would be less prepared to do the 'blue sky' thinking or think the unthinkable that can be so productive of good decision-making. She thought that it was one thing for officers' ideas and thoughts to be probed and tested by members in an environment of confidence and security, but another for their ideas and thoughts to be subject to wider public debate, especially from residents with particular personal interests to advance or defend. She was especially concerned for more junior officers whose contributions were important. The concern was particularly because at the time of the request passions were still running high about the issues discussed as the debate was ongoing.

f. The ICO had accepted that a public authority should be afforded private space for staff to freely give and test ideas and so protect the integrity of the deliberation process, and keep it free from outside interference. However, it considered this need diminished as the decision on the proposed development sites had already been made. It had not properly appreciated that the process was ongoing until the final plans have been examined by the Planning Inspector. It was too simplistic for the ICO to have stated that once the draft local plan was published in October 2011, advice-giving and exchanging views had come to an end. Further consideration of the merits of the 'proposed' sites, and other sites, would necessarily take place after publication. The publication of the draft local plan meant that, in legal terms, the Council was embarking on a consultation process about the 'proposed' sites. The Council could change its mind about the 'proposed' sites; and further discussion would inevitably take place internally.

<u>Golf Course</u>

g. The ICO's Decision Notice gave weight to '*the real possibility that the public may perceive there to be a conflict of interest on the part of the Council in terms of promoting a site for development which involves the demolition of one golf course (in Boorley Green), whilst at the same time it is seeking to invest in a business venture to build a hotel, spa and golf course at the Rose Bowl stadium*'. The ICO had not seen the response to the requester dated 6th January 2012 that ought reasonably to have dispelled any possible concern of a conflict of interest. At no time was there consideration that the closure of Botley Park golf club would benefit the newly developed golf course at the Ageas Bowl.

Issue 1

13. The Appellant's submissions on Issue 1 included:

a. Until the draft plan was finalised, (around March 2015), all working documents should be withheld information as they remain part of the process

whereby the draft plan becomes the plan and 'material in the course of completion'. The draft plan remains, by definition a draft document which has numerous stages to overcome before it becomes the local development plan and as such there is considerable importance in protecting safe thinking space and safe policy development space.

b. The Appellant argued that it would be artificial to separate out the various stages of the process as the ICO has done in looking at regulation 12(4)(d). For regulation 12(4)(d), it does not matter how long it takes for the purpose to be completed, although the length of the period may, affect the public interest arguments. Instead, what was relevant was the purpose for which the material relates, which was the development and then approval of the plan for development. It was only when the plan had been approved that the process had been completed.

c. Further, the various stages were inter-connected and cannot be viewed in isolation. What occurs at an earlier stage will impact on what occurs at subsequent stages, all the way through to completion of the process itself.

d. It was incorrect to conclude that because the draft plan was on the Council's website, the withheld information could no longer be said to be material in the course of completion. The process was ongoing.

Issue 2

14. The Appellant argued in relation to the factors the ICO considered favoured disclosure:

a. The requester had been wrong in asserting that the public had been hampered from responding effectively to the consultation in relation to the selection of Boorley Green as a preferred site for development, by not having access to all the documents that were considered as part of the decision-making process. There was in fact considerable material in the public domain at the time of the consultation explaining what the advantages and disadvantages of the Boorley Green site, as well as the alternative site at Allington Lane. The documents underlying the Appellant's reasoning for proposing Boorley Green as its preferred development site in the draft Local Plan *were* publicly available. The minutes of the Cabinet meeting of 15th September 2011 explain very clearly what the reasons were for determiningthis. In addition, the consultation document on the Draft Local Plan contained the reasons.
b. Local people were able to make substantial responses to the consultation, including a point-by-point rebuttal of the abundant material that had been produced by the Appellant. There was also a further substantial document produced by the requester in response to the pre-submission consultation.
c. The requester alleges that the Cabinet was given advice by its officers at some stage which the Cabinet did not follow. There is little public interest in knowing whether this is the case and what advice may have been given when it is the members and not the officers who make the decisions. In this case, members' decisions were taken in public, based on publicly available information. On the other hand, a disclosure of the withheld material that discloses officers' views would severely compromise the "safe space" for giving frank advice.

d. The ICO suggested the Appellant might be perceived to have an apparent conflict of interest as a result of its financial interest in a golf course and hotel which would be in competition with the Botley Park golf course currently located on the Boorley Green site, which would increase the public interest. This point weighed heavily in the ICO's Decision Notice, but the Appellant had already explained to the requestor that '*none of the material under consideration included any reference to the golf course at the Rose Bowl'.* The witness testimony confirmed that the connection between the Rose (or Ageas) Bowl and the preference for the Boorley Green site/impact on the Botley Park golf course had not formed part of any discussion that she had been privy to. In the circumstances, there was nothing to be gained by disclosing the withheld documentation, as the point had already been made and the public interest was not served by demonstrating a negative. As the witness stated in evidence "*at the time the request was made this was a very live issue, it engendered a large number of issues for officers. They need to be giving advice without constraint. If [they] felt the public [would] pick it up, [future discussion] would be stilted with no free flow of information*".

15. The Appellant argued in relation to the factors favouring witholding the documents from disclosure:

Incomplete: weakens policy process

a. The draft plan was still being developed and had a long way to go until it would become the final plan. In such circumstances it would be very prejudicial to the ongoing process and weaken the quality of discussion and debate to disclose information central to those discussions and debate when it might prove necessary to re-visit earlier stages later in the process, such that the withheld information would again become material. A preliminary view had been given but this was very different from a decision having been made. The ICO was wrong in its assessment that advice-giving and the exchange of views had come to an end.

Safe Space for Officials in Controversial Policies

b. The most weighty argument was that "safe space" produces better decision-making, as officers are comfortable in offering with frankness their views and giving advice, and members can benefit from those views and advice, testing their viability and robustness and asking for further thinking and work to be done before reaching their own views. The documents reflecting this thinking and sharing of views, reflect a particular point in time in the process. The withholding of information was necessary to ensure a final plan was completed, objectively and without external pressures. This is particularly so where the process was difficult and controversial and disclosure might discourage frank and outspoken discussion.

c. The time of the request was a particularly sensitive time for the Appellant as it was actively considering the consultation responses. Quoting the First-tier

Tribunal[2] *Wirral Metropolitan Borough Council v ICO EA/2012/0117*, *(Para 26):*

> *"[T]here is a marked contrast between the vulnerability and sensitivity of a reasonably fearless and independent-minded official two years after the discussion took place and the policy was adopted . . and at the moment that the report is published and when the crucial decision still hangs in the balance.'*

d. Documents identified as C1-20: although these are identical to those that are already in the public domain, the Appellant relies on the general principle of "safe space"; which should not readily be interfered with and, in the circumstances, there is no public interest in disclosing these documents – it adds nothing to the sum of public knowledge about the decision-making process – if they are disclosed.

Chilling Effect

e. If the internal communications about different options were to be disclosed during this further period - when the draft plan was subject to further consultation, possible moderation and amendment by the Council and then needed to be signed off by the Secretary of State– it would have a chilling effect and officers and members would wish for their discussions and conversations to take place without the gaze of publicity.
f. The witness explained how advice would be less frank, more nuanced and so less helpful to members in approaching their decision-making, if the "safe space" was interfered with for this decision-making process. At the time of the request, the Appellant was still in the process of deciding what should be contained in the draft plan. At the stage that the request was made, a first draft had been circulated for consultation; the consultation responses were being considered when the request was put in by the requester and a further draft was subsequently put out for consultation; there was then consultation on the pre-submission Local Plan.
g. These arguments apply not only to documents that, in the ICO's view, are 'completed' and so do not fall within regulation 12(4)(d), but also those documents that, in the ICO's view, are 'incomplete': that is, post-consultation documents. The points made in the latter documents – advice from officers as to the consultation responses – were being considered at the very time that the request was made.

No 'killer' document

h. Whilst there was no 'killer' document amongst the withheld documents which was of particular sensitivity to the Appellant, by the same token there was no 'killer' document amongst the withheld documents for the ICO to point to favouring particular disclosure.
i. The withheld documents add very little to the sum of public knowledge about the process. It is questionable that they would assist in "more effective participation by the public in environmental decision-making". Nevertheless, by requiring them to have been disclosed at the time of the request would

[2] We note that first-tier Tribunal decisions are not binding on us.

have severely impaired the “safe space” that was ongoing for the Appellant's deliberations on the draft plan.

Misleading the Public

j. With respect to documents – such as the maps and photographs of development sites –if these were disclosed out of context, members of the public may gain a misleading view of the process because only partial information about these sites would be disclosed.
k. The notes of working group meetings were not ‘formal minutes’. They were not intended for publication, but were to assist officers and members to remind themselves of what had taken place so far in the discussions. They were not signed off and accepted as an accurate record.

Respondent's Evidence and Submissions

16. The ICO submitted a letter from the requester at the time of his complaint. This claimed:

a. The Appellant had materially prejudiced residents from properly challenging the draft plan by not disclosing background papers to the decision for selecting a preferred site in Botley Park golf course in Boorley Green over one in Allington Lane.

b. Whilst not a listed background paper, the Council's professional staff had prepared a sustainability appraisal and strategic environmental assessment, which included analysis of both sites and these were available on the Council's websites. The summary of these showed clearly that there were more positive criteria for developing Allington Lane to Boorley Green. Hence the reasons set out in the Cabinet minutes for the decision did not reflect the Council's own analysis. They also did not stand up to objective analysis.

c. The decision related to the development of 1400 homes and was far-reaching affecting many local residents and golfers. It would undermine the viability of the Botley Park hotel and raise concerns about the Council having been conflicted in the decision making as having competing interests in the Rose Bowl that included a hotel and golf course.

d. The household survey on this point favoured developing Boorley Green by roughly 3%, but the public response had only been 3%. The Appellant's published report on the survey did not provide further information, analysis or advice on relevant considerations on the location.

e. When the Council leader laid a statement of the initial thinking of the Cabinet that Boorley Green should be taken forward as the preferred option, it had not been the subject of minuted discussion, so the requester assumed it reflected behind the scenes discussion. The decision of 15 September 2011 at a Cabinet meeting, was taken without reports or papers before them on material planning considerations relevant to a decision of the location of a major development, and essential properly to inform any decisions to be made on such location, and without the requisite list of background papers.

f. As working group discussions were part of the background to the decision process, then papers relevant to the choice between Allington Lane and

Boorley Green should have been disclosed as background papers to the Cabinet agenda. The relevant threads of the working group meetings including material planning considerations would normally have been summarised in the papers for Cabinet to inform decisions made, but were not in this case.

g. The requester suspected that the Appellant may have relied in its decision on papers that had not been made available on the website as they had not agreed to provide assurance that they had not so relied.

h. The Appellant's Chief Executive had stated that there was no 'evidence' before the Cabinet on 15 September 2011 regarding the respective merits of Allington Lane and Boorley Green. The requester therefore surmises that members must have taken account of papers and other material from their series of working group meetings.

i. The members and officers knew that Council's decisions on the draft plan needed to be open to proper scrutiny as part of the local plan's statutory processes.

Issue 1

17. The ICO's submissions included the following points:

a. The dispute between the parties on Issue 1 concerns fourteen documents that relate to material that is already completed, namely the selection by the Appellant of Boorley Green as a preferred site for inclusion in the draft plan published on 28 October 2011. The publication of the draft plan in October 2011 represented an end point of what can be seen as the first stage of the wider process of producing a final plan.
b. The draft plan published in October 2011 set out conclusions on the preferred sites to take forward for proposed development. It concluded that three sites including land north of Boorley Green were to be taken forward as preferred locations for large-scale development. Publication of these conclusions represented the end point of the first part of the process of producing a final plan. This was so even if the issues remained 'live' and the process continued with the next immediate step being a consultation on the draft Plan, which ran until January 2012.
c. The process of reaching a final plan cannot be considered as one complete and indivisible process and rather will be achieved by progressing through a number of discrete stages. The Appellant appeared to acknowledge this in its grounds by having stated, "…the draft Local Development Plan … has numerous stages to overcome before it becomes the Local Development Plan…"
d. The primary purpose of the withheld information was to feed into and inform the production of the draft plan. Therefore, once this draft Plan had been endorsed by the Council and published on its website, the withheld information could no longer be said to be material in the course of completion.
e. The Appellant's contention is, in effect, that for the entire duration of the Plan preparation process – which, on witness evidence takes around seven to eight years, any and all documents relating to the Plan are still "*material in the course of completion*" and should be withheld until 2015. That approach is not consistent with taking a restrictive interpretation of the exception.

Issue 2

18. In terms of weighing the interest in disclosure against that of withholding the information, the ICO argued that even if all twenty-two documents were engaged by regulation 12(4)(d) as well as 12(4)(e), such that both exceptions would count towards withholding the information, it still considered the public interest would weigh in favour of disclosure.

19. The ICO argued that the factors favouring disclosing the disputed information included:

    a. Regulation 12(2) EIR, requiring a presumption in favour of disclosure, reflecting that "disclosure of information should be the general rule" under Recital (16) to Directive 2003/4/EC.

    b. The Appellant's selection of Boorley Green as a preferred site for development is likely to have a significant impact on members of the local community, and it has generated significant local opposition.

    c. A fundamental purpose underlying the access to environmental information regime is to facilitate "*more effective participation by the public in environmental decision-making*".[3] The ICO identified:
        i. A Cabinet meeting on 11 September 2011 at which it was decided that Boorley Green would be the preferred site for future housing development, to be included in that draft Plan. Members considered a report by the Planning Policy and Design Manager that stated that the household opinion survey has been completed, but did not state the results.
        ii. There was increased public interest in disclosure to understand the decision making process since the Appellant had a financial interest in a golf course and hotel which would be in competition with the Botley Park golf course currently located on the Boorley Green site, and so the public may, legitimately, perceive that it had an apparent conflict of interest as a result of its interest.

20. The ICO argued that the factors relied on by the Appellant as a basis for withholding the information were not as compelling:

    Safe Space

    a. The withheld information related to potential development sites considered for inclusion in the local plan. Whilst at the time of the request, the draft local plan was a live issue, a decision had been made about the potential development sites and the preferred sites were included in the draft local plan published for consultation in October 2011. Therefore the need for private thinking space had therefore diminished. Whilst the Appellant was still consulting on the planning decision at the time of the request, so it was to that extent "live", and this might mean officials may still have had a certain need for a safe space, so as to be able to consider the responses received to the consultation, this was counterbalanced by the fact that the public needed sufficient information about the decision with which to respond to the

[3] See Recital(1) to Directive 2003/4/EC.

consultation effectively.

Chilling Effect

b. The Council's 'chilling effect' arguments were that disclosure would inhibit officers and members in future debate. Key factors to take into account in attaching weight to such arguments were the timing of a request, whether the issue was still live and the content and sensitivity of the information. In this case, the issue of the local development plan generally was ongoing but the decision on the proposed development sites, which were the subject matter of this request had been made. In effect, the stage in the local development plan process regarding proposed development site in terms of advice-giving and exchanging of views had come to an end. Whilst some weight should be given to any chilling effect arguments, the Appellant has not made adequate public interest arguments about the severity or extensiveness of any inhibition that would enhance this weighting.

c. The Appellant's arguments do not go further than identifying the public interest inherent in Regulations 12(4)(d) and 12(4)(e). It is not disputed that those public interest arguments are legitimate and bear some weight. However, they are not sufficient, without more, to outweigh the presumption in favour of disclosure (or all information falling with the scope of the exception would be de facto withheld).

d. In respect of the contention that there was a risk of disclosure causing members of the public to believe, mistakenly, that alternative sites might be at risk of future development, there was no reason to consider that the documents would be either difficult or burdensome to explain. Further, the Appellant had not identified which particular parts of the disputed information were misleading, or the reasons why it considered those parts would be difficult or burdensome to explain.

e. The Appellant has not identified specific concerns relating to the particular information in dispute that would justify withholding the information.

Our Findings

Issue 1

21. We are asked to consider whether all the documents fall within regulation 12(4)(d) EIR, or just those two that are unfinished documents and those postdating the September decision and October publication of the '*Draft Eastleigh Borough Local Plan 2011-2029 October 2011'* for consultation that post-date the resolution to include part of Boorley Green as a preferred option for development as reflected in the consultation document.

22. We accept the ICO's arguments on this point. The documents in question were prepared in advance of and to assist in the thinking that resulted in the draft Plan that was published for consultation. We regard the draft Plan as material that was complete for the purposes of the EIR, since it was published on the website for the purposes of consultation. We accept that a final decision on the site for development could not have been made at that stage, but a decision on their current preferred sites had been made, and it was this decision that the requester was interested in, and referring to in his

request. It seems to be a sufficiently significant decision in its own merit. We were told this was an iterative process, and we consider it would most likely then result in the Council proceeding to focus its work accordingly, subject to the results of consultation.

23. We were not swayed by the Appellant's reasoning that the presumption in favour of disclosure on the basis of Regulation 12(2) EIR (reflecting Article 4(2) of Directive 2003/4/EC), only applied in balancing the public interest and not in determining how to interpret whether the documents were "material in the course of completion". However, in any event we favoured the ICO's arguments as stronger regardless of the presumption.

24. We do not accept that the draft plan that was published for consultation was by definition a draft document, given that it was a formal document that had been decided as ready for consultation, and that word 'draft' did not detract from this.

Issue 2

25. We consider first, the fourteen documents identified in paragraph 9 above, in which only regulation 12(4)(e) applies.

26. Based on an examination of the contents of the withheld information, this Tribunal finds very few compelling reasons for either disclosing or withholding the requested information. As such, the decision is finely balanced. In weighing the competing interests for and against disclosure, there is a presumption favour of disclosure. *(See regulation 12(2) EIR discussed above.)* The ICO also reminds us that the burden is on the Appellant to satisfy the Tribunal that there are public interest factors in favour of withholding the information, which are sufficient to outweigh the factors in favour of disclosure.

27. In our view, on the facts of this case, key issues for us to resolve so as to arrive at a decision are:

    a. Whether the public interest favours disclosure because it would serve greater transparency in the decision making process or would assist in more effective participation by the public in environmental decision-making. Our reasoning below explains that we do not think it would.
    b. Whether disclosure serves a public interest related to potential concerns of the Appellant having been unduly swayed by a conflict of interest in its decision process. Our reasoning below explains that we do not think it would.
    c. Whether there is a sufficiently strong public interest in knowing whether a key officer had (at any stage) advised against the decision that Cabinet made. Our reasoning below explains that we do not think there is.

28. We consider the key public interest arguments favouring disclosure to be:

Transparency, Scrutiny, Effective Participation in Debate

a. The Appellant's decisions should be open to public scrutiny and transparency to promote confidence in them. This is particularly heightened where, as here, the decision is likely to affect members of the local community, and has generated significant local opposition, albeit the response to the Appellant's survey on the topic of 3% seems to be a low figure. However, the Appellant

showed us material in the public domain that has made clear its decision making process and reasoning in favouring Boorley Green over Allington Lane. Conversely, we do not accept as strong evidence, the arguments given by the ICO from the requester that disclosure was in the public interest because the published material was inadequate and hampered residents from being able to fully engage in the debate and understand what information was before the Cabinet informing its decision making process.[4] Additionally, the Appellant showed us that interested parties or residents had engaged in the debate and produce relatively thorough consultation responses. In essence, we were not given strong reasons why the further disclosures would enable more effective participation.

b. We accept that full disclosure of information relating to decision-making processes removes any suspicion as to how such decisions have been made. In this case, suspicion was raised as to whether the Appellant had a conflict of interest in relation to owning a golf course as described in paragraph 11(h) above. We consider this issue carries some weight, but it is relatively low because the requester was sent a letter explaining why it did not consider there to be a conflict and the witness confirmed that no consideration was given during the decision making process that the closure of Botley Park golf club would benefit the newly developed golf course at the Ageas Bowl, and that she could not remember it ever being discussed.

c. The requester asserted that material published on the website showed that the reasons set out in the Cabinet minutes for its decision did not reflect the Council's own analysis as to the number of positive criteria for developing Allington Lane. To the extent that this might arouse suspicions if the Cabinet decision had or had not followed the analysis or advice of its officers, the question arises as to whether disclosure satisfies any public interest in this regard. We recognise some weight in knowing whether the decisions of members follows advice of its officers, but it would be more at the level of 'interesting to know' than serving a public interest. We were not given strong reasons in the circumstances to give significant weight to this in the present circumstances. The reasons for the members' decisions were made public. We do not think the public would always expect members to follow officers' advice, given they are elected to make independent decisions and part of the officers' role is to 'speak truth unto power', and not be inhibited from doing so. We accept the witness testimony on this point, that any advice given to members by, for instance, professional officers would be taken as a factor in their decision, but not the only one.

d. We note the ICO's point in relation to the staff survey in paragraph 19(c) above. Having reviewed the Cabinet minutes on this that are publicly available, in the absence of arguments elaborating on the point, we did not think that what was published or shown to the Cabinet was unsatisfactory.

[4] We note in particular, the following documents in the public domain: Cabinet report for 11th July 2011; The documents presented to us in an open file with page numbers O183-4, O193, O198 para 24,O200-201 paras 27-31, and Appendix 7, and most importantly, the Cabinet report for 15 September 2011 (O205 to O207); and paragraphs 4.39 and 4.49 of the published draft plan of October 2011; and the consultation responses that we were shown.

e. We regard the strongest consideration for disclosing the material to be that there is a presumption in favour of disclosure within EIR.

29. The public interest arguments favouring withholding the information are:

Internal communications

Safe Space, Chilling effect and inhibition of frankness of the debate

a. We were told that those involved in discussions relevant to the requested material did not expect that notes of their discussions, (which were not definitive, or agreed by all concerned), would subsequently be disclosed to the outside world. They knew that officers would present the final outcome of their discussions in a report to Cabinet and full Council. We recognise the importance of providing a safe space for the working group to be able to engage in discussion freely, without interference. Had the reasons for the decisions not been made publicly available, there would be a stronger argument for delving into the notes of the working group. We recognise that whilst the policy debate is on-going and passions are running high, officers do need to feel secure about offering their views and opinions. We accept the strongly expressed testimony of the witness that members need to know that they are receiving open and honest advice and that officers do not hold back. They were fully assured of this in this case because the meetings were considered to be confidential and there would be no expectation of any officer telling the public what had been said there. Similarly, the officers should have full confidence in ensuring a free flow of documents and information within the forum. We found this to be the strongest public interest put to us.

b. We were not at all swayed by the Appellant's arguments that the ICO failed to give proper weight to the fact that the decision to prefer Boorley Green was only a preliminary view, and essentially the plan will not be finished until 2015. This discounts both the importance underlying the legislation of more effective participation by the public in and therefore during the environmental decision making; and the reality that the decision making process here is lengthy and by necessity has building blocks or stages, even if an initial 'view' may later need to be revisited.

c. The Appellant asserted that the withholding of information was necessary to ensure a final plan was completed, objectively and without external pressures. This was particularly so where the process was difficult and controversial and disclosure might discourage frank and outspoken discussion. We recognise that the disclosing of information might add to the burden of the Council, but were not convinced that disclosure of the material would significantly add pressure or impede the ability for the Council to act objectively. We gave this factor very little weight.

d. We also gave low weight to the arguments, that as the meetings had not been formally minuted, or transcribed verbatim, disclosing the documents that reflected the debate without proper control and explanation could lead to the contents of the documents being misinterpreted. Arguments had been made that non-disclosure avoided the use of public resources to explain or justify draft documents or interim positions, there was a need to use public

resources prudently; disclosure of unfinished documents and policies may raise public concerns unnecessarily, leading to distrust and unnecessary anger from members of the public, and so on. We found all these points to be unsubstantiated.

30. In summary, for the fourteen documents, having considered the weight of arguments favouring disclosure and those for withholding it, we judged the strongest to be the need for there to be a safe space for those involved in internal communications and for officers and members not to be deterred from speaking freely. We recognise the EIR presumption in favour of disclosure, but in the context and circumstances of this case, the value inherent in respecting this safe space was greater than that of disclosing the specific information. This is so for all documents with the caveat in paragraph 31 below.

31. It became clear during the hearing that some documents had already been published by the Council. In this case, we found the objections the Appellant has given to disclosing them somewhat puzzling. We do not believe disclosure of these documents within the context of this request would therefore have a deleterious effect on protecting the safe space for making internal decisions, such that they should be disclosed. (*See paragraph 15(d) above.)*

32. As regards the two unfinished documents identified in paragraph 9, the arguments in paragraphs 26 to 29 apply. Additionally, there is a weighty interest in not disclosing material that is unfinished as it does not seem to serve any strong purpose in this case to make incomplete material public and given that it is in draft, may mislead debate. We aggregate this interest with that in maintaining a safe space for internal communications and find the public interest balance favours withholding the information.

33. As regards the six documents identified in paragraph 9, there is an additional interest in not disclosing material that the ICO has agreed falls within regulation 12(4)(d) as relating to a stage of the process that was not yet completed. The documents themselves were complete, and we do not think this argument had much force in this case. However, since the arguments in paragraphs 26 to 29 also apply to these documents, we reach the same conclusion that we did for the fourteen documents, in paragraph 30 above.

34. Our decision is unanimous.

Judge Taylor

Appendix

Appellant's Chronology for Process Involving the Plan

Activity	Date	Comment
Consultation on issues and options for core strategy	Oct/Nov 08	
Development of Draft Local Plan	2009-11	Household opinion survey in summer 2011 to seek views on two alternative strategic sites.
Draft Local Plan consultation	Oct 11/Jan 12	Information request received 23 April 2012
Consultation on changes to Draft Local Plan	Jun/ Jul12	
Consultation on Pre-submission Local Plan	Aug / Oct12	November 2012 – HCC letter advising that one of 3 strategic sites in the Plan would not be released: EBC decision that the Plan was no longer sound and alternative sites needed to be found. Period of search and re-writing the Plan followed.
Anticipated:		
Consultation on Revised draft Local Plan due to changes in site allocations	Oct/Nov 13	
Consultation on Pre-submission Local Plan	Feb/Mar 14	
Submission of Plan to Secretary of State	End May 14	
Examination in Public	Sept 14	
Inspectors Final Report	Mar 15	
Plan Adopted	Apr 15	