

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 05 November 2021

Public Authority: London Borough of Barnet
Address: Hendon Town Hall
The Burroughs
Hendon
London
NW4 4BG

Decision (including any steps ordered)

1. The complainant has requested information concerning area regeneration proposals being considered by London Borough of Barnet.
2. The Commissioner's decision is that London Borough of Barnet has correctly relied on regulations 13 and 12(5)(e) of the Environmental Information Regulations 2004 to withhold some of the requested information from the complainant.
3. The Commissioner does not require the public authority to take steps to ensure compliance with the legislation.

Background

4. One Public Estate (OPE) is a national programme delivered with Government partners which aims to unlock land for new homes and commercial space as well as to create new opportunities to save on running costs or generate income¹.
5. As part of this programme London Borough of Barnet ("the public authority") and Middlesex University are seeking to bring forward area regeneration proposals which involves 8 sites within the Hendon area of Greater London.

Request and response

6. On or about 9 December 2020, the complainant wrote to the public authority and requested information in the following terms:

Request A

"The original (signed-off) Public Interest Test (PIT) document that supports the Schedule 12A exemption decision related to Item 17 of the 8th Dec P&RC Meeting

(Note: I have attached an 'Example Schedule 12A PIT template' used by other local authorities as part of normal information governance process and I would expect that LBB would have an equivalent document specific to Item 17)"

¹ <https://www.gov.uk/government/news/more-than-150-councils-join-the-one-public-estate-programme#:~:text=One%20Public%20Estate%20is%20a,regeneration%20and%20integrated%20public%20services>.

Request B

"The full 'Outline Business Case' i.e. information that LBB claim is as exempt under Item 17 of the 8th Dec P&RC Meeting".

7. On 22 January 2021, the public authority substantively responded. It denied holding the requested information as regards Request A. As regard Request B, it provided some information within the scope of the request but refused to provide the remainder. It cited the following exceptions as its reason for doing so:
 - Regulation 12(4)(d) (material still in the course of completion)
 - Regulation 12(5)(d) (Confidentiality of proceedings)
 - Regulation 12(5)(e) (Confidentiality of commercial or industrial information)
 - Regulation 12(5)(f) (Interests of person who provided the information)
 - Regulation 13 (Personal information)
8. The complainant requested an internal review on 28 January 2021. The public authority sent him the outcome of its internal review on 26 March 2021.
9. It revised its position by releasing further requested information to him. However, it now relied on the below exceptions to continue to withhold requested information.
 - Regulation 12(5)(d) (Confidentiality of proceedings)
 - Regulation 12(5)(e) (Confidentiality of commercial or industrial information)
 - Regulation 12(5)(f) (Interests of person who provided the information)
10. On the 2nd of June 2021 the public authority revised its position. It released further requested information to the complainant and confirmed that the remaining withheld information was withheld on the following ground.
 - Regulation 12(5)(e) (Confidentiality of commercial or industrial information)

- Regulation 12(5)(f) (Interests of person who provided the information)
- Regulation 13 (Personal information)

Scope of the case

11. The complainant contacted the Commissioner on 31 March 2021 to complain about the way his request for information had been handled. Amongst other things he stated he accepted the public authority's response to part (a) of his request but not its response to part (b).
12. The Commissioner will determine whether the public authority correctly withheld information by relying on one or more of the exceptions it cited in its revised response dated 2 June 2021. Which were as follows.
 - Regulation 12(5)(e) (Confidentiality of commercial or industrial information)
 - Regulation 12(5)(f) (Interests of person who provided the information)
 - Regulation 13 (Personal information)

Reasons for decision

13. The Commissioner's previous decisions relating to planning matters concluded that the information in question was environmental and that, as such, the information access provisions of the EIR apply. Bearing this in mind, having regard to her own published guidance and having read the withheld information, the Commissioner is satisfied that it is environmental information, as defined by regulation 2(1)², it being related to planning matters.

² [The Environmental Information Regulations 2004 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

Regulation 13(1)

14. The public authority relies on Regulation 13 (Personal information) to withhold a small amount of requested information that is the personal data of third parties. However, the complainant has stated to the Commissioner that he only challenges this reliance as it relates to an author of the report and/or where it relates to senior personnel of the public authority.
15. The Commissioner being satisfied that this exception has not been applied to senior personnel of the public authority, has in accordance with the complainant's wishes, only considered the public authority's reliance on this exception as it relates to an author of the report.
16. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
17. In this case the relevant condition is contained in regulation 13(2A)(a)³. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
18. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then regulation 13 of the EIR cannot apply.
19. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

20. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

³ As amended by Schedule 19 Paragraph 307(3) DPA 2018.

22. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
23. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
24. Having viewed the germane withheld information, the Commissioner is satisfied that it relates to a living individual, it being the name of that person. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
25. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
26. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?
27. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
28. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR
29. The Commissioner considers that the lawful basis most applicable to a disclosure under EIR is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".
30. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under EIR, it is necessary to consider the following three-part test:

- i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
 - ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
31. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.
 32. In considering any legitimate interest(s) in the disclosure of the requested information under EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
 33. Further, a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
 34. The Commissioner recognises that there will always be a legitimate interest in public authorities being transparent and accountable, particularly in the way that they are or proposing to spend public money.
 35. Secondly and specific to this case, the complainant avers that the “redacted name could be the name of a 3rd party individual or more likely to be a senior member of Barnet Estate Planning team. It is conceivable that if this was a senior Barnet individual, then this person might be accountable for triggering a breach of EIR Reg. Regulation 19”. Regulation 19 makes it a criminal offence to alter records with intent to prevent disclosure.
 36. The Commissioner is satisfied that the withheld name is not the name of senior personnel of the public authority. The Commissioner can also not discern any evidence that validates the complainant’s hypothesis that there may have been a breach of regulation 19 and the Commissioner therefore considers the hypothesis to be speculative. Nonetheless the complainant’s interest, that releasing this personal data would help to determine whether there has been a breach of regulation 19 is objectively a legitimate one to have.

Is disclosure necessary?

37. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
38. As stated above, the complainant's assertion that the individual may be accountable for a breach of regulation 19 is highly speculative and indeed the Commissioner has not identified any evidence concerning the same. However, and in any event, if the complainant believes there has been a breach of regulation 19 by a known or an unknown person he could complain about the same to the Commissioner who will act accordingly. This avenue of complaint is an alternative and less intrusive measure which renders the disclosure unnecessary under the EIR. Accordingly the Commissioner finds that the public authority correctly relied on regulation 13 to withhold this third party data.

Regulation 12(5)(e)

39. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".
40. The information withheld by reference to regulation 12(5)(e) comprises of commercial figures and calculations in the context of planning considerations.
41. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".
42. There are four conditions that need to be met for this exception to be applicable. They are as follows -
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality provided to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?

The Public Authority's submissions

43. The public authority considered the application of regulation 12(5)(e) to the requested information against the four conditions.

(i) Whether the information is commercial or industrial in nature – the information in this case related to the development of land, including projected build costs and revenues, and so is commercial in nature;

(ii) Whether confidentiality is provided by law – the public authority is of the view that a common law duty of confidence attaches to the withheld information because of the circumstances in which the information was submitted to the public authority.

The information that has been withheld is some of the most important and commercially confidential information for the Hendon Hub project – the financial and proposed rental information and the potential funding sources. It is therefore not trivial, and certainly not in the public domain, as it has only been shared internally and with a very small number of officers related to the project team.

44. When putting together the business case for the Hendon Hub it was essential that it made sure that it was the correct deal for it to pursue, and that it did as many checks and balances as possible to come to the correct conclusions how to structure the deal to maximise value for money and ensure that it minimised risk. As such, it liaised closely with professional advisors – primarily CBRE and KPMG to advise on valuation and deal structure, to include soft market testing. It also worked very closely in partnership with the University to bring forward the project, on an open book basis. The information provided by all the above parties was only shared with the project team and officers of the public authority. It all forms an essential part of the commercial discussions and has not been divulged to the public or any third parties. As the project evolves more information will gradually be able to be released to the public as information becomes less commercially confidential.
45. In addition, it has received strong confirmation from Middlesex University that they feel that information was provided under strict confidence. Middlesex University saying

"... that all business cases provided to our Executive Board of Governors have a clearly stated expectation that the information is commercially sensitive and confidential. Rentals and the rental escalation information allow people significant insight into the University's financial position in this transaction. If the transaction is

eventually completed then the broad details are likely to become public, in arrears, in our financial statements as part of liability disclosure. We will also have to share with our banks Until then however there is commercially significant work that (the public authority) is leading on around both the tendering for the work and the financial support. Our assumption has been that this information needs to be shared in a controlled manner to avoid prejudicing these negotiations”.

The withheld information, as provided by CBRE, is confidential to and would not otherwise be released without receiving a fee from the public authority.

(iii) Whether the confidentiality is protecting a legitimate economic interest – the public authority is of the view that the duty of confidence identified arises for the protection of one or more legitimate economic interests.

The proposals concern redevelopment by a public sector developer (the public authority) through an Outline Business Case, in such a way as to enable new civic facilities on the parts of the site to be retained by it and in such a way as will also enable the provision of new residential and commercial floorspace on the parts of the site to be disposed of in due course.

The legitimate economic interests that are protected by the confidentiality attaching to the OBC are (i) those of the public authority developer seeking to make a return from the disposal in due course of the residential and commercial floorspace provided for in the scheme; and (ii) those of the public authority as the existing freehold owner of part (but not all) of the site.

This was relevant in two main ways. First, the public authority needs to be able to deliver the residential/commercial elements of the scheme in order to enable to be able to deliver the civic facilities for the public authority; the public authority’s ability to do the latter in turn depends on its ability to achieve a return on the scheme as a whole that renders it viable to undertake. Second, because as at the date of the request the public authority did not own the freehold of the entire site, negotiations (or the prospect thereof) with one or more third parties were necessary in order to assemble the site and if information in the OBC tended to reveal land values, it could affect those negotiations.

(iv) Whether the confidentiality would be adversely affected by disclosure – the public authority considers that the interests identified

at (iii) above would stand to be adversely affected were disclosure to be given of the withheld information.

Releasing the withheld information would adversely affect the public authority's ability to deliver the residential and commercial elements of the scheme, and thus also its ability to deliver the civic facilities aspect of the scheme.

The public authority considers that the interests of the parties supplying the withheld information (KPMG, CBRE and Middlesex University) would be adversely affected by the disclosure of that information. KPMG, CBRE and Middlesex University were not under a legal duty to supply that information and have not consented to the disclosure of the withheld information, which was supplied to the public authority and that the public authority was not entitled to disclose the information.

Complainant's submissions

46. A clear understanding of the actual commercial context is critically important when reviewing the public authority's claimed EIR exceptions. He stresses the need for the Commissioner to understand the actual (as opposed to claimed) commercial context of the proposed Hendon Hub. In this case the public authority is not just an interested 3rd party facilitating an open market transaction. The public authority is acting both as a development co-sponsor and as a regulatory planning authority. There is a potential conflict in these two roles, and this makes the need for openness and transparency even more important.
47. The commercial relationship between the public authority and Middlesex University, including funding for the project, is not clear.
48. The public authority claims commercial exceptions based on the need for commercial competitiveness/secretcy. However, it appears that this not an 'open market' transaction where commercial confidentiality is of vital importance to ensure the best market pricing.

Commissioner's considerations

Is the information commercial or industrial in nature?

49. Having viewed the withheld information the Commissioner agrees with the public authority's assertion that the information in this case relates to the development of land, including projected build costs and revenues, and thus is commercial in nature.

Is the information subject to confidentiality provided by law?

50. In addition to the information needing to be commercial or industrial in nature, it must also be subject to a contractual or common law duty of confidence. The information must not be trivial in nature, or already publicly available.
51. The Commissioner has viewed correspondence from third parties which indicates that the withheld information is confidential. Similarly the Commissioner has viewed information from KPMG that states that information was provided in confidence under its contract with the public authority. The Commissioner therefore concludes that the withheld information was provided confidentially either under common law principles of confidence and/or contractually.

Is the confidentiality provided to protect a legitimate economic interest?

52. The withheld information being confidential, protects the legitimate economic interests of the public authority and Middlesex University. The information comprises of valuations, cost and profit projections, to release the same would harm the legitimate commercial interests of the public authority and the university in any future contractual negotiations. These are legitimate economic interests to be protected.

Would the confidentiality be adversely affected by disclosure?

53. The information request was made prior to all the then ongoing negotiations between the parties and others regarding commercial matters being concluded. If the withheld information were to be released prior to their conclusion of these negotiations, then it would have severely hampered the public authority and Middlesex University (in particular) in those negotiations. Accordingly legitimate economic interests would be adversely affected by disclosure.
54. Due to the matters explained and laid out above the Commissioner considers the exception afforded by regulation 12(5)(e) to be engaged.
55. In common with all EIR exceptions, the exception at regulation 12(5)(e) is subject to the public interest test set out in regulation 12(1)(b) EIR.
56. The Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the withheld information.

57. When carrying out the test, the Commissioner must consider the presumption towards disclosure provided in regulation 12(2).

The public authority's submissions

58. The factors that were considered relevant by the public authority in considering the operation of the public interest balance can be summarised as below.
59. The scheme represents enabling development, whereby land is to be developed for commercial purposes ('commercial' in the sense of generating a profit) that in turn enables buildings to be brought forward that will be put into civic use (either as public authority offices or as facilities available to the community). The reason for undertaking development in this way is to seek to minimise both cost and commercial risk to the public authority.
60. There is a public interest in ensuring that the public authority is able to dispose of the residential and commercial floorspace aspects of the development for the best price achievable so as to be able to deliver the other elements of the scheme.
61. The disposals referred to above would stand to be adversely affected if information were to be put into the public domain that undermined the public authority's ability to achieve maximum financial return.
62. Although the scheme is of local significance in particular within the London Borough of Barnet, in comparison with schemes such as Brent Cross Regeneration areas, the scale of the scheme is relatively modest.
63. Extensive public engagement, and more structured pre-application consultation, had been undertaken prior to the submission of the planning applications in 2021. The scheme was not ready to go to the public authority's Planning Applications Committee as at the date of the request.
64. Because the scheme involves land which the public authority owns or has an interest in, and will result in new civic facilities, the public would be likely to want to understand the economics of the scheme.
65. That as much information as possible should be disclosed and where particular information is not disclosed, it is withheld because the public authority is satisfied that the ability of the public authority to realise the best return in the delivery of the scheme would be adversely affected, such that the project as a whole (including the non-commercial elements of the scheme) would stand to be adversely affected. By way of examples:

- a. Treatment of residential floorspace values.
 - b. Treatment of affordable housing floorspace values.
 - c. Treatment of commercial floorspace values.
66. Considering the above factors, the public authority remains of the belief that the public interest in maintaining the exception outweighs the public interest in release.

Commissioner's Considerations

67. There will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision making, all of which ultimately contribute to a better environment.
68. The Commissioner considers that there will always be some inherent public interest in maintaining commercial confidences. Third parties would be discouraged from confiding in public authorities if they did not have some assurance that confidences would be respected. It may be important to preserve trust in public authorities' ability to keep third party information confidential. However, the Commissioner does not consider that a generic argument about inherent public interest carries significant weight, a public authority's arguments must be related to specific circumstances.
69. Turning to the specifics of this case, the Commissioner observes that the public authority has provided the overwhelming majority of the requested information and that she has found the exception afforded by regulation 12(5)(e) is engaged. That is, it is likely that releasing the withheld information would negatively affect legitimate economic interests of the public authority and third parties.
70. On balance the Commissioner considers that the public interest in maintaining the exception outweighs the public interest in releasing it notwithstanding the presumption in law that it should be released.
71. The primary reason for this finding is that to release the withheld information would likely negatively impact economically the public authority and third parties. The Commissioner also considers that the information already released goes a considerable way to illuminating the project proposals and facilitating public debates about those proposals. Releasing the relatively small proportion of withheld

information would qualitatively add relatively little to the information that has already been released.

72. Having found that the public authority correctly relied on regulations 12(5)(e) and 13 to withhold the withheld information from the complainant, the Commissioner did not go on to consider regulation 12(5)(f).

Right of appeal

73. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 89638963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

74. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
75. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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