

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

Date: 20 December 2011

Public Authority: London Borough of Croydon
Address: Taberner House
Park Lane
Croydon
CR9 3JS

Decision (including any steps ordered)

1. The complainant has requested information relating to Croydon Council Urban Regeneration Vehicle, which is a 28 year partnership between the council and John Laing aimed at regenerating a range of key sites across Croydon. Specifically, the complainant has requested a copy of the contracts between the council and John Laing relating to this partnership.
2. The Commissioner's decision is that the council inappropriately relied on regulation 12(5)(e) for the majority of the remaining withheld information. In respect of one element of the withheld information the Commissioner decided that regulation 12(5)(e) does apply and that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exception.
3. The Commissioner requires the council to release the following information to ensure compliance with the legislation:
 - details of John Laing's professional liability insurance;
 - the price change matrix attached to Annexure 4 of the Conditional Sale and Development Agreement; and
 - the development property fee and new council property fee (page 59 of the Property and Development Management Agreement).
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

(or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 11 November 2010, the complainant wrote to the council and requested information in the following terms:
 - "- Copies of the contracts signed between Croydon Council and John Laing in regard to the Urban Regeneration Vehicle.
 - Details of the £145 million loan from the Public Work Loans Board (dates, interest, when repayments are due, terms and conditions, etc)
 - How much of this money was then loaned to John Laing, at what rate of interest, how will it be repaid, and what are the terms and conditions?
 - If any of it was used for any other purpose, what was it used for and the details of this use?
 - At what amount is the 1.2 acre plot of land which is part of the Urban Regeneration Deal valued at?
 - How much of a share of the development profits on the sites the council owns as part of the deal will Croydon Council get?"
6. The council responded on 20 January 2011. It released some information to the complainant but refused to disclose other information under sections 41 and 43 of the Act.
7. Following an internal review the council wrote to the complainant on 8 March 2011. It stated that it remained of the opinion that the remaining withheld information was exempt from disclosure under sections 41 and 43 of the Act.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether the council had acted appropriately by withholding the outstanding information under sections 41 and 43 of the Act.
9. During the Commissioner's investigation further information was released to the complainant. This notice will focus on the remaining withheld information only, which consists of the following:

- 1) the value of various A and B loans and transfer values for a number of different sites earmarked for development (page 37 to 41 of the Conditional Sale and Development Agreement);
 - 2) details of John Laing's professional liability insurance;
 - 3) the price change matrix attached to Annexure 4 of the Conditional Sale and Development Agreement; and
 - 4) the development property fee and new council property fee (page 59 of the Property and Development Management Agreement).
10. During the Commissioner's investigation it was also established that the complainant's request should have been considered under the EIR. The requested information relates to or concerns the agreement in place between the council and John Laing to redevelop certain areas of land. The Commissioner considers this to be a measure or plan as defined in regulation 2(1)(c) which will or is likely to affect the elements of the environment outlined in regulation 2(1)(a) of the EIR i.e. the land, landscape etc. On reflection the council agreed with the Commissioner's view and confirmed that it now wished to rely on regulation 12(5)(e) of the EIR for the non disclosure of the remaining withheld information.

Reasons for decision

Regulation 12(5)(e)

11. Regulation 12(5)(e) states 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.
12. For the Commissioner to agree that the remaining withheld information is exempt from disclosure by virtue of regulation 12(5)(e), the council must demonstrate that:
 - the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
13. This exception is also subject to the public interest test. In addition to demonstrating that this exception is engaged, the council must also explain how it considered the public interest for and against disclosure

and how it reached the view that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception.

14. Dealing with the first bullet point first, the Commissioner is satisfied that the remaining withheld information relates to the acquisition of earmarked sites in the area for redevelopment. He considers the sale of land to be a commercial transaction and therefore agrees that the remaining withheld information is commercial in nature.
15. Turning now to the second bullet point, the Commissioner considers "provided by law" includes confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
16. The council confirmed that section 29 of the Management Agreement and Section 10 of the Property and Development Management Agreement contain binding contractual confidentiality clauses and the remaining withheld information is contained in these two documents. It stated that it considers these clauses are sufficient to meet this element of the exception.
17. The Commissioner has reviewed the two clauses. He is satisfied that these clauses place both the council and John Laing under a contractual duty of confidence not to disclose information contained within the documents without the prior agreement of the other party.
18. Although the Commissioner accepts that there are binding contractual obligations of confidence in this case which are sufficient to meet the second bullet point of paragraph 12 above, he does not accept that this fact alone is enough to engage this exception. The council still needs to demonstrate that disclosure of the remaining withheld information would adversely affect its own or John Laing's legitimate economic interests.

A and B loans and transfer values

19. The council argued that the A and B loan value and transfer value for each site it has yet to acquire has been withheld from the complainant. The transfer value equates to the financial provision the council has put to one side for the acquisition of the site. The A and B loan equate to the transfer value and represent two sources for this provision, which may be payable at different times.
20. The council stated that at the time of the request it had not commenced negotiations with third party landowners over the acquisition of these sites but it envisaged this taking place very shortly. If this information was to be disclosed prior to these negotiations and prior to a price being formally agreed, it would damage its commercial interests and the

interests of John Laing. It explained that the landowners will appoint agents to negotiate the best price for them and these agents are specialists at disposal who will search all available information to ascertain, amongst other things, the financial provision the council has put to one side for the site. The council argued that it is common place for such agents to review annual reports, publications, PR literature and submit FOI/EIR requests seeking financial figures from which they can map the financial provision the council has earmarked for the acquisition of the site.

21. The council confirmed that it therefore felt disclosure would adversely affect its ability to negotiate and secure the best price it can for the sites required, which would in turn adversely affect the redevelopment plans in place for the area and its legitimate economic interests.
22. The Commissioner has given this matter careful consideration and he has reached the view that disclosure of this information at the time of the complainant's request would have adversely affected the economic interests of the council. He accepts that the council had not entered into negotiations with the landowners concerned at this time but intended to do so in the near future. The values redacted from the information disclosed to the complainant reveal the financial provision the council has put to one side for each site. Disclosure at this stage would have released into the public domain the amounts the council was willing to pay for each site prior to the negotiations commencing and a price being fairly agreed with the landowner. Disclosure at this time would have placed the council at a disadvantage in the forthcoming negotiations, adversely affected its ability to negotiate and secure the best price it can for each site. The Commissioner accepts that disclosure would therefore have adversely affected the economic interests of the council.

Details of the contractor's professional liability insurance

23. The council confirmed that John Laing had objected to the disclosure of this information. It stated that John Laing had negotiated these terms with a third party insurer and it regarded the information as commercially sensitive. John Laing felt that disclosure would prejudice its commercial interests in future negotiations with other local authorities and other banks, as it is a major contractor bidding for several similar contracts around the country.
24. The council also advised that John Laing felt disclosure of this information would release details into the public domain of the risk it was willing to take. It considers such information could be used by its competitors to its disadvantage causing harm to its business. John Laing informed the council that it regards this information to be pricing information and its disclosure would more than likely cause it to lose bids it is working on and future bids. It advised the council that it is

currently the market leader in these forms of public and private sector partnerships and was in the process of bidding for a similar contract with another public authority at the time of the complainant's request.

25. The Commissioner has reviewed this information. He notes that it details the limits of liability and states that John Laing should have sufficient professional indemnity insurance in place to cover these liabilities. He notes that John Laing agreed to the disclosure of the limits agreed in respect of its public liability insurance but refused to allow the disclosure of the same information for its professional indemnity insurance. However, it has failed to explain in sufficient detail why.
26. The Commissioner also does not consider that the council or John Laing has explained in enough detail exactly how disclosure of this information would adversely affect John Laing's legitimate economic interests. John Laing stated that it considers this information would be useful to one of its competitors and could be use to outbid it in current tendering exercises and future contracts but it has failed to explain how.
27. It is the Commissioner's view that this information is not pricing information as John Laing has alleged but the agreed limits of liability of this contract in respect of professional liability insurance. He considers that all contracts of this nature and size will have similar limits of liability, which will have been agreed between the parties concerned and that it is not a unique feature of this particular contract. The withheld information does not contain any specific details of the insurance John Laing has in place or contains any information on the specific terms it negotiated with its insurer. It simply states that the contractor should have at least a set amount of professional liability insurance in place. The Commissioner remains unconvinced at this stage that the disclosure of this information would adversely affect the legitimate economic interests of the contractor concerned.
28. As the Commissioner remains unconvinced that disclosure of this information would adversely affect the legitimate economic interests of John Laing, he has concluded that regulation 12(5)(e) of the EIR is not engaged.

The price change matrix

29. The council confirmed that this is a table of factors which may impact upon the transfer values for the earmarked sites and that the contractor regards this information as pricing information. It explained that this table highlights how these values can change and possible strengths and weaknesses. It stated that disclosure would allow competitors to understand the methodology used by John Laing and the strategies used in submitting the prices that it did which could then be used by these competitors in future tendering exercises to outbid the contractor.

30. No other arguments or more detailed submissions were provided to the Commissioner.
31. The Commissioner has reviewed the table himself. He accepts that this table details a number of factors which could affect the transfer value of the sites yet to be acquired. However, these appear to be high level assumptions which do not specifically state in any great detail exactly how each factor could affect the transfer values. With regards to 'impact' the table either states that the factor may "impact on the TV [transfer value]" or may "impact on TV up or down". No further detail is given.
32. The Commissioner also considers that while some of the factors do contain prices quoted by John Laing, it is his view that these are total figures for a particular site relating to the factor concerned i.e. the total cost of demolition for each site. These figures are not broken down in any detail and do not reveal in depth pricing information put forward by John Laing. It is also the Commissioner's view that this table is specific to the contract in place addressing particular named sites required for redevelopment. He cannot see at this stage from the information itself or from the submissions he has received from the council how this information would be useful to one of John Laing's competitors. This contract has already been awarded to John Laing and although this contractor may be bidding for similar contracts with other authorities or private sector organisations the specifics of these contracts will be different.
33. While the Commissioner may accept that the table details factors which may or may not affect the transfer values, he does not consider this information constitutes the methodologies and strategies used John Laing, as the Council has alleged. The Commissioner may consider unique ways of working, novel strategies and methodologies to be commercially sensitive in some cases but he does not consider this is the information being considered here.
34. For the reasons explained above, the Commissioner has decided that the Council has supplied insufficient evidence to demonstrate that the disclosure of this information would adversely affect the economic interests of the contractor concerned. He has therefore concluded that regulation 12(5)(e) is not engaged.

The development property fee and new council property fee

35. The council described John Laing as a 'general manager' responsible for all tasks required to deliver the project. For these services the council pays John Laing these fees. It stated that these fees were negotiated with the council in confidence and disclosure of this information would adversely affect John Laing's ability to negotiate effectively in future tender exercises. It reiterated that John Laing is a market leader for

these types of partnerships and it is currently tendering for a similar contract with another authority.

36. Again no further arguments or further details were supplied by the council despite the Commissioner requesting on several occasions further more in depth submissions.
37. As explained previously, the relevant consideration here is 'would' disclosure adversely affect the economic interests of John Laing, as the council has alleged. Evidence that disclosure may or would be likely to cause an adverse affect is not sufficient to engage this exception.
38. While the council has stated that this information could be used by John Laing's competitors to gain a commercial advantage during future tender exercises and during the current tender it is involved in, it has again failed to explain why. Although future and current tender exercises are mentioned, the council and John Laing has failed to explain how similar, if at all, the details of this contract are to the contract currently under consideration with another authority or to possible future contracts with other public sector and private sector organisations. The Commissioner can only conclude from the information he has been provided that this contract is specific to the redevelopment of key areas earmarked by the council and the fees reflect the specific tasks under this contract that John Laing is responsible for. Other contracts will be different involve other factors and require the relevant contractor to undertake different services. He can therefore only conclude that there is no evidence to suggest that these fees would be comparable to the fees potentially negotiated for other contracts and therefore insufficient evidence has been provided to demonstrate that disclosure 'would' adversely affect the economic interests of John Laing.
39. For the reasons explained above, the Commissioner has decided that regulation 12(5)(e) of the EIR is not engaged for this information.
40. As the Commissioner did conclude that regulation 12(5)(e) is engaged for the A and B loan amounts and the transfer values of each site, he now needs to go on to consider the public interest test for this information.

Public interest test

41. The council stated that it accepted there is a public interest in upholding the overall spirit of the information regulations and disclosing information to the public to enable them to understand more clearly why certain decisions have been made. It confirmed that there is a public interest in the overall transparency and accountability of the council and the disclosure of information which will further public debate.

42. The council also advised that there is a public interest in the disclosure of these loan amounts and transfer values as they equate to the council and John Laing's valuation of the sites required for redevelopment and highlight the sums of money they are willing to pay once negotiations with the third party landowners commence. It stated that it accepted that such transactions involve the spending of public funds and there is always a public interest in members of the public scrutinising how such funds are spent to ensure that value for money is being achieved.
43. However, in this case the council confirmed that it felt the public interest test rested in non disclosure and in the maintenance of this exception.
44. The council stated that disclosure would adversely affect the council's ability to negotiate with the third party landowners over the acquisition of these sites. It stated that these negotiations have not commenced yet and if the financial provision it had put to one side for each site was revealed prior to these negotiations taking place it would hinder its ability to secure the best price it can for each site. The council stated that such consequences would not be in the public interest or the interest of the public purse.
45. The Commissioner has considered the arguments for and against disclosure. He accepts that there is a public interest in promoting the overall transparency and accountability of the council and that disclosure would promote public debate. He also accepts that the contract between the council and John Laing relates to the major redevelopment of key sites in the area, involves a significant amount of public funds and will therefore attract considerable public interest.
46. The Commissioner considers disclosure of the information would assist the public in understanding more clearly the arrangements between the council and John Laing over the purchase of these sites and reveal the amount of public funds earmarked for their acquisition. As the council stated there is a strong public interest in releasing information which enables the members of the public to see how public money has been spent to enable them to scrutinise such spending and evaluate whether value for money is being achieved.
47. However, in this case, due to the circumstances at the time of the request, the Commissioner considers the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining this exception.
48. As explained earlier in this Notice, at the time of the request the sites to which the withheld information relates were yet to be acquired. The council explained that it had not by this time entered into any negotiations with the landowners of these sites over their purchase. The A loan and B loan amounts and the transfer values reveal the financial

provision put to one side for the acquisition of these sites. The Commissioner accepts that the disclosure of this information prior to the negotiations taking place and a price being agreed would adversely affect the council's ability to negotiate a fair and competitive price for each site. If the landowner's agents were aware prior to such discussions of the financial provision put to one side, it would hinder the council's ability to secure the best price it can and place it at an unfair disadvantage. It could also lead to the landowners inflating their price.

49. The Commissioner considers it is in the public interest to ensure that a level playing field exists during such commercial negotiations and it is not in the public interest to adversely affect the council's ability to achieve value for money. Disclosure would lead to the council having to pay more for the land that it originally wished or would prevent the council from securing a price less than the financial provision it has made which again would not be in the interests of the taxpayer and the general public as a whole.

Right of appeal

50. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

51. 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.
52. 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

Andrew White
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