

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

Decision notice

Date: 14 February 2013

Public Authority: Homes & Communities Agency
Address: Arpley House
110 Birchwood Boulevard
Birchwood
Warrington
WA3 7QH

Decision (including any steps ordered)

1. The complainant requested copies of legally binding agreements between the Homes and Communities Agency ('HCA') and Langtree Artisan relating to the former Odeon cinema in Bradford. HCA disclosed a copy of the agreement, subject to a small amount of information contained within the agreement which it withheld under section 43 of the FOIA. HCA considered that the request may fall under the provisions of the EIR and sought to also apply regulation 12(5)(e) of the EIR. The Commissioner's decision is that the correct access regime is the EIR and HCA correctly applied regulation 12(5)(e) to the remaining withheld information. The Commissioner does not require any steps to be taken.

Request and response

2. On 10 December 2011, the complainant wrote to HCA and requested information in the following terms:

"I require full and unredacted copies of any and all legally binding agreements between the Homes & Communities Agency and Langtree Artisan with regard to the former Odeon cinema in Bradford city centre, irrespective of whether those agreements were made by Homes & Communities Agency or by a predecessor and transferred thereto, and further irrespective of whether any or all obligations made under said agreement(s) have been previously discharged"

3. HCA responded on 30 January 2012 and provided a copy of a development agreement, but withheld sections of the agreement under section 43(2) of the FOIA. HCA also stated that, if the information was considered to be environmental information, as defined by the EIR, it considered the withheld information to be exempt under regulation 12(5)(e) of the EIR.
4. On 4 February 2012, the complainant requested an internal review of HCA's refusal to disclose the information requested. He accepted that some of the information could be redacted as it was likely to be commercially sensitive but he stated that he did not consider it appropriate to withhold other information.
5. HCA provided the outcome of its internal review on 1 March 2012. It disclosed some additional information but maintained that the remaining withheld information was exempt under section 43(2) of the FOIA and regulation 12(5)(e) of the EIR.

Scope of the case

6. The complainant contacted the Commissioner on 12 July 2012 to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether HCA had correctly withheld the information, and whether the public interest favours disclosure.
7. In his complaint to the Commissioner, the complainant indicated that he was happy to limit his request to the following elements within the development agreement:
 - the premium paid (or payable)
 - the mechanism for calculation of overage payments.
8. The information which HCA has continued to withhold from the development agreement comprises:
 - Premium figure (page 12)
 - Beck and ground costs (page 63)
 - Net Value (page 64)
 - Building appraisal annex
9. Having viewed a full copy of the development agreement, the Commissioner notes that information concerning the calculation of

overage provisions is contained within schedule 2 of the development agreement. The beek and ground costs, net value and the building appraisal annex are all linked in some way to the calculation of overage provision. As such, the Commissioner considers that all of the remaining information withheld from the development agreement falls within the scope of the request. He has therefore considered whether HCA has appropriately withheld this information.

Reasons for decision

Background

10. According to information on HCA's website:

"The former Bradford Odeon cinema transferred to the Homes and Communities Agency (HCA) in September 2011, as part of the portfolio of assets from the former Regional Development Agency, Yorkshire Forward. With ownership came a number of legal duties to the HCA.

Along with the building, we inherited a development agreement signed between the previous owner and a developer, Langtree Artisan, for a plan that involved demolishing the building and replacing it with a 'New Victoria Place' development of offices, a hotel and apartments."

Correct Access Regime

11. HCA originally processed the complainant's request for information under both the FOIA and the EIR. During the course of the Commissioner's investigation HCA maintained its position that FOIA was the correct access regime, but on balance it considered the safest approach was to consider the request under both access regimes.

12. The Commissioner considers that the information requested constitutes environmental information and that the correct access regime is, therefore, the EIR. The Commissioner has determined that the requested information falls within the definition of environmental information set out at regulation 2(1)(c) of the EIR. This provides that:

"'environmental information' has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material on—

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to

in (a) and (b) as well as measures or activities designed to protect those elements.”

13. The Commissioner considers that the phrase “any informationon” should be interpreted widely and that this in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which is implemented into UK Law through the EIR. The Commissioner does not consider it necessary for the requested information itself to have a direct effect on the environment in order for it to be environmental information. It will usually include information concerning, about, or relating to measures, activities and factors likely to affect the state of the elements of the environment.
14. The withheld information comprises information contained within a development agreement which HCA inherited from Yorkshire Forward. It is clear that the agreement contains a number of conditions, including a resolution to grant planning permission for the New Victoria Place scheme. Planning permission was granted, subject to a number of conditions, by Bradford Council in September 2009. Langtree Artisans’ proposals for New Victoria Place include demolition of the existing building. The Commissioner is satisfied that the development agreement constitutes environmental information, as defined by Regulation 2(1)(c). This is because it is information on (concerning, relating to, or about) a measure (the development) which is likely to affect the elements of the environment.

Regulation 12(5)(e) – confidentiality of commercial or industrial information

15. Regulation 12(5)(e) concerns the confidentiality of commercial or industrial information where such confidentiality is provided by law. When assessing whether this exception is engaged, the Commissioner will consider the following questions:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
16. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive because if the information was disclosed under the EIR, it would cease to be confidential.

Is the information commercial or industrial in nature?

17. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
18. HCA has applied regulation 12(5)(e) to parts of a development agreement it inherited from Yorkshire Forward relating to land which currently accommodates the Bradford Odeon cinema. Yorkshire Forward purchased the property in 2003 with the view to redeveloping it. Yorkshire Forward subsequently conducted a tendering exercise for redevelopment of the site, and selected Langtree Artisan as the preferred developer. The parties then entered into a conditional contract, as outlined in the development agreement. The agreement is a commercial document which sets out the terms for the transfer and development of the site. It includes an obligation on the site owner to grant leases to the developer in respect of the site following the satisfaction of various conditions within the agreement. It also provides for premiums to be paid by the developer to the site owner on completion of the development or phases of the development. In view of this, the Commissioner is satisfied that the agreement relates to a business activity for commercial gain, the information is commercial in nature. He therefore considers that this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

19. In relation to this element of the exception, the Commissioner will consider if the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute. There is no need for the information to have been obtained from another party as is the case with section 41 of the Act.
20. HCA has argued that the confidentiality in this case is imposed under contractual obligation. The confidentiality clause (clause 34) contained within the agreement binds the parties into keeping confidential certain terms contained within the agreement. The Commissioner accepts that the circumstances and contractual terms under which the information was agreed between the parties involved in the agreement were sufficient to create an obligation of confidence.
21. The Commissioner therefore concludes that the requested information is subject to a duty of confidence which is provided by law in view of the contractual relationship between HCA (in inheriting the land and development agreement from Yorkshire Forward), and the other parties

to the development agreement - Langtree Artisan Limited and Langtree Group Plc.

Is the confidentiality required to protect a legitimate economic interest?

22. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect. In the Commissioner's view, it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probable than not".
23. HCA argues that the confidentiality is designed to protect the legitimate economic interests of itself, and Langtree Artisan Limited ('LA'). HCA considers that, as the development agreement is a conditional one, disclosure would have an adverse effect on its own position and that of LA.
24. HCA considers disclosure would adversely affect its own interests because if competitors knew what amounts HCA had accepted in relation to the project they would never offer more than those amounts on this project if it ever needed to be retendered, or any comparable schemes in the future. As HCA believes that competitors would only offer the same or less if the project needed to be retendered, this would seriously undermine its ability to obtain best value for its development assets and projects.
25. In respect of any prejudice caused to a third party, the Commissioner will not accept speculation from a public authority regarding harm to the interests of third parties without evidence that the arguments genuinely reflect the concerns of the third parties involved. In line with this approach, HCA provided detailed submissions from solicitors acting on behalf of LA. LA argue that disclosure would adversely affect their economic interests for the following reasons:
 - The information is contained within a development agreement (conditional contract) entered into in confidence between the parties, following a development tendering exercise where LA was selected from an eventual shortlist of 3 tenderers to be the preferred developer. The contract is only unconditional on formal granting of planning permission which has not yet happened. IN view of the conditional nature of the agreement, LA argue that the

site is still considered "under offer" and the price remains highly confidential.

- LA believes that disclosure would prejudice confidentiality because it would publicize information about its costs, income, assumptions about rental levels and profits, necessary to make the scheme viable. This information would be used by potential tenants for the scheme, competitors, and contractors tendering for the construction work to strengthen their respective commercial positions and weaken LA's. All of this would threaten the viability of the scheme and therefore potentially mean the project does not happen, compromising LA and HCA's joint aim to deliver the scheme and the much-needed regeneration and to create a return for LA and the premium for HCA. In terms of timing, once the planning permission has been granted, pre-lets are in place and contracts for construction are let, LA consider the information would no longer be commercially sensitive.
 - LA considers disclosure would give competitors in the market and prospective tenants the ability to use typical costs and profit margins to make assumptions, create a mirror appraisal and work out LA likely rental figures. LA also consider that disclosure would allow the potential build contractors to know what price the works are expected to cost which would in turn compromise its ability to negotiate a good price for the work. This would compromise LA's ability to negotiate a good deal and therefore compromise the whole scheme and HCA's likelihood of receiving the premium which is payable on completion of the scheme, or parts of the scheme.
26. HCA advised the Commissioner that, since the request was made, the development agreement was terminated on 17 September 2012 as LA failed to comply with its terms and sign the Section 106 Agreement required for the parties to achieve satisfactory planning permission. The withheld information is clearly considered by LA to be commercially sensitive and HCA considers that disclosure would increase the likelihood of LA taking legal action against HCA, which would include action under the confidentiality clause. In addition, HCA considers that the termination of the agreement strengthens its arguments around disclosure undermining its ability to seek a new developer on an open and competitive basis, and affect its ability to achieve best value for the development.
27. The Commissioner has considered the arguments put forward by HCA and LA. He accepts that the requested information consists of information which, both now and at the time of the request was of significant commercial value and which, if disclosed, may be used to competitive advantage by any party competing against LA. This would

cause harm to the legitimate economic interests of HCA and LA. The Commissioner has taken into account the timing of the request in this case. The request was made prior to the agreement becoming unconditional, and as such the Commissioner accepts that disclosure of the withheld information would prejudice the commercial interests of HCA and the developer.

Would confidentiality be adversely affected by disclosure?

28. As the first three elements of the test cited at paragraph 15 of this notice have been established the Commissioner is satisfied that disclosure into the public domain would adversely affect the confidential nature of that information by making it publicly available and would consequently harm the legitimate economic interests of HCA and LA. He therefore concludes that the exception at regulation 12(5)(e) is engaged in respect of the withheld information and has gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure of the requested information.

Public interest arguments in favour of disclosing the information

29. Regulation 12(2) of the EIR requires the public authority to apply a presumption in favour of disclosure.
30. In his internal review request the complainant stated that he understood "why the Agency has elected to redact commercially sensitive information included in the document including the premium paid and beck/ground costs". However, he said that he was unable to agree that it was reasonable to withhold the building appraisal annex as the condition of the building was Yorkshire Forward's justification for demolishing rather than restoring the building. As such the complainant believed the balance of the public interest favoured disclosure of the building appraisal annex. In its internal review response, HCA explained that the building appraisal annex did not contain details of the condition of the building, but actually set out the developer's revenue and costs relating to the development to show its profit margins.
31. In his complaint to the Commissioner, the complainant pointed out that the site in question was of intense public interest and the majority of people wanted to see the building restored rather than demolished in accordance with the development agreement. The complainant advised that LA had recently entered administration "after taking £1.8m of public money to build homes in Sheffield which they did not complete". He believes this casts serious doubt over LA's ability to perform on the Bradford Odeon development and this tips the balance of the public interest in favour of disclosure.

32. HCA acknowledge that, in addition to improving transparency, there is a considerable and legitimate public interest in improving the accountability of public authorities. Through measuring the reaction to published information, public authorities have the opportunity to genuinely gauge the impact of their decisions and the effectiveness of their interventions.
33. HCA also acknowledge that disclosure would empower those interested members of the public to make robust, articulate and informed representations when opposed to an authority's activities. This is in the public interest which is served by helping to ensure that public authorities remain accountable to society.
34. However, HCA is of the view that the public interest in this case has to a large extent been satisfied through disclosure of the majority of information contained within the development agreement.

Public interest arguments in favour of maintaining the exception

35. HCA argues that disclosure of information relating to LA's financial position regarding the development has the potential to directly undermine its commercial position. This is because it would reveal LA's relative strengths and weaknesses, unfairly disadvantaging them in the marketplace, and their ability to compete effectively.
36. HCA considers that disclosure of the remaining information prior to the development agreement becoming unconditional would prejudice the successful delivery of the scheme and would directly impact on the development. HCA does not consider this to be in the public interest.
37. HCA is of the view that disclosure could impact on its ability to achieve its operational objectives. HCA needs to be able to inspire the trust and confidence of organisations if works with to ensure the exchange of information remains honest, comprehensive and complete. HCA considers disclosing information which has the potential to compromise the future provision of such information could undermine its ability to make reasoned and effective decisions.

Balance of the public interest arguments

38. The Commissioner has considered the above arguments. He considers that arguments in favour of maintaining an exception must always be inherent in the exception that has been claimed. The interests inherent in regulation 12(5)(e) are the public interest in avoiding commercial detriment and the public interest in protecting the principle of confidentiality.

39. There is a particular public interest in the subject of the request in this case because the development will have a significant impact on the local community. The Commissioner notes that there has been strong opposition to the development from members of the public, including the setting up of a campaign group - Bradford Odeon Rescue Group. It is therefore clear that there will be weight attached to the argument that the disclosure of the disputed information will help the public engage with HCA about plans that could ultimately affect them.
40. The Commissioner is of the view that there is generally a strong public interest in public authorities being accountable for the decisions they make and the money they spend. However, the Commissioner notes that the public interest in release has been lessened to a certain degree through the disclosure of the majority of the development agreement by HCA.
41. The Commissioner understands that a planning application for the site was originally submitted in October 2008, and a revised application in July 2009. The plans for the development were approved in 2009, but planning permission was subject to referral to the Secretary of State and the completion of a Section 106 Agreement. When HCA inherited the land and the development agreement, the resolution to grant planning permission and the agreement still stood. However, before the building could be demolished, a number of steps had to be taken, the first of which was the signing of the Section 106 Agreement. Following this, the local planning authority would need to be satisfied that the development plans were viable and in keeping with the principles of the obligations under the planning consent granted in September 2009.
42. At the time of the request no Section 106 Agreement had been signed and as such, the development agreement remained very much unconditional. The Commissioner notes that HCA subsequently terminated the development agreement in September 2012 as LA failed to comply with its terms and sign the Section 106 Agreement required for the parties to achieve satisfactory planning permission.
43. The Commissioner accepts that disclosure of the remaining information within the development agreement prior to it becoming unconditional could prejudice the successful delivery of the scheme. The Commissioner also does not consider that it would be in the public interest to disclose information which could undermine the HCA's future negotiating position in this or any other development scheme. The Commissioner notes that the development agreement was terminated by HCA after the request was received. HCA now has to consider alternative proposals for the site. The Commissioner considers this

strengthens the position in relation to the conditional nature of the agreement, and the impact of disclosure of the remaining withheld information, both at the time of the request and now.

44. The Commissioner is of the view that, whilst there are strong public interest arguments on both sides, the public interest in disclosure is, in all the circumstances of the case, outweighed by the public interest in maintaining the exception. In reaching his decision, he has placed considerable weight on the conditional nature of the development agreement, and the timing of the request. Therefore the Commissioner is satisfied that HCA correctly withheld the information under regulation 12(5)(e) of the EIR.

Right of appeal

45. 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: 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

46. 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.
47. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF