

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 31 March 2014

**Public Authority:** London Borough of Hammersmith and Fulham  
**Address:** Hammersmith Town Hall  
King Street  
London W6 9JU

### **Decision (including any steps ordered)**

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1. The complainant requested information, including a financial model, relating to the Earl's Court Area regeneration. London Borough of Hammersmith and Fulham (the Council) considered the request under the FOIA and refused to disclose the model citing a number of exemptions. During the course of the Commissioner's investigation, the Council cited EIR exceptions in the alternative, namely Regulations 12(5)(b) (the course of justice), 12(5)(e) (confidentiality of commercial or industrial information) and 12(5)(f) (interests of the person who provided the information).
2. The Commissioner has investigated and his decision is that the exception for commercial confidentiality is engaged and that the public interest favours withholding the information. He requires no steps to be taken.

### **Request and response**

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3. On 24 December 2012 the complainant wrote to the Council and requested information in the following terms:

*"However three documents relevant to the viability of the scheme are not in the public domain, and these are the focus of my request. They are:*

1. *Development Infrastructure Study by DVS for H&F, RBKC and GLA (Full Report). Summary published November 2011 and*

*contained within the RBKC Officers Report mentioned above. In the summary the 'existing use values' were blanked out. I do not mind if the same figures are also blanked out of the full report. It is the full report that I am seeking through this request.*

*2. EC Harris Built Asset Consultancy: Cost Analysis for the Earls Court and West Kensington Opportunity Area redevelopment proposals, Publication date: probably 2011*

*3. CBRE model for Capco referred to as 'the 2012 model' in a letter from PWC to Jane West of H&F dated 16th August 2012. The letter details tests on the '2012 model' version of this CBRE analysis which is described in the letter as 'DFBC4 for JLL (13.12.11) (inc Variable Profit.xlsx'".*

4. The Commissioner understands that 'Capco' referred to in the request is Capital and Counties Properties plc.
5. The Council responded on 21 January 2013. It denied holding the information requested at points (1) and (2) of the request. It refused to provide the information requested at point (3) of the request, citing the section 43 exemption of FOIA (commercial interests) as its basis for doing so.
6. Following an internal review, on 25 July 2013 the Council revised its position. It cited section 41 of FOIA (information provided in confidence) in addition to section 43.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 15 August 2013 to complain about the way point (3) of his request for information had been handled.
8. In bringing his complaint to the Commissioner's attention the complainant stated that the document sought:

*"... is one of the keys to the willingness of both London Borough of Hammersmith and Fulham (LBHF) and RBKC [Royal Borough of Kensington and Chelsea] to grant planning permission for a major regeneration project involving the demolition of two council estates (and their replacement) and of the Earls Court Exhibition Centre".*
9. In summary he told the Commissioner:

*"This Complaint is against the refusal of LBHF to provide a valuation document related to the Earls Court Regeneration. LBHF claims that it would breach confidentiality with Capco the developer with resultant damage to their commercial interests. Moreover they have, they say, contracted not to reveal this information...."*

10. The complaint described the information at issue as:

*"The Capco financial model used to justify the package approved by the LBHF Planning Committee of 12<sup>th</sup> September 2012"*

11. The Council told the Commissioner that the withheld information is:

*"a financial assessment of how Capco can redevelop a particular site and of the estimated costs involved"*

12. The Council initially considered the request under FOIA. During the course of the Commissioner's investigation, it confirmed its application of sections 41 and 43 *"in respect of the entirety of the model"*. It additionally cited section 42 *"in respect of one element of the model"*.

13. The Commissioner accepts that a public authority is able to raise a new exemption or exception and that he must consider any such new claims.

14. Also during the course of the Commissioner's investigation, while maintaining its view that the information falls to be considered under the FOI legislation, the Council cited exceptions in the alternative:

*"Alternatively, if the request falls to be considered under the EIR then the Council relies on the various EIR exceptions identified below"*

15. In that respect it applied one exception - regulation 12(5)(b) (the course of justice) - to a small part of the model, and two exceptions - regulations 12(5)(e) (confidentiality of commercial or industrial information) and 12(5)(f) (interests of the person who provided the information) - to the entirety of the model.

16. Accordingly the Commissioner considers the scope of his investigation to be the Council's application of sections 41, 42 and 43 of FOIA or, in the alternative, regulations 12(5)(b), 12(5)(e) and 12(5)(f) to the withheld information.

17. In its correspondence, the Council variously described the withheld information as *"a spreadsheet"*, *"the model"* and *"the CBRE model"*.

18. For the purposes of this decision notice, the Commissioner will refer to the withheld information as *"the model"*.

## Reasons for decision

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*Is the information environmental information?*

19. The Commissioner has first considered whether the withheld information comprises environmental information.

20. Regulation 2(1) of the EIR defines what 'environmental information' consists of. The relevant parts of the definition are found in 2(1)(a) to (f) which state that it is any information in any material form on:

*"(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*

*(d) reports on the implementation of environmental legislation;*

*(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*

*(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*

21. In the Commissioner's view, the use of the word 'on' indicates a wide application and will extend to any information about, concerning, or relating to the various definitions of environmental information.

22. The context of the request in this case is a proposed redevelopment scheme. The Council told the Commissioner that the proposed scheme

at Earls Court *"involves the comprehensive redevelopment of the Earl's Court Exhibition Centre and the surrounding area"*.

23. In bringing his complaint to the Commissioner's attention, he explained:

*"The purpose for which Capco had provided this spreadsheet to LBHF was to demonstrate the viability (profitability) of the scheme"*.

24. The Commissioner has issued guidance on the EIR<sup>1</sup>. That guidance states:

*"... sometimes information might not seem to be obviously environmental but could still fall under the definition. For example, financial information would be classed as environmental information if it related to the costs of redeveloping land and building a new leisure complex"*.

25. The Commissioner understands that the withheld information comprises financial delivery information and delivery proposals relating to plans to redevelop the Earls' Court Exhibition Centre and surrounding area in London. The development intends to provide, amongst other things:

- new homes, shops, offices and leisure facilities;
- a new school;
- leisure and healthcare facilities; and
- new transport links.

26. The Commissioner accepts that the model may not, in itself, be designed to be a plan to affect the state of the elements. However, having considered his guidance and viewed the withheld information the Commissioner considers that the information falls within the definition of environmental information.

27. In the Commissioner's view, the withheld information details estimates and costs attributable to the regeneration scheme, a scheme that will clearly affect the land. The information should therefore be considered under the EIR.

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Environmental\\_info\\_reg/Detailed\\_specialist\\_guides/guide\\_to\\_environmental\\_information\\_regulations.ashx](http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Environmental_info_reg/Detailed_specialist_guides/guide_to_environmental_information_regulations.ashx)

28. The Commissioner is satisfied that the model constitutes environmental information as defined by Regulation 2(1)(e). He considers the requested information to be information on cost benefit and other economic analyses and assumptions used within a measure (the development) affecting or likely to affect the elements and factors referred to in 2(1)(a) and 2(1)(b).

*Regulation 12(5)*

29. The exceptions under Regulation 12(5) provide protection when disclosing information would 'adversely affect' (harm) particular interests. The adverse effect test under the Regulations is similar to the prejudice test under the FOIA.
30. The Commissioner has first considered the Council's application of regulation 12(5)(e) to the entirety of the model.

*Regulation 12(5)(e) commercial interests*

31. Regulation 12(5) EIR states that:

*"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—*

*(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".*

32. The purpose of the exception is to protect any legitimate economic interests underlying commercial confidentiality. The Commissioner's guidance explains that the exception can be broken down into a four-stage test. All four elements are required in order for the exception to be engaged:

- the information is commercial or industrial in nature;
- confidentiality is provided by law;
- the confidentiality is protecting a legitimate economic interest; and
- the confidentiality would be adversely affected by disclosure.

*Is the information commercial or industrial in nature?*

33. The Commissioner considers that, for information to be commercial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade

and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit.

34. In correspondence with the complainant the Council said:

*"Capco have confirmed that the requested information constitutes a trade secret as it is a spreadsheet containing information unique to the parties involved in the regeneration and is not generally known by competitors. It is therefore a source of trading advantage".*

35. The Council also told the Commissioner:

*"The information in the CBRE model is self-evidently commercial in nature".*

36. Taking into account the context of the model and its purpose, the Commissioner accepts that the information is commercial in nature and relates to the commercial activity of a third party – namely Capco.

37. He has therefore concluded that this element of the exception is satisfied.

*Is the information subject to confidentiality provided by law?*

38. In considering this matter the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.

39. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.

40. In that respect the Council told the complainant:

*"Capco is a publically listed company and this information is not available to the market".*

41. In correspondence with the Commissioner, the Council said:

*"The CBRE model is not otherwise accessible: it is not in the public domain, and Capco has only shared it with a limited number of professional advisers for the purpose of taking advice in relation to the Scheme .... Further, the information in the CBRE model is non-trivial".*

42. Having considered its arguments, and viewed the withheld information, the Commissioner is satisfied that it is not publically available. He is also satisfied that it is not trivial in that it relates to a proposal for a

comprehensive redevelopment – a redevelopment described by the Council as *"a very substantial and important regeneration project"*.

43. As he is satisfied that the information has the necessary quality of confidence the Commissioner has gone on to consider whether the information was shared in circumstances importing an obligation of confidence.

44. In that respect, the Council told the complainant:

*"Furthermore, Capco provided this information to H&F on a 'full and frank disclosure' basis in order to be open and transparent however this was on the understanding that the information would remain confidential. This understanding was set out in the contract between Capco and H&F as well as representations made at the outset of the relationship between H&F and Capco that the information would remain confidential... The disclosure of this information could therefore lead to H&F being taken to court for an alleged breach of confidence"*.

45. The Commissioner also understands that the third party developer *"would not have presented the information in this way"* if it had been known that the information would be made public.

46. In the Commissioner's view, it is reasonable for Capco to consider that documents containing costings, such as the model at issue in this case, would be provided to the Council on a confidential basis.

47. The Commissioner is therefore satisfied that, whilst recognising that public authorities cannot contract out of their EIR obligations, the information in this case is not trivial and is not in the public domain and that it was shared in circumstances imparting an obligation of confidence. Accordingly he finds this element of the exception satisfied.

*Is the confidentiality protecting a legitimate economic interest?*

48. In the Commissioner's view, in order to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. Legitimate economic interests could relate to, for example, retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information or protecting a commercial bargaining position in the context of existing or future negotiations.

49. Where, as in this case, it is a third party's interests that are at stake, the Commissioner considers that the public authority should consult with the third party unless it has prior knowledge of their views. It will not be



sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party.

50. In that respect, the Council told the complainant:

*"If the information were to be disclosed, Capco have advised H&F that their negotiating position would be significantly weakened with future negotiations to do with the development. Their competitive position in the market place would also be adversely affected".*

51. During his investigation, the Council provided the Commissioner with evidence in support of its argument that disclosure of the model would cause harm to the third party's legitimate economic interests. That evidence included a letter from Capco to the Council in which Capco set out its "substantive reasons why it would be very harmful for Capco if the model was released".

52. The Commissioner has therefore had the opportunity to consider Capco's submissions about the harm that would be caused as a result of disclosure of the model.

53. From the evidence he has seen, the Commissioner is satisfied that the Council consulted the third party both at the time of the request and again during the course of his investigation.

54. The Council acknowledged, however, that:

*"the task of deciding whether or not the CBRE model should be released rests with the Council, as the relevant public authority, not with Capco. The Council has therefore applied its own mind to the question of disclosure, having regard to Capco's letter".*

55. In its submissions, the Council confirmed that it endorsed many of Capco's arguments. For example, it argued that disclosure would affect the third party's ability to negotiate and to obtain funding, thereby impeding its ability to deliver the development plans. It also explained why it considers that disclosure would harm Capco's interests not only in this development but also in a range of future developments.

56. The Commissioner has also had the opportunity to consider the submissions provided by the complainant in this case. The complainant told the Commissioner:

*"Clearly a printout showing the detailed viability of a scheme could have all kinds of damaging implications for its owner if published. However that is not the case here".*

57. He explained, for example, that:

*"First of all, the printout that I seek does not show the full details of the model that lies behind it....The particularities of the CBRE model would not be visible to someone who sees only the printout in question. All that they would see is the detailed inputs cumulative land value they generate for the specific Earls Court redevelopment."*

and

*"The document in question is more than a year old and any commercial value to a competitor is long dead. In any case there are no competitors in this case, as LBHF gave the development to Capco without any attempt to secure best value by auctioning the opportunity".*

58. In correspondence with the Commissioner, the complainant explained why he dismissed Capco's claim that disclosure in this case would weaken its negotiations in future negotiations to do with the Earls Court development.

59. With respect to Capco's claim that disclosure would prejudice their future site acquisitions and competitive position in the market, the complainant told the Commissioner:

*"This again is nonsense: the details of the Earls Court redevelopment are unique to that development and knowing them would not enable any competitor to gain an advantage over Capco".*

60. In his view:

*"The claims made in favour of retaining the confidentiality of the document are therefore all without foundation".*

61. In the context of Regulation 12(5)(e), it is not enough that disclosure *might* cause some harm to an economic interest. The Commissioner must consider whether the Council has established that disclosure *would* cause some harm.

62. The Commissioner is unable to give an expert opinion on such matters. However, having considered all the relevant submissions, he is satisfied that the Council has demonstrated that disclosure would result in a degree of harm to the legitimate economic interests of Capco.

63. In light of the above the Commissioner is satisfied that the Council has demonstrated that the confidentiality in this case is protecting the legitimate economic interests of Capco.

*Would confidentiality be adversely affected by disclosure?*

64. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it is inevitable that this element will be satisfied. He acknowledges that disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would also harm the legitimate economic interests that have already been identified.
65. Regulation 12(5)(e) is subject to a public interest test. The Commissioner must therefore consider whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the disputed information.

*The public interest test*

66. Regulations 12(1) and (2) of the EIR provide:

*"(1) ... a public authority may refuse to disclose environmental information requested if-*

*(a) an exception to disclosure applies under paragraphs (4) or (5); and*

*(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

*(2) A public authority shall apply a presumption in favour of disclosure."*

*The public interest in disclosing the information*

67. The complainant told the Commissioner:

*"There is a strong public interest argument for this, in the context of this massive redevelopment scheme".*

68. He also told the Commissioner:

*"It should also be mentioned that the scheme is highly contentious.*

*There have been calls for the Secretary of State for the Environment to call it in, very large petitions and numerous critical articles in the national press ...".*

69. He also said:

*"the Earls Court development, a 20 year project (at least) will once Crossrail in London is completed, probably be the biggest building project in the country, and not just London, for a number of years".*

70. In correspondence with the complainant, the Council recognised the public interest in disclosure. It said:

*"The release of the information could be seen to be in the public interest by providing greater transparency of the costs and profitability for those parties involved with the Earl's Court regeneration development, a programme of work that will affect residents and businesses within the borough".*

*The public interest in maintaining the exception*

71. In correspondence with the Commissioner the Council highlighted a number of public interest considerations in favour of withholding the information. For example the Council argued that there is a significant public interest in maintaining the confidentiality of the withheld information, given the adverse effects that disclosure could have both on Capco's economic interests and on the project as a whole. It argued that it is not in the public interest for a commercial organisation to suffer damage to its legitimate commercial interests as a result of disclosure.

72. In that respect, the Commissioner notes that Capco stated:

*"It is crucial to note that the Scheme is in no way dependent upon public funding. For the avoidance of doubt, this means that there are no grants or subsidies associated with the Scheme. The entirety of the financial risk falls on the shoulders of Capco".*

73. It also argued that future negotiations and discussions could be impeded by disclosure and that, given the importance of the regeneration scheme, the resultant effect on the progress of the development would not be in the public interest.

74. For example, it explained that disclosure would impact economic growth in the area, including the expected contribution of the regeneration scheme to the creation of new jobs and the building of new homes.

75. It further maintained that it is not in the public interest for disclosure to have the effect of distorting market competition: it explained that disclosure would enable Capco's competitors to exploit its commercial information to their commercial advantage. It argued that *"preserving fair market competition"* is strongly in the public interest.

*Balance of the public interest*

76. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption.
77. He has also taken into account that regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure. Therefore there may be occasions when information should be disclosed even though it is confidential and disclosure would harm someone's legitimate economic interests.
78. In this case, the Commissioner considers that the Council and the developer must have been aware that a project of this scale, with the attendant repercussions for the local community, would attract public interest.
79. In his view, the scale of the development, a regeneration scheme which is anticipated to take a number of years to complete, is a factor which increases the need for public scrutiny.
80. In that respect he recognises that disclosure of the model would promote openness and transparency and inform public debate on what is clearly a substantial regeneration project. However, he also understands that the proposed development is subject to the planning process, a process which goes some way to meeting the public interest.
81. The Commissioner accepts that while the withheld model relates to plans for the physical development of the land, it is a financial model illustrating how Capco structures a development of this nature.
82. The Commissioner has noted the Council's arguments that disclosure would have an effect on the ongoing nature of the scheme and on the developer's ability to conduct negotiations in a way which would optimise its economic and commercial interests. He is mindful that the purpose of the exception is to protect legitimate economic interests, and the severity and frequency of the harm is a relevant public interest factor.
83. While also noting the complainant's view that the withheld information is more than a year old and therefore has lost its commercial value, the Commissioner has not factored this into the public interest balance. This is because, in deciding that the exception is engaged, he has already found that the information is of commercial value.
84. Having considered the relevant arguments the Commissioner, in reaching a decision in this case, is mindful of the general presumption in favour of disclosure. However, in this case, given the nature and content of the withheld information - a roadmap by which Capco will develop the

scheme which it is developing as a private developer for commercial purposes – he considers that the public interest in maintaining the exception outweighs the public interest in disclosure.

*Other exceptions*

85. As the Commissioner has concluded that the information was correctly withheld under regulation 12(5)(e) it has not been necessary to consider the other exceptions cited by the Council.

## Right of appeal

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86. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

87. 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.
88. 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 .....**

**Gerrard Tracey**  
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