

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 9 October 2014

**Public Authority:** London Legacy Development Corporation

**Address:** Level 10  
1 Stratford Place  
Montfichet Road  
London  
E20 1EJ

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

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1. The complainant has requested information about the lease agreement for the former Press and Broadcast Centres at the Queen Elizabeth Olympic Park. London Legacy Development Corporation provided most of the information within the scope of the request but refused to provide the remainder, citing the exemptions in sections 41 and 43 of the FOIA.
2. The Information Commissioner's decision is that the requested information is exempt from disclosure by virtue of section 41 and 43 of the FOIA. The Commissioner does not require any steps to be taken.

#### **Background**

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3. The London Legacy Development Corporation ("LLDC") is responsible for the redevelopment of the Queen Elizabeth Olympic Park, which was the venue for the London 2012 Olympic and Paralympic Games. The redevelopment has the stated aim of transforming east London, creating opportunities for local people and driving innovation and growth.
4. Redevelopment is ongoing. LLDC's current published timeline sets out anticipated progress to 2018.

## **Request and response**

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5. On 1 August 2013, the complainant wrote to LLDC and made a request for the following information:

*"The iCity Press and Broadcast Centres lease agreement and its terms and any associated documents."*

6. LLDC responded on 30 September 2013. It provided a substantial amount of information within the scope of the request, including revised copies of the agreements, but refused to provide the remainder. It cited the following FOIA exemptions as its basis for doing so:
- section 40 – personal data;
  - section 41 – information provided in confidence; and
  - section 43 – commercial interests.
7. Following an internal review LLDC wrote to the complainant on 21 February 2014. It released some information which it had previously withheld. It also supplied some information which had been omitted from its initial response to the complainant in error. It maintained that the remainder was exempt under sections 40, 41 and 43.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 25 February 2014 to complain about the way his request for information had been handled. He subsequently agreed that information covered by section 40 should be excluded from the scope of the request.
9. The Commissioner therefore considers the focus of the investigation to be whether LLDC was entitled to rely upon the exemptions at section 41 and 43 to withhold the remaining information.

## **Reasons for decision**

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### **Section 41 – information provided in confidence**

10. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

11. LLDC identified two documents that it said were exempt under section 41:

- Appendix 3 - iCity Letting Strategy
- Appendix 4 - Cash Flow Model

**Was the information obtained from another person?**

12. LLDC stated that the information was provided to it by iCity, as part of pre-contractual negotiations. The Commissioner is satisfied that this is the case.

**Would disclosure constitute an actionable breach of confidence?**

13. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

- whether the information has the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and
- whether disclosure would be an unauthorised use of the information to the detriment of the confider.

*Does the information have the necessary quality of confidence?*

14. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
15. LLDC is responsible for the development of the buildings and outdoor spaces of the Queen Elizabeth Olympic Park. As part of this remit, it acts as the planning authority for the Park and surrounding areas and makes high level plans for development of the estate.
16. The information at Appendix 3 and Appendix 4 was received by LLDC in its role as the body responsible for overseeing the onward development of the Park (in this case, the letting of buildings and complexes so as to secure long term innovation and growth for the area). The information was supplied to it as part of iCity's bid to run the Press and Broadcast Centres, which it describes as "*...unique premises, with potential for use in multiple different ways*".
17. The letting strategy sets out iCity's business plan, including specific information about how it would allocate the available space for use by different organisations, lease terms and marketing details. The cash flow model sets out a detailed breakdown of projected expenditure and

income and includes formulas for the calculation of these figures. LLDC has described the information as an asset which it has taken iCity time, skill and money to develop.

18. Having regard to the above, the Commissioner would accept that the information cannot be said to be publicly available and as such it cannot be considered to be otherwise accessible. LLDC has also argued that the information cannot be said to be trivial as it constitutes sensitive commercial and financial information about iCity's proposals for the centre, which could cause harm to iCity's commercial interests if disclosed. The bespoke financial arrangements outlined in the documents include cash flow models, fee rates and the proposed rights of potential tenants and other parties.
19. Based on the above the Commissioner accepts that the information is not trivial as it contains quite detailed information about iCity's proposals which could be considered commercially sensitive information. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

*Was the information imparted in circumstances importing an obligation of confidence?*

20. In support of its position, LLDC has referred to the test set out in *Coco v AN Clark (Engineers) Ltd [1969] RPC 41*, specifically:

*"...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence".*

21. Following this, LLDC considers that the circumstances, nature of and way in which the withheld information was supplied to it by iCity impliedly and expressly confirmed that it would retain a confidential quality. The lease had been under negotiation between the two parties for some time and the understanding for both was that negotiations were and would remain highly confidential. LLDC has stated that this understanding is formalised in the lease agreement, which prohibits the disclosure of confidential information relating to the negotiation of the lease without both parties' consent. It has consulted with iCity about the request, and iCity has confirmed that it considers the information to be highly confidential.

22. The Commissioner recognises that information provided by iCity as part of its leasing application was provided in order to enable LLDC to make an informed decision on whether or not to grant iCity the lease to run the Press and Broadcast Centres. He accepts that there is both an implied and explicit obligation of confidence on the part of the LLDC that it will not share information provided as part of this process.

*Would disclosure be of detriment to the confider?*

23. LLDC has consulted with iCity about the request. iCity has confirmed that it considers that disclosure would be detrimental to its commercial interests. The timing of the request is significant here. The request was submitted in August 2013, and reviewed in February 2014. During this time the lease was still under negotiation. LLDC says that the lease was not signed until May 2014.
24. The Commissioner accepts that disclosure of the requested information, which, as stated above, contained detailed bespoke financial and commercial information, could have prejudiced iCity's commercial interests by giving competitors and potential tenants access to commercially sensitive information about its business plan, at a time when the lease has not been finalised.
25. For similar reasons, LLDC also believes that disclosure would be detrimental to iCity's commercial interests should it in future tender for the lease to operate other plots and premises in the Park. Potential tenants would be able to use the information to their advantage in negotiations regarding the leases, in a manner which would be likely to place both iCity and LLDC at a disadvantage.
26. LLDC also referred to the ICO's guidance on confidentiality:
- "If the authority can demonstrate that this disclosure would undermine its relationship with a particular company, or affect its ability to do similar business with others, then this should be given more weight than a general assertion that breaching confidentiality will have a harmful effect on trust".<sup>1</sup>*
27. LLDC said that iCity has stated its belief that disclosure of the withheld information would be likely to constitute a breach of confidence for which it would be entitled to take action against LLDC.

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<sup>1</sup> Information Commissioner's Office Line to Take 161: Public interest factors for regulation 12(5)(e) (withdrawn)

28. The Commissioner notes that the above guidance has been withdrawn, but he accepts LLDC's submission that disclosure would have a genuine and negative effect on the relationship between the two parties, based around the detriment that iCity would be likely to experience as a result of the disclosure. The Commissioner accepts LLDC's contention that if the information were disclosed the commercial interests of iCity would be compromised, potentially putting it at a competitive disadvantage and damaging its commercial relationships with LLDC and prospective tenants.

**Is there a public interest defence for disclosure?**

29. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether LLDC could successfully rely on such a public interest defence to an action for breach of confidence in this case.
30. When he submitted his complaint to the Commissioner, the complainant asked to be allowed to make further public interest arguments in support of the disclosure of the information. The Commissioner twice invited him to make such representations but none have been received.
31. For his part, the Commissioner accepts that there is a general public interest in public authorities being open and transparent about the ways in which contracts with private organisations are awarded. In this case, the 2012 Olympic Games received considerable public funding, with the promise that the investment would be rewarded with a legacy which would benefit the wider community. It follows that there is a public interest in scrutinising how that legacy is being fulfilled and how the public is benefitting.
32. LLDC has argued that breaching the duty of confidence it has to iCity would be highly likely to have a detrimental impact on its relationship with iCity. LLDC quoted the ICO's guidance on section 41 when addressing this point:

*"There is a public interest in maintaining trust and preserving a free flow of information to a public authority where this is necessary for the public authority to perform its statutory functions".<sup>2</sup>*

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/libr](http://ico.org.uk/for_organisations/guidance_index/~media/documents/libr)

33. The Commissioner notes that LLDC's own negotiating position might also be damaged if prospective tenants become aware of the terms on which it was willing to do business with iCity. Since it is tasked with obtaining good value in respect of publically funded assets, this would be contrary to the public interest.
34. In weighing the above public interest arguments for and against disclosure, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.
35. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
36. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.
37. LLDC also claimed that section 43(2) applies in respect of appendix 3 and appendix 4. Because he has determined that section 41 applies, the Commissioner has not gone on to consider whether section 43 also applies in respect of that information.



### **Section 43 – prejudice to commercial interests**

38. Section 43(2) FOIA provides an exemption from disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
39. In order for a prejudice-based exemption such as section 43(2) to be engaged the Commissioner considers that three criteria must be met.
- The actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
  - The public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
  - It is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority (ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice) is met. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather, there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
40. In this instance LLDC has applied the exemption at section 43(2) to make a series of redactions from an unsigned version of the lease agreement dated 15 May 2013 (LLDC says that the lease was not finalised and signed until late May 2014).
41. Having seen the withheld information, the Information Commissioner notes that it comprises specific contractual provisions, charges payable, key project dates, formulas for calculating payments, and details of profit distribution.
42. LLDC said that disclosure would be likely to prejudice its own commercial interests, as it would prejudice its negotiating position in a competitive environment, as well as the commercial interests of iCity, by revealing market-sensitive information likely to be of use to its competitors. LLDC said that both these effects would be likely to occur, at the time leading up to the signing of the lease agreement (in May



2014) and in the event of iCity's tendering for other leases on the Olympic Park.

*Applicable interests*

43. When identifying the applicable interests, the Commissioner must consider whether the prejudice claimed is to the interest stated.
44. The term 'commercial interests' is not defined in the FOIA. However the Commissioner's guidance on the application of section 43 describes it thus:

*"A commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*<sup>3</sup>

45. The Commissioner considers that details of how a business will deliver a service relates to a person's ability to participate competitively in a commercial activity, and therefore that, in the context of the request in this case, the withheld information relates to a commercial interest.

*Nature and likelihood of the prejudice*

46. A public authority must be able to point to prejudice which is real, actual or of substance. The disclosure of information must have some effect on the applicable interest, and this effect must be detrimental or damaging in some way.
47. Furthermore, there must be what the Hogan Tribunal<sup>4</sup> called a 'causal link' between the disclosure and the prejudice claimed. The public authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice claimed.

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[http://ico.org.uk/~media/documents/library/Freedom\\_of\\_Information/Detail ed\\_specialist\\_guides/AWARENESS\\_GUIDANCE\\_5\\_V3\\_07\\_03\\_08.ashx](http://ico.org.uk/~media/documents/library/Freedom_of_Information/Detail ed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx)

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<http://www.informationtribunal.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

48. In this case LLDC has specified that the prejudice relates to its own commercial interests and to those of iCity, and that the threshold is the lower one of "*would be likely to occur*".
49. The Commissioner considers it important that, in claiming the section 43 exemption on the basis of prejudice to the commercial interests of a third party, a public authority must have evidence that this does in fact represent or reflect the view of the third party.
50. The Commissioner has considered the representations iCity made to LLDC on the subject of disclosure. He is satisfied that LLDC consulted with the third party likely to be affected by any disclosure and that LLDC has accurately reflected its views in its submissions to him.
51. LLDC has explained that the information is commercially sensitive. Its disclosure would allow iCity's competitors and potential future tenants of the Broadcast and Press Centre access to commercially valuable information, which they could use to secure better rates in relation to future agreements for leases of space within the centre. This would be likely to weaken iCity's negotiating position and commercial interests by giving its competitors an unfair advantage in any on-going, imminent and future procurements. LLDC considered it likely that iCity's competitive advantage would be lost by release of the methodologies contained in the withheld information.
52. In relation to LLDC itself, although the leasing agreement regarding the Press and Broadcast Centre is now completed, the withheld information has a bearing on other negotiations and transactions LLDC is currently involved in, and is likely to be involved in in the future with regards to other leases to be negotiated across the Olympic Park. Disclosure of this information, which would be to the world at large, will provide to current and potential bidders for various opportunities across the Park, critical commercial information which would be likely to weaken LLDC's negotiating position. This would be likely to negatively impact the ability of LLDC to obtain value for money, achieve the best commercial position and maximise the potential return on public investment.
53. In the Commissioner's view, the level of competition within an industry or commercial field can affect whether the release of information will harm someone's commercial interests.
54. In this case, the ongoing development of Olympic Park is both fast moving and very high profile. LLDC has stated that it is currently involved in similar leasing negotiations, and its expectation is that iCity might bid for the leases of other sites on the Park.
55. In view of this, the Commissioner accepts that disclosure of the withheld information would be likely to harm both LLDC's and iCity's ability to operate in a competitive market.

56. Thus, with regard to the three-limb test for engaging a prejudice-based exemption the Commissioner is satisfied that, in relation to the arguments identified by LLDC, the first limb is met. The nature of the harm envisaged, and the likely prejudice to the commercial interests of LLDC and iCity, clearly relate to the interests which section 43(2) is designed to protect.
57. In respect of the second and third limbs of the prejudice test, the Commissioner considers that disclosure would be likely to offer iCity's competitors an opportunity to gain business advantage to the detriment of both LLDC and iCity.
58. The Commissioner is therefore satisfied that there is a causal link between disclosure of the requested information and the prejudice identified, that it can correctly be described as real, actual or of substance, and that it would be likely to arise. The Commissioner therefore finds that the exemption is engaged.

### **The public interest test**

59. Having established that the section 43 exemption is engaged the Commissioner must go on to consider the public interest test as set out in section 2(2)(b) of FOIA.

#### *Public interest arguments in favour of disclosing the requested information*

60. As set out at paragraph 30 above, the complainant had expressed a desire to submit public interest arguments, but failed to do so, despite twice being invited to do so by the Commissioner. The Commissioner is therefore unaware of the complainant's specific public interest concerns.
61. The Commissioner considers that there is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of information helps to promote transparency and accountability amongst public authorities. This in turn may assist members of the public in understanding decisions taken by public authorities and perhaps even to participate more in decision-making processes.
62. The development of the Olympic Park is a high-profile initiative which involves the redeployment of publicly subsidised assets, often into private control. The development of the Park will directly affect the local community and the potential commercial opportunities afforded to it.
63. LLDC has acknowledged that there is a public interest in transparency and accountability for decision making (especially financial decision making involving public funds) as well as in providing information to

allow those affected by decisions (including planning decisions) to understand them and, where relevant, to challenge them.

*Public interest arguments in favour of maintaining the exemption*

64. The development of the former Olympic Park is ongoing; site and property leases remain to be allocated, and will for some considerable time. A commercial context therefore continues to exist. Insight into the details of iCity's successful lease application would be likely to give its competitors an unfair advantage when competing against iCity for remaining, similar leases at the Park. It is in the public interest that the ongoing development of the Park is not jeopardised through the occurrence of unfair competition.
65. LLDC has the stated aim of regenerating the local area, creating jobs and benefiting the local community, through the development of the Park. The scale of the improvements for the local community could be adversely impacted if LLDC and iCity are not able to achieve best value in their business dealings, as a result of the disclosure of commercially sensitive information.
66. Whilst private organisations should expect to be scrutinised when bidding for involvement with publicly funded projects, the disclosure into the public domain of commercially sensitive information, particularly where it reveals methodologies and may place it at a disadvantage with its competitors, may inhibit some from putting themselves forward. It is in the public interest for LLDC to have access to as wide a range of bidders as possible, to ensure the best possible outcome for the redevelopment of the former Olympic Park.

**Balance of the public interest**

67. 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.
68. There is a presumption running through the FOIA that openness is, in itself, to be regarded as something which is in the public interest. In that respect, the Commissioner acknowledges that, in providing the complainant with a substantial amount of information within the scope of his request, LLDC has gone some way to address the public interest. The redactions it has made under section 43 represent a very small amount of the information that has already been disclosed.
69. The Commissioner recognises that there is a public interest inherent in prejudice-based exemptions, in avoiding the harm specified in the exemption – in this case harm to the commercial interests of LLDC and iCity. He recognises that there is a strong public interest in not

disclosing information which would be likely to commercially disadvantage private companies or disclosing information which could negatively impact on the future tendering process. Having found the exemption engaged, he must take into account that there is automatically some public interest in maintaining it.

70. In all the circumstances of the case, the Commissioner considers that it would not be in the public interest to disclose the withheld information. It follows that LLDC is entitled to rely on the exemption at section 43(2) as a basis for withholding it.

## Right of appeal

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71. 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: 0870 739 5836

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)

72. 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.
73. 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 .....**

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**