

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

Decision notice

Date: 3 November 2016

Public Authority: Royal Borough of Kensington and Chelsea
Address: Town Hall
Hornton Street
London
W8 7NX

Decision (including any steps ordered)

1. The complainant has requested a copy of the viability assessment prepared in relation to the regeneration options considered for the Silchester Estate. The Royal Borough of Kensington and Chelsea (the Council) confirmed that it held the requested information and provided some general clarification with regard to the assumptions that had been used for the purposes of the viability calculations. The Council considered however that under the 'confidentiality of commercial or industrial information' (regulation 12(5)(e)) exception to disclosure in the EIR it was not obliged to provide a copy of the report. The Commissioner has found that regulation 12(5)(e) of the EIR is engaged but that on balance the public interest favours disclosure. She therefore requires the Council to release a copy of the requested information to ensure compliance with the legislation.
2. The public authority must take this step 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

3. On 23 March 2016, the complainant wrote to the Council and requested information concerning the Silchester Estate in the following terms:

*The documents that I would like to access are the **financial viability assessments** that will have been carried out on each of the six options proposed by the architect Porphyrios Associates and that are due to be considered for decision by RBKC Council in either April or May 2016.*

The architects have used the information contained in the financial viability assessment to decide whether each of the individual six options are "financially viable" and each option has been accorded a Red-Amber-Green award to reflect these findings.

I would expect these financial assessments to include details of all costs, such as decanting, rehousing, buying out leaseholders, demolition, rebuilding, ground works – minus income (sales and rental streams) and to determine and conclude which of each of the six options proposed by the architect are financially viable.

I would also expect these documents to include a breakdown of figures that would indicate the percentage of properties for private sale/intermediate use and how many social rented properties will be provided to rehouse existing secure tenants currently living on Silchester Estate and guaranteed with a "right to return".

4. The Council responded on 22 April 2016 and confirmed that it held the requested information before stating that this would be considered under the EIR. The Council advised the complainant that the information engaged the 'confidentiality of commercial or industrial information' (regulation 12(5)(e)) exception in the EIR. Regulation 12(5)(e) is subject to the public interest test and the Council found that on balance the public interest favoured withholding the information. It did though provide some clarification in reply to the questions about the assumptions that had been used.
5. The complainant contacted the Council later the same day and asked it to reconsider the decision to withhold the requested information, citing the strong public interest in transparency. Accordingly, the Council carried out an internal review, the outcome of which was emailed to the complainant on 28 April 2016. The reviewer upheld the Council's original reliance on regulation 12(5)(e) of the EIR.

Scope of the case

6. The complainant contacted the Commissioner to complain about the Council's decision to refuse the request for the viability information produced in connection with the regeneration proposals for the Silchester Estate.
7. The Council has maintained that regulation 12(5)(e) was applied correctly to the viability report captured by the request. The Commissioner's analysis of the Council's position follows in the body of this notice.

Reasons for decision

Background

8. The Council has explained that the motivation behind regenerating the Silchester Estate stems from the recognition of the growing shortage of all types of housing in London. In the Borough there is an increasing demand for housing, with: those on middle incomes largely unable to access either market or affordable housing; over 2767 households on a waiting list for affordable housing; and, approximately 1800 households in temporary accommodation, the members of which the Council has a duty to rehouse.
9. On 16 July 2015 a report entitled 'Silchester Estate – Estate Redevelopment Options Appraisal'¹ was presented to Cabinet. The Executive Summary of the report introduced the purpose of the briefing as follows:

The Council has recently committed to a programme of new house-building on selected estates in its ownership in order to meet the following objectives: to provide better quality homes for existing and future tenants; to deliver additional affordable housing; to tackle the root causes of social deprivation; and to improve the urban design and built environment of those estates.

The Royal Borough has almost completed the first redevelopment scheme in this area (the ex-Silchester Garages site) with its

¹ <http://www.silchesterestate.org.uk/executive-decision-report-from-housing-cabinet-16-july-2015/>

partner the Peabody Trust. This scheme has been well received within the area and some informal local feedback has asked the council about what happens next. The Council therefore wishes to explore further redevelopment opportunities in the area through an Options Appraisal exercise, working with local residents and stakeholders.

This report requests that the Cabinet approves the appointment and funding of a property consultant and associated project/design team to take this work forward and produce the necessary Options Appraisal and accompanying viability reports.

10. The consultancy firm, CBRE, was appointed by the Council to provide the appraisal information. To fulfil this role, the architectural group Porphyrios Associated was instructed by CBRE in a sub-consultancy capacity to produce masterplan options against the Council's objectives, with CBRE providing the high-level advice for the feasibility exercise. Six options were contemplated, which were split into two categories – the first group extending only to Council land and the second group to both Council land and private land. A matrix was developed to assess each option.
11. The Commissioner notes that at the date the request was made the viability report had not been completed. The information therefore under consideration represents the draft version that was held at the time in question.

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

12. Regulation 12(5)(e) of the EIR allows 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. If the exception to disclosure is found to apply, the public authority must go on to assess the public interest test.
13. With regard to the legitimate economic interests that are protected by the exception, the Commissioner's guidance² says that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially

² https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosure which would otherwise result in a loss of revenue or income.

14. Previous decisions of the Information Tribunal have found that the construction of the exception should be read as imposing a four-stage test. Each of these must be satisfied for the exception to be engaged:
 - (i) The information is commercial or industrial in nature.
 - (ii) Confidentiality is provided by law. This will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute.
 - (iii) The confidentiality is protecting a legitimate economic interest.
 - (iv) The confidentiality would be adversely affected by disclosure. Although this is a necessary condition, the Information Tribunal has indicated that the disclosure of truly confidential information into the public domain would invariably harm the confidential nature of that information.
15. The Council has addressed in turn each of the tests in the exception.
 - *(i) Is the information commercial or industrial in nature?*
16. The Council has highlighted that the viability assessment contains assumptions about costs and values that would either be made by or received by a third party, including assumptions about the land owned by third parties. The assessment also makes assumptions about the cost of building new homes and other built elements. The Commissioner accepts the Council's view that this information is commercial in nature.
 - *Is confidentiality provided by law?*
17. The Commissioner's guidance explains that confidentiality in this context will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute. The Council considers that the report is protected by the common law of confidence. Two principal questions arise when assessing whether the common law of confidence applies.
18. Firstly, does the information have the necessary quality of confidence? This will involve confirming that the information is not trivial and is not in the public domain. The Council has stated that the report has not been made publicly available and argues that the information is clearly

not trivial as it concerns an extensive area of land which could potentially be redeveloped. If it were to be redeveloped, any scheme would involve expenditure and income which would total many millions of pounds.

19. Secondly, was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied, and may depend on the nature of the information itself and the relationship between the parties. The Council has explained that the viability information has been prepared by consultants on its behalf and has been used to inform recommendations by officers and decisions by councillors. According to the Council, the consultants have a duty of confidentiality, as do officers. The Commissioner also notes that the report itself states that its contents are commercially sensitive. While an organisation cannot contract out of its obligations under the EIR through the use of a confidentiality clause, the statement may nevertheless demonstrate a general expectation of confidentiality.
20. For these reasons, the Commissioner accepts the Council's position that a duty of confidence attaches to the requested information.
 - *(iii) and (iv) Is the confidentiality protecting a legitimate economic interest?*
21. To satisfy this stage of the test, disclosure of the disputed information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. It is not enough that disclosure *might* cause some harm. Rather, a public authority is required to demonstrate that the risk of some harm occurring is *more probable than not*.
22. The Council argues that what is at risk of being harmed through disclosure is its negotiating position. If the scheme goes ahead, it will require a competitive tendering exercise for a contractor or development partner.
23. In the Council's view, placing in the public domain information about assumed costs, values and profits would likely prevent the Council from getting the most advantageous tender proposals from developers or contractors should a decision be made to proceed with full or partial redevelopment of the estate. The Commissioner recognises that reports on the viability of proposed regeneration projects are an important mechanism in the planning process. The assumptions upon which a viability decision is generated reveal, to a greater or lesser degree, the business strategy of an organisation. The Commissioner considers that the successful delivery of a regeneration proposal by the Council represents a legitimate economic interest. Furthermore, the

Commissioner accepts that information of this nature would be of interest to third parties which have a financial interest in the scheme.

24. As stated above, the Commissioner will find that the fourth stage of the test incorporated into the exception will automatically be met where the three previous stages are satisfied. On the basis of her findings, the Commissioner has determined that regulation 12(5)(e) of the EIR is engaged. She has therefore gone on to assess the public interest test.

Public interest arguments in favour of disclosure

25. The complainant argues that there is an extremely strong case for disclosure, which reflects the significance of the issue being considered. He asserts that it is incumbent on the Council to permit local residents access to information that will allow them to make informed judgements on decisions that could affect the community to a profound extent. The complainant has explained that one of the options being assessed effectively represents a 'scorched earth' approach to the Estate, which makes the need for transparency even more important. The Council, for its part, has accepted that there is a strong public interest in disclosure based on the potential assistance it will give to residents to understand why particular options might be pursued.
26. The complainant suggests that recent decisions of the Information Tribunal have further endorsed the value of viability information to the local community. In particular, he has cited the following cases considered by the Tribunal: *Royal Borough of Greenwich v The Information Commissioner & Brownie* (EA/2014/0122, 30 January 2015)³, *The London Borough of Southwark v The Information Commissioner* (EA/2013/0162, 9 May 2014)⁴ and *Jeremy Clyne v The Information Commissioner & London Borough of Lambeth* (EA/2016/0012, 14 June 2016)⁵. Each of these decisions considered the application of regulation 12(5)(e) to viability reports, albeit produced in those instances on behalf of developers planning to regenerate specific sites.

³[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1478/Royal%20Borough%20of%20Greenwich%20EA.2014.0122%20\(30.01.15\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1478/Royal%20Borough%20of%20Greenwich%20EA.2014.0122%20(30.01.15).pdf)

⁴[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1279/London%20Borough%20of%20Southwark%20EA.2013.0162%20\(09.05.14\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1279/London%20Borough%20of%20Southwark%20EA.2013.0162%20(09.05.14).pdf)

⁵<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1808/Clyne,Jermy%20EA-2016-0012%20AMENDED%2023-06-16.pdf>

27. The differently constituted Tribunals each placed significant weight on the transparency of viability information, with the Tribunal in the *Greenwich* case disagreeing that the pricing and other assumptions embedded in a viability appraisal were none of the public's business. Instead, the Tribunal insisted that public 'understanding of the issues fails at the starting line if such information is concealed' (paragraph 18).

Public interest arguments in favour of maintaining the exception

28. While it has accepted that there is a strong public interest in disclosure, the Council has argued that the stronger public interest at the time of the request lay with maintaining the exception.
29. The Council's reasoning for this flows from the nature and severity of the harm that was identified in relation to the engagement of the exception. The Council considers it is vital that the best financial deals for the authority, and in turn the residents of the borough, can be achieved – an aim that could be jeopardised through an early release of key planning information.

The balance of the public interest

30. The Tribunal identified in *Southwark* three factors which were of such importance that they dwarfed other considerations (paragraph 39). These were:
- a) The project must not be followed to fail or be put in jeopardy;
 - b) The importance of public participation in decision making;
 - c) The avoidance of harm to a party's commercial interests.
31. The circumstances of the *Southwark* case and the nature of the disputed information itself differ in important respects from the present case. Nevertheless, the Commissioner considers that the combination of the factors serve to form a useful framework for testing the public interest.
32. According to the Council, the regeneration project is designed to address the housing shortage in the borough while enhancing the local area. This is clearly an important objective. The Commissioner agrees with the Council that on occasion confidentiality will be required in order that it can conduct its business effectively. A balance may therefore need to be struck with the competing interest which promotes transparency. The question for the Commissioner in this case is whether the severity of the harm which the Council considers would arise through disclosure is such that it would not have been appropriate to release the information in question at the date the request was made.

33. The Council has explained that the viability analysis was 'indicative only' at the point of time in question. It was the first assessment undertaken to determine if there was any merit in looking further at redevelopment options for the site. Regarding the use of the information, the Council has clarified that the report contains a number of high level assumptions that need to be reviewed and verified on an iterative basis. The viability assessment itself will be updated at the next stage of the process of examining the redevelopment options.
34. In terms of the severity of the prejudice claimed in respect of its own economic interests, the Council asserts that the viability assessment, whilst containing high level information, remains commercially sensitive. It is argued that disclosure would weaken the Council's negotiating position with third party leaseholders and landowners by identifying cost estimates for buying out commercial interests and revealing the surpluses that could be generated by each scheme option.
35. The Commissioner accepts that in a commercial sphere it is vital that an organisation is able to protect and sustain its negotiating position. Recent decisions of the Information Tribunal have, however, found that financial figures – particularly eventual sales and purchasing prices – will be dictated far more by the market at the time of disposal than by any assumptions recorded in a viability assessment.
36. In the view of the Commissioner, it is important that the viability report was prepared for the purposes of allowing the Council to settle on a preferred regeneration scheme. It therefore relates to an early stage of the planning process and in parts contains information that is made up of generalised or global figures relating to the different options. This being the case, the Commissioner considers there is a strong likelihood that the financial calculations are likely to be revised as the plans for the site develop. This would therefore weaken the severity of the harm cited by the Council. In some cases as well, the Commissioner considers that the figures will be based on industry standard assumptions. This would again reduce the value of the information to a competitor.
37. Against this is the acknowledged strong public interest in the report. While the report is only in draft form, it does set out the central viability assumptions which were being assessed. The information therefore still retains value in demonstrating to the public how the options were being considered.
38. Taking into account the weight of the competing arguments, the Commissioner has concluded that in all the circumstances the public interest in disclosure outweighs the public interest in disclosure.

Right of appeal

39. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. 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.
41. 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

Alun Johnson
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