

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

**Date:** 14 August 2017

**Public Authority:** The London Borough of Camden  
**Address:** Town Hall  
Judd Street  
London  
WC1H 9JE

**Decision (including any steps ordered)**

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1. The complainant submitted a request to the London Borough of Camden seeking information about the Highgate Newtown Community Centre. The Council provided the complainant with a limited amount of information falling within the scope of his request but withheld the remainder on the basis of regulations 12(4)(e) (internal communications) and 12(5)(f) (commercial confidentiality) of the EIR. The Commissioner is satisfied that both exceptions are engaged and that the public interest favours maintaining each exception.

**Request and response**

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2. The complainant submitted the following request to the Council on 29 July 2016:

*'In the Appendix to the Cabinet report of 24th February 2016 which considered the Community Investment Programme: Highgate Newtown Community Centre and Fresh Youth Academy Redevelopment (CENV/2016/05), the following statement was made:*

*"Once the design team had confirmed the proposal, a comprehensive cost analysis was undertaken to confirm the financial viability. Costs and Values were obtained that indicated a surplus. Total Development Costs (Excluding VAT): £ 12,473,958 Anticipated Sales Income: £*

*12,987,000 Potential Surplus/Shortfall: £ +513,042" (Appendix 1 Page 3)*

*However, in the main report at Paragraph 3.4, it states that "..... several options for the site have been considered over the previous year, however due to the negative or small predicted positive margins, most were seen as not having a realistic chance of being built. An independent validation/valuation of the assumptions in the business case has been carried out by the Council's external consultants and it can be seen in the table below that scenario 5 can deliver a surplus that makes it viable, which we will work to increase through design development and improving the value of the residential element".*

*I would, therefore, wish to request, under the Freedom of Information Act, the following:*

*a copy of the independent validation/valuation report carried out by the Council's external consultants referred to in Paragraph 3.4 of the Cabinet Report, as it relates to Scenario 4.4*

*copies of all internal council reports, meeting minutes on the viability of Scenario 4.4*

*copies of all e-mails and any other forms of correspondence between council officers, councillors and external consultants with regard to the viability of Scenario 4.4 and the decision not to proceed with this option.'*

3. The Council responded on 30 August 2016 and confirmed that it held information falling within the scope of the request but considered it to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA.
4. The complainant contacted the Council on 5 September 2016 and asked it to conduct an internal review of this refusal.
5. The Council informed the complainant of the outcome of the internal review on 30 November 2016. The review explained that the correct access regime under which the request should be considered is the EIR rather than FOIA.
6. In relation to question 1 which sought '*a copy of the independent validation/valuation report carried out by the Council's external consultants referred to in Paragraph 3.4 of the Cabinet Report, as it relates to Scenario 4.4*' the Council provided a high level report provided by external contractors. However, the Council explained that although a more detailed breakdown of costs was held this was being withheld on the basis of regulation of 12(5)(e) (confidentiality of commercial or industrial information) of the EIR. In relation to question 2 which sought '*Copies of all internal council reports, meeting minutes on the viability of*

*Scenario 4.4'* and question 3 which sought '*copies of all e-mails and any other forms of correspondence between council officers, councillors and external consultants with regard to the viability of Scenario 4.4 and the decision not to proceed with this option*' the Council explained that it considered this information to be exempt from disclosure on the basis of regulation 12(4)(e) (internal communications) of the EIR.

## Scope of the case

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7. The complainant contacted the Commissioner on 19 January 2017 in order to complain about the Council's decision to withhold information falling within the scope of his request. The complainant explained that he was also concerned that the refusal notice and internal review appeared to have been conducted by the same Council officer.
8. The Commissioner has therefore considered whether the Council was entitled to rely on regulations 12(5)(e) and 12(4)(e) in the manner which it has. In relation to the handling of the internal review, this issue does not fall within the statutory requirements of the EIR but the Commissioner has commented on this issue in the Other Matters section at the end of this notice.

## Reasons for decision

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### Regulation 12(5)(e) – commercial confidentiality

9. Regulation 12(5)(e) of the EIR provides 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'.
10. In order for regulation 12(5)(e) to be engaged, the following four conditions must be met:
  - (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. Where the arguments refer to the economic interests of a third party, it will not be sufficient for a public authority to speculate on the potential harm attached to disclosure. Instead, it is imperative that a public

authority has evidence that demonstrates the arguments genuinely reflect the concerns of the third party.

(iv) The confidentiality would be adversely affected by disclosure. Although this is a necessary condition, the Information Tribunal<sup>1</sup> has indicated that the disclosure of truly confidential information into the public domain would invariably harm the confidential nature of that information. In other words, if the first three criterion are met then the exception will be engaged.

*(i) Is the information commercial or industrial in nature?*

11. This request concerns the Council's plans to demolish the buildings which currently house the Highgate Newtown Community Centre (HNCC) and Fresh Youth Academy (FYA) as the existing buildings are nearing the end of their life. The Council does not have the funding to pay for the capital works and therefore a self-financing solution needs to be found for this project. The Council's intention is that by building new for sale housing on the site enough money can be raised to pay for new and improved community facilities.
12. The withheld information in question concerns detailed cost reports provided to the Council by a third party, Philip Pank Partnership, and contain detailed breakdowns of the anticipated costs the Council is likely to incur in the completion of this project.
13. The Commissioner is satisfied that the information is of a commercial nature.

*(ii) Is the information subject to confidentiality provided by law?*

14. In considering this point 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.
15. 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.
16. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.

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<sup>1</sup> [EA/2010/0012](#)

17. In terms of the common law of confidence, the Commissioner accepts that the information has the requisite quality of confidence given that it is not trivial and is not in the public domain. Furthermore the Commissioner accepts that there was an implied understanding between the parties that the withheld information would not be disclosed.

*(iii) Is the confidentiality provided to protect a legitimate economic interest?*

18. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person 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.

19. The Council argued that the cost reports upon which it based the redevelopment decisions concerning the feasibility options contain commercial information and remain sensitive. It explained that the cost reports contain assumptions about levels of profit and overheads, preliminaries, fees and contingencies, as well as traditional build costs that would be damaging to the Council if these figures were to be seen by contractors who would be competitively tendering for the construction of the scheme. The procurement and tendering for the project have still not taken place so this information remains commercially sensitive. The Council explained that the summary report provided to the complainant in September 2016 contained a high level cost analysis without detailing the specific percentages and allowances for the items listed. The complainant emphasised that his request sought information concerning the proposed scenario 4.4 which the Council's Cabinet had rejected, preferring instead option 5. Consequently the complainant argued that as there will not be any future expenditure, procurement or commercial contracts in relation to scenario 4.4 it was hard to envisage why disclosure of this information would harm the Council's commercial interests.

20. The Commissioner acknowledges that the withheld information concerns a scenario, 4.4, which the Council decided not to take forward. However, in the Commissioner's view it is clear that whilst scenario 4.4 has been rejected in favour of scenario 5, significant elements of the potential costs involved in the former scenario will be incurred by the Council in relation to scenario 5. Consequently, in her view disclosure of the costs reports concerning scenario 4.4 would still provide a clear insight into the Council's likely overheads, preliminaries, fees and contingencies, as well as traditional costs in respect of scenario 5. Furthermore, it is clear that the withheld information contains significantly more detailed information than the summary of anticipated costs provided to the complainant. The Commissioner also accepts the premise of the Council's

argument that disclosure of this information would provide any contractors tendering for work associated with scenario 5 with a detailed insight into the Council's budget and anticipated costs for this project. Given that the tendering and procurement process has yet to be completed, and given the detailed nature of the withheld information and in her view the sufficient crossover between scenarios 4.4. and 5, the Commissioner is persuaded that disclosure of the withheld information would represent a real risk of adversely affecting the Council's position in any forthcoming negotiations.

21. The Commissioner has therefore concluded that regulation 12(5)(e) is engaged.

### **Public interest test**

22. Regulation 12(5)(e) is a qualified exception and therefore the Commissioner must consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the requested information. In doing so, the Commissioner recognises that regulation 12(2) of the EIR specifically provides that public authorities should apply a presumption in favour of disclosure.
23. In his submissions to the Commissioner the complainant emphasised that the report presented to the Council Cabinet on 24 February 2016 resulted in the Council adopting scenario 5 rather than scenario 4.4 which the report acknowledged was 'well received at public consultation events by the local and wider community' and was the option that received the strongest local support. The complainant argued that there was a public interest in the disclosure of information he had requested in order to allow the public to better understand the basis upon which the Cabinet Office had taken the decision to proceed with scenario 5 rather than 4.4.
24. The Council argued that there was a strong public interest in ensuring its ability to conduct negotiations in respect of this development on a competitive basis was not undermined by the disclosure of the withheld information.
25. In the Commissioner's opinion there is a strong public interest in the disclosure of the withheld information to allow the public to fully understand the basis upon which the Council's Cabinet made the decision to progress with the redevelopment of this area. The financial information disclosed to date only provides a limited insight into the basis of this decision making. However, the Commissioner recognises that the success of the project depends upon the Council delivering a self-financing solution. Given this the Commissioner accepts that there is a strong, and in her view ultimately compelling, public interest in

maintaining the exception in order to ensure that the Council's position in securing best value for money in delivering this development.

### **Regulation 12(4)(e) – internal communications**

26. Regulation 12(4)(e) states that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications. It is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. Rather, as long as the requested information constitutes an internal communication then it will be exempt from disclosure.
27. The information withheld in this case consists of internal discussions in the form of meeting notes and minutes of board meetings within the Council about the development in question. The Commissioner accepts that the withheld information clearly falls within the scope of the exception provided by regulation 12(4)(e).

#### *Public interest test*

28. The Council emphasised that the purpose of this exception was to provide public authorities with a safe space to develop ideas and debate live issues. Furthermore the Council argued that disclosure of internal communications could inhibit free and frank discussions and lead to a chilling effect on future discussions. In the circumstances of this particular case, the Council explained that although the main Cabinet decision to progress with the project had been taken, further discussions are still required and the project is a long way from delivery. Consequently, the Council emphasised that the decision making remained live and ongoing and that the withheld information included discussions of various options, and proposals that were still relevant to the future decisions that the Council had yet to take.
29. With regards to the arguments in favour of maintaining regulation 12(4)(e), although a wide range of information will be caught by the exception, in the Commissioner's view, the public interest should be focused on the protection of the internal deliberation and decision making processes. Arguments about protecting such deliberations and processes often relate, as the Council suggested, to preserving a 'safe space' to allow a public authority to debate live issues away from external scrutiny. They also relate to preventing a 'chilling effect' on free and frank views in the future. The weight that applies to these factors will vary from case to case, depending on the timing of the request and the content and context of the particular information in question.
30. In the circumstances of this case, the Commissioner accepts at point the complainant made his request, in July 2016, significant decisions in respect of this project remained ongoing, including the Council's response to its consultation in relation to scenario 5 which closed in May

2016, with amended proposals made public in September 2016 and planning permission being granted in April 2017. The Commissioner therefore accepts that at the point the complainant submitted his request the Council still needed a safe space in which to make further decisions about this development. The Commissioner also accepts that the information contains reasonably detailed discussions of the project such that she would expect that some limited chilling effect could occur on future discussions about this project if this information was disclosed.

31. With regard to the public interest in disclosure, as noted above the Commissioner accepts that there is a strong public interest in the disclosure of the withheld information to allow the public to fully understand the basis upon which the Council's Cabinet made the decision to progress with the redevelopment of this area. Disclosure of meeting and board minutes would have arguably provided the public with a greater insight into the decision making within the Council in respect of this project than simply the financial information contained in the cost reports withheld on the basis of regulation 12(5)(e). Furthermore disclosure of the information at the time of the request could have assisted the public in responding to the consultation on scenario 5 and/or in commenting on the planning application. The public interest in disclosure of this information should therefore not be undermined.
32. However, and by a relatively narrow margin, the Commissioner has concluded that the public interest favours maintaining the exception contained at regulation 12(4)(e).

## Other matters

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33. With regard to the processing of the internal review the Code of Practice (the Code) issued under regulation 16 of the EIR sets out how public authorities should deal with internal reviews under the legislation. Paragraph 61 of the Code states that:

*'The complaints procedure should be a fair and **impartial** means of dealing with handling problems and reviewing decisions taken pursuant to the EIR, including decisions taken about where the public interest lies.'* (emphasis added).<sup>2</sup>

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1644/environmental\\_information\\_regulations\\_code\\_of\\_practice.pdf](https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf)



34. In the Commissioner's view in order to be impartial the internal review should not be conducted by the same person who initially responded to the request.
35. The Commissioner therefore asked the Council to confirm whether the same individual had conducted both the refusal notice and internal review.
36. In response the Council provided the following explanation as to how this internal review was processed:

*'All our requests for information are handled by qualified Information and Records Management Officers (IRMO). All responses including any refusal notices are issued under the name of the IRMO handling that case.*

*All our internal reviews are carried out by our Borough Solicitor. The IRMOs administer the review process by supplying the necessary documents. The Borough Solicitor then sends his response to the IRMOs for formatting and he then approves and signs the response sent out in his name. In this case, the IRMO was covering a colleague's work and was not aware that all internal review responses should be sent out in the Borough Solicitor's name. On receipt of the draft response from the Borough Solicitor, he sent it out by mistake in his own name.*

*We apologise for any confusion this error may have caused.*

*I can confirm therefore that the original refusal notice was responded to by a Council Officer and the internal review was conducted and responded to by the Borough Solicitor.'*

37. In light of this explanation the Commissioner is satisfied that the Council handled the internal review in line with the Code of Practice and an administrative error led to the complainant, understandably, assuming that this had not in fact been the case.

## Right of appeal

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38. 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)

39. 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.

40. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**