

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

Decision notice

Date: 18 January 2018

Public Authority: London Borough of Lambeth
Address: Olive Morris House
18 Brixton Hill
London
SW2 1RL

Decision (including any steps ordered)

1. The complainant has requested unredacted financial data sheets for the proposed regeneration of Cressingham Gardens. London Borough of Lambeth Council ("the Council") refused the request on the basis of the exception at regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that the regulation 12(5)(e) exception is engaged and the public interest favours maintaining the exception and withholding the information. She requires no steps to be taken.

Request and response

3. On 31 January 2017 the complainant wrote to the London Borough of Lambeth Council ("the Council") and requested information in the following terms:

"At the 21 March 2016 Cabinet, redacted financial data sheets were included for the proposed Cressingham Gardens regeneration. Please provide un-redacted versions."

4. The complainant followed this up with correspondence on 10 March 2017 asking for an internal review as she had not received a response within the required timeframe. The Council then responded on 13 March 2017 and explained it considered the redacted information to be commercially

sensitive and therefore excepted from disclosure on the basis of regulation 12(5)(e) of the EIR as disclosing the information could prejudice the negotiations between the Council and third party contractors.

5. Following an internal review the Council wrote to the complainant on 10 April 2017. It stated that it upheld its decision to refuse the request under regulation 12(5)(e) of the EIR.

Scope of the case

6. The complainant contacted the Commissioner on 13 April 2017 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine whether the Council has correctly applied the regulation 12(5)(e) exception to withhold the information that has been redacted from the financial data sheets.

Background

8. In 2015 the complainant made a request to the Council for the financial model used to calculate and provide the figures in the viability assessment for the Cressingham Gardens regeneration cabinet report.
9. The Council, in response, explained that for each of the scenarios considered in the viability report the data sheets that had been provided comprised a list of assumption and the appraisal outputs. Some of this data was disclosed and the remainder redacted in accordance with regulation 12(5)(e). During the Commissioner's investigation of this the Council amended its response and sought to rely on regulation 12(4)(b) of the EIR to refuse to provide any further information.
10. This was then the subject of a decision notice¹ which found it was manifestly unreasonable for the Council to comply with the request for the financial model itself rather than considering whether the redactions made to the data sheets that were disclosed were correct.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625445/fs50606315.pdf>

Reasons for decision

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

11. The withheld information in this case is information redacted from the data sheets that have been disclosed as part of the previous complaint. The information is figures contained within a list of assumptions and the appraisal outputs for each of the scenarios considered in the viability report.
12. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information if to do so would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
13. When assessing whether this exception is engaged the Commissioner will consider the following points:
 - Is the information commercial or industrial in nature?
 - Is the information subject to confidentiality provided by law?
 - Is the confidentiality required to protect a legitimate economic interest?
 - Would the confidentiality be adversely affected by disclosure?
14. The Commissioner considers that the withheld information is environmental information within the meaning of regulation 2(1)(c) of the EIR. She considers that the information is on measures, plans and activities likely to affect the state of the elements and factors mentioned in regulations 2(1)(a) and (b) EIR.

Is the information commercial or industrial in nature?

15. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for a profit.
16. The Council considers the information is of a commercial nature as it relates to a commercial activity. In this case the withheld information forms part of the financial assumptions calculated using the bespoke financial model to analyse the Cressingham Gardens regenerations proposals.

17. The Commissioner accepts that the nature of the information is commercial as it relates to a clear business activity with a commercial gain.

Is the information subject to confidentiality provided by law?

18. With regard to this element of the exception the Commissioner will consider if the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.

19. The Commissioner considers the Council is relying on the information being subject to a common law of confidence. In her previous decision notice relating to the Financial Model; the Commissioner found at paragraph 45 that:

" ... the Council has already provided arguments demonstrating why it considers that the release of the financial assumptions calculated using the Bespoke Model would have an adverse effect on its ability to analyse the Cressingham Gardens regeneration proposals ... From a wider perspective, the Commissioner considers that the Council has also cogently explained why it is assumed that the disclosure of the fundamental characteristics of the Bespoke Model would have a harmful effect on its wider business operations."

20. The Commissioner went on to explain how she was guided in her thinking by the approach of the Information Tribunal in *London Borough of Southwark v Information Commissioner and Lend Lease and Glasspool*². This case related to a viability report produced in relation to a proposed redevelopment of an estate. The Information Tribunal found that regulation 12(5)(e) was engaged and the operating model and commercial projections in particular should be withheld. In explaining its thinking, the Tribunal commented that financial models are used as analytical tools on large projects and allow for different scenarios to be run and tested.
21. In this case the same can be said and it is clear the Model is a 'live' tool and that information is added to it consider options and make viability assessments. The tool is implicitly confidential as its use is restricted and limited and it is not otherwise accessible. The information is therefore not trivial in nature and it relates to a significant development project in its early stages. The Commissioner notes the information has not been

² EA/2013/0162

made available elsewhere and has been provided with an implied duty of confidence due to the nature of the project.

22. Taking this into account the Commissioner is satisfied there is a common law duty of confidence, particularly where the information relates to the consideration of options. As such she is satisfied that the withheld information was imparted in circumstances importing an obligation of confidence.

Is the confidentiality required to protect a legitimate economic interest?

23. 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.
24. Under the EIR the test is whether the confidentiality is designed to protect the legitimate economic interests of the person who the confidentiality is designed to protect, which in this case is Home for Lambeth and, by extension, the Council.
25. The Council had explained to the Commissioner during her previous investigation that when carrying out estate regeneration projects it was effectively in the same position as a private sector developer in that the Council would need to assemble the necessary land interests and bring the project forward. It explained the Council was in the process of establishing a new wholly owned company – Homes for Lambeth (HFL)³ – which will be a commercial enterprise that the Council holds all the shares in. HFL will operate as an independent entity and function on a commercial basis. To progress estate regeneration HFL will need to enter into commercial deals with other land owners and development partners, negotiate planning agreements with the planning authority and raise funding.
26. The information under consideration here relates to one of the estate regeneration projects that the Council will need to deliver through HFL. The financial assumptions and approaches that the Council is using will be adopted by HFL as it progresses the projects. These financial assumptions are, therefore, commercially sensitive data that, if

³ <http://estateregeneration.lambeth.gov.uk/hfl>

disclosed, would seriously prejudice the future operation of HFL and its ability to negotiate appropriate deals.

27. The Commissioner has also taken account of the timing of the request; it was received at a time when the Council was still at the early stages of considering options. As such the commercial sensitivity of the information was high.
28. Taking this into account the Commissioner accepts that the withheld information consists of information which is of commercial value and which, if disclosed, may impact on HFL's commercial interests, particularly its ability to negotiate with third parties. This would harm the legitimate interests of the Council and as such the Commissioner accepts that disclosure of the withheld information would prejudice the commercial interests of the Council and HFL.

Would confidentiality be adversely affected by disclosure?

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

Public interest test

Public interest arguments in favour of disclosing the information

30. The complainant argues that full transparency over the proposed Cressingham Gardens development is needed as it will affect over 200 social council homes. Therefore there is a public interest in seeing all information relating to the options being considered by the Council.
31. The Council acknowledges that the proposed regeneration of Cressingham Gardens is of importance to its residents and the proposals will have a direct impact on them. However, the Council argues that the financial information about the viability of a development project is different from the issue of the financial impact on individual residents. The Council states that it is providing information to residents to enable them to make informed decisions about financial matters that affect their properties.

Public interest arguments in favour of withholding the information

32. The Council argues that it is in the public interest that it is able to function effectively in a commercial environment and make the best use of public resources, including obtaining the benefit of a properly competitive tender exercise.
33. The Council also states that it must be able to maximise the ability of HFL to secure the financing of the project and this may involve raising finance via the involvement of one or more private sector development partners. The Council considers private sector development partners would be deterred from involvement with HFL if commercially sensitive information is disclosed and this would not be in the public interest as it would impact on the Council and HFL being able to negotiate the best terms for the financing of the project.

Balance of the public interest arguments

34. The Commissioner has considered all these arguments. She considers that arguments in favour of maintaining an exception must always be inherent in the exception that has been claimed. The interests inherent in regulation 12(5)(e) are the public interest in avoiding commercial detriment and the public interest in protecting the principle of confidentiality.
35. There is a particular public interest in the subject of the request in this case as it involves the proposed regeneration of an estate. This is likely to impact on a number of individuals who live in the houses in the development. Therefore the Commissioner recognises the public interest in the disclosure of any information relating to this development. The Commissioner usually attaches weight to the argument that disclosure of withheld information will help to engage the public and ensure transparency. She does so in this case but she also recognises there are counter arguments.
36. The Commissioner accepts the timing of the request is a factor when considering the public interest in disclosure; in this case the request was made at a point when the Council states options were still being considered. The Council has also shown that specific information has been provided to residents about the financial impact of the proposals of their homes and it has committed to continuing to provide information as and when it is able to. The information the Council continues to withhold is not substantial but is only that which the Council considers to be most sensitive and most likely to have a commercial prejudice to its continued considerations and future negotiations with third parties.
37. The Commissioner accepts that there is a public interest in allowing public authorities the time to discuss and decide on matters away from

public scrutiny so as to allow for all options to be considered and the best value to be obtained.

38. The Commissioner recognises that disclosing this information whilst the issue still 'live' and options were still being evaluated could have a detrimental impact on the interests identified in the exception. She does not consider it would be in the public interest to disclose information which could damage the public authority's commercial interests and HFL's negotiating position in relation to this scheme.
39. The Commissioner does accept that there is always a public interest in ensuring that public authorities are transparent and able to demonstrate they are acting appropriately and in the best interests of the public. It is important that public authorities are accountable for the decisions they make and the money they spend and generate.
40. The Commissioner is of the view that, whilst there are strong public interest arguments on both sides, the public interest in disclosure is, in all the circumstances of the case, outweighed by the public interest in maintaining the exception. In reaching this decision she has placed considerable weight on the fact that at the time of the request discussions about options were still live and there was an expectation of confidentiality, particularly in relation to commercially sensitive information discussed as part of this.
41. The Commissioner does accept that the regeneration of a housing estate will impact on local residents and communities and will require public authorities to be open and transparent about proposals. In this case, her decision is based on the fact that the specific information in question that is being withheld is financial figures that although could be used to infer something about how a decision on a final option is made; it will have a detrimental impact on the Council and HFL's ability to secure best financial deals going forwards.
42. Therefore, the Commissioner is satisfied that, in response to this request at this time, the Council correctly withheld the information and she has determined the regulation 12(5)(e) exception was engaged and provided a basis for this.

Right of appeal

43. 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

44. 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.
45. 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

Jill Hulley
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