

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

Decision notice

Date: 11 March 2020

Public Authority: Royal Borough of Greenwich
Address: The Woolwich Centre
35 Wellington Street
Woolwich
London
SE18 6HQ

Decision (including any steps ordered)

1. The complainant requested a copy of a contract between The Royal Borough of Greenwich and a consortia comprising of Lovell Partnerships Limited, Morgan Sindall Group Plc and Asra Housing Association Limited in relation to the redevelopment of 3 housing estates collectively referred to as the Woolwich Estates. The public authority disclosed a significant amount of information from the contract and withheld the rest of the information relying on the exceptions at regulations 12(5)(e) (confidentiality of commercial information) and 13 (personal data) of the EIR.
2. The Commissioner's decision is that the public authority was entitled to rely on the exception at regulation 12(5)(e).
3. No steps are required.

Request

4. The complainant submitted a request for information to the public authority on 31 December 2018 in the following terms:

"I am writing in accordance with FOI legislation to seek access to the Agreements signed between Lovell and the Council...[sic]"
5. The public authority responded on 25 January 2019. It explained that it had determined that the request was for environmental information within the meaning of the EIR. Further to regulation 7(1) EIR¹ it explained that it was extending the deadline to comply with the request "by up to a further 20 working days from the initial due date (26 February 2019)."
6. The public authority actually responded earlier on 1 February 2019. It clarified that it considered the requested information environmental information within the meaning of regulations 2(1)(a) and (c) EIR. It withheld the information relying on the exception at regulation 12(5)(e) EIR (confidentiality of commercial information).
7. The complainant requested an internal review of the decision to withhold the requested information on 22 February 2019.
8. The public authority wrote to the complainant with details of the outcome of the internal review on 14 March 2019. The review upheld the decision to rely on regulation 12(5)(e).

Scope of the case

9. The complainant contacted the Commissioner on 9 May 2019 in order to complain about the public authority's handling of his request, specifically disputing the application of the exception at regulation 12(5)(e). The Commissioner has referred to the complainant's submissions at the relevant part of her analysis below.

¹ By virtue of regulation 7(1), a public authority may extend the period of 20 working days to comply with a request to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse to do so.

<http://www.legislation.gov.uk/ukxi/2004/3391/regulation/7/made>

10. The public authority reconsidered its response following the complaint to the Commissioner and on 11 December 2019 released a redacted version of the requested information to the complainant. It however maintained the application of regulation 12(5)(e) to the redacted information and additionally relied on the exception at regulation 13 EIR (personal data) to withhold some of the redacted information.
11. The scope of the Commissioner's investigation therefore was to consider whether the public authority was entitled to rely on the exceptions at regulations 12(5)(e) and 13 to withhold the redacted information (the withheld information).

Reasons for decision

The withheld information

12. The withheld information was redacted from a copy of a contract between The Royal Borough of Greenwich and a consortia comprising of Lovell Partnerships Limited, Morgan Sindall Group Plc and Asra Housing Association Limited dated 9 July 2013. The contract is an agreement to develop the Connaught, Morris Walk and Maryon Road & Grove Estates in Woolwich (the Woolwich Estates).
13. The public authority explained that the redevelopment which the contract relates to is a long term project expected to last 10 years and has a number of phases which are ongoing and each phase will be progressed and adjudicated in turn. According to the public authority, at the time of the request, 3 phases remained to be adjudicated and negotiated in the future.

Applicable access legislation

14. The complainant has not disputed the public authority's view that the withheld information is environmental information within the meaning of regulation 2(1) EIR².
15. For the avoidance of doubt, the Commissioner considers that the withheld information is environmental information within the meaning of regulations 2(1)(c) and (e) EIR.

² The full text of regulation 2(1):
<http://www.legislation.gov.uk/ukxi/2004/3391/regulation/2/made>

Application of Regulation 12(5)(e)

16. The Commissioner initially considered the application of the exception at regulation 12(5)(e) which the public authority has applied to the withheld information in full.

17. Regulation 12(5)(e) states:

“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.”³

Complainant's submissions

18. The complainant's submissions are reproduced below.

19. “The concerns raised about confidentiality is unreasonable having regard for my duties as a Councillor bound by the Council Constitution and the Nolan Principles of Public Life. The failure to grant access denies me the ability to adequately represent the interests of those that I was elected to represent.”

20. In response to the disclosure made by the public authority on 11 December 2019, the complainant commented: “The most recent guidance from Government on Scrutiny spells out pretty clearly the principle of confidentiality relating to these issues and should be made available using the pink sheet mechanism. Serious questions remain as to the rights of members to hold officers to account acting in our capacity as elected members...”

21. The complainant further commented as follows in response to an email from the Commissioner on 7 January 2020 setting out the limitations of her investigation relative to his objective: “I would clearly have preferred not to submit this matter for investigation. As a Councillor in the Borough for many years I believe decisions to withhold any information by Officers places Councillors in an extremely difficult position in taking decisions in the interests of the community we serve. The importance of confidentiality is self evident and has been managed over many years through the principle of confidential section in reports to Members taking decisions. In recent years advise from Government

³ <http://www.legislation.gov.uk/uksi/2004/3391/regulation/12/made>

deals with the obligation of transparency being a key issue. Advice set out in recent advice confirms the principle that all information should be available and if necessary through the principle of a separate agenda dealing with confidential matters.”

Public authority's submissions

22. The public authority consulted with Lovell Partnerships Limited (Lovell) before providing its submissions. A table setting out the redactions and the rationale behind the redactions was provided as part of the submissions.
23. The submissions are summarised below.
24. As a general comment, the public authority advised that Lovell has stressed that the withheld information would give a competitive advantage to its competitors, would likely cause delay as Lovell may have to take stock of its position in respect of the development, potentially putting at risk the profit of the agreement of which there would be a smaller share for the public authority as part of the Overage Provision. There is also a general unfairness of competitors obtaining Lovell's expertise, skill and intellectual property in its business and financial models. This would disadvantage Lovell's ability to engage in negotiations on similar schemes on a level playing field.
25. The public authority acknowledged that in order to successfully engage the exception, it needed to establish that:
 - The withheld information is commercial or industrial in nature,
 - The withheld information is confidential under the common law of confidence, contract or a statutory bar,
 - The confidentiality is protecting a legitimate economic interest, and
 - The confidentiality would be adversely affected by disclosure.
26. The public authority considers that the withheld information is commercial in nature and relates to a commercial activity. This is because the information relates to a contract with commercial entities pertaining to land.
27. The public authority explained that the withheld information contains commercially sensitive information which is commercially unique and sensitive with value to a commercial and Housing Association competitor. Paragraph 29.2 (which has been disclosed) contains specific references to confidentiality. The withheld information is therefore

subject to a contractual obligation of confidence between the parties. In addition, the withheld information has the necessary quality of confidence (that it is not trivial and not in the public domain). The information is inherently sensitive, comprising financial data pertaining to the sale and development of land. There is an expectation that this type of information would not be shared with anyone other than the parties in the agreement.

28. Furthermore, Lovell, Morgan Sindall and Asra are commercial entities that have competitors and as such their commercial interests are at risk should the information be disclosed. This would likely discourage developers from sharing information with public authorities and as such likely to also prejudice the public authority's ability to enter into similar agreements with developers.
29. The contract relates to the redevelopment of three Council estates over a long period of time and although signed in 2013 is still the basis for the parties progressing the redevelopment work. Given the dynamic commercial situation, changes in legislation and policy, understanding of best practice and lessons learnt from earlier phases, elements of the contract are negotiated from time to time with the amendments captured in a Deed of Variation (DoV). To date there have been three such DoVs relating to several matters.
30. Currently, the parties are negotiating over a number of points which may or may not be agreed in principle and then reflected in a new DoV. It is these negotiations that are live and ongoing. The public authority listed the current areas of negotiations in its submissions. The Commissioner has not reproduced them here for the obvious reason that revealing current areas of ongoing negotiations could be considered prejudicial to the interests of any of the parties.
31. With respect to the balance of the public interest, the public authority acknowledged that there is a general public interest in transparency and openness in public affairs. It added that the withheld information would enable the public to better scrutinise how public money is spent and provide accountability. If residents have a better understanding of how public money is spent, this may give them more confidence in the integrity of the public authority and in its ability to effectively allocate public funds.
32. In favour of maintaining the exception, the public authority argued disclosing the commercially sensitive withheld information could lead to commercial harm and a loss of reputation for the public authority within the development industry.

33. Negotiations between the parties are currently ongoing and disclosure could prejudice those negotiations.
34. The Commissioner asked the public authority to clarify whether the complainant and/or other councillors were given access to the contract further to their oversight and scrutiny functions. The public authority initially explained that the complainant or other councillors have not been given access to the contract further to their oversight and scrutiny functions. However, in response to follow-up enquiries from the Commissioner, the public authority explained that the contract and matters relating to it have been subjected to significant scrutiny by members in Council meetings on 20 June 2012, 18 June 2013, 24 July 2014, 19 November 2015 and 13 March 2019. Copies of the minutes of the relevant meetings were provided to the Commissioner. It also explained that the public authority had met its obligations in the Statutory Guidance on Overview and Scrutiny in Local and Combined Authorities in relation to the development agreement.
35. The public authority concluded that on balance, the public interest in maintaining the exception outweighs the public interest in disclosing the withheld information.

Commissioner's considerations

Is the exception engaged?

36. The Commissioner initially considered whether the exception is engaged with reference to the four criteria which must be met, namely; the information is commercial or industrial in nature, the information is subject to a duty of confidence under either the common law of confidence, contract, or a statutory bar, the confidentiality is protecting a legitimate economic interest and, that economic interest and thereby its confidentiality would be adversely affected by disclosure of the information.
37. The Commissioner considers that the withheld information is commercial in nature relating as it does to the purchase of land for development purposes including the construction of buildings for commercial and residential purposes.
38. The Commissioner considers that the withheld information is subject to the common law duty of confidence for the reasons set out by the public authority.
39. The Commissioner considers that to satisfy the third criterion, 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.

40. The Commissioner accepts that disclosure of the withheld information would adversely affect Lovell's and public authority's economic interests. It would reveal terms agreed by the consortia and the public authority which could be advantageous to competitors, particularly in the case of Lovell, by placing the parties in a weaker bargaining position in similar negotiations in the future. In addition, disclosing the withheld information whilst negotiations are ongoing further to a new DoV could leave the public authority with less room for manoeuvre should it come under public pressure to accept or refuse certain terms. This is likely to affect the public authority's economic interests.
41. The Commissioner considers 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 criteria are met then the exception will be engaged. Consequently, she has concluded that the public authority was entitled to engage the exception at regulation 12(5)(e).

Balance of the public interest

42. In common with all EIR exceptions, the exception at regulation 12(5)(e) is subject to the public interest test set out in regulation 12(1)(b) EIR. Therefore, the Commissioner has considered whether in all the circumstances of the case the public interest in maintaining the exception outweighs the public interest in disclosing the withheld information.
43. Regulation 12(2) of the EIR⁴ requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. According to the Upper Tribunal, "If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure..." and "the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced

⁴ <http://www.legislation.gov.uk/ukxi/2004/3391/regulation/12/made>

and (2) to inform any decision that may be taken under the regulations”⁵

44. In addition to the general public interest in transparency and accountability, the Commissioner considers that the withheld information would inform discussions about financial decisions taken by the public authority pursuant to the redevelopment of the Woolwich Estates. It would also inform discussions about the provision of affordable and social housing for residents.
45. Although a significant amount of the information in the contract has been released since the request, the public interest in the withheld information informing oversight and scrutiny of the development agreement should not be underestimated. Residents of the Woolwich Estates and tax payers generally reasonably expect their elected representatives to thoroughly scrutinise the development agreement in order to ensure, among other things, that the public authority is receiving value for money. The complainant considers that the public authority has prevented him from fully scrutinising the agreement due to concerns about revealing confidential information. He has submitted that the refusal to allow him access to the agreement in full restricts his ability to adequately represent the interests of his ward in his capacity as a Councillor.
46. However, this has to be balanced against the strong public interest in not prejudicing the commercial interests of the parties to the agreement and consequently increasing costs to tax payers. Implementation of the development agreement is at an advanced stage and it would not be in the financial interests of the public authority for any of the remaining parties to withdraw from the agreement over concerns regarding the publication of provisions they consider to be commercially sensitive. In addition, there is a strong public interest in protecting the commercially sensitive information of Lovell and its partners from competitors. Releasing such information is likely to place them at a competitive disadvantage in the housing market.
47. Whilst there may be legitimate grounds to argue that the development agreement and matters relating to it should be subjected to additional oversight and scrutiny, the Commissioner is not persuaded the EIR is the proper mechanism to access the agreement for that purpose.

⁵ Vesco v Information Commissioner (SGIA/44/2019) at paragraph 19.

Publishing the withheld information could ultimately be detrimental to the interests of those the complainant represents and tax payers generally.

48. Therefore, the Commissioner finds that on balance, the public interest in maintaining the exception outweighs the public interest in disclosure.
49. In this case, the Commissioner's view is that the balance of the public interests favours maintaining the exception, rather than being equally balanced. This means that the Commissioner's decision, whilst informed by the presumption provided for in regulation 12(2), is that the exception provided by regulation 12(5)(e) was applied correctly.
50. In light of her decision, the Commissioner did not consider the application of the remaining exception at regulation 13.

Right of appeal

51. 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@justice.gov.uk

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

52. 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.
53. 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

Terna Waya
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