

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

Decision notice

Date: 10 November 2014

Public Authority: London Borough of Croydon
Address: Bernard Wetherill House
8 Mint Walk
Croydon
CR0 1EA

Decision (including any steps ordered)

1. The complainant has requested information relating to the proposed redevelopment of the Whitgift Centre, a shopping complex in Croydon. The London Borough of Croydon (the Council) provided some of the information subject to redactions. However, this notice concerns one request that asked for a copy of the viability information produced by the developer and the Council's claim that it did not hold this information for the purposes of the EIR. The Council explained that the developer only shared the viability information with an adviser to the Council and not the Council itself. Furthermore, the sharing of the information was subject to a confidentiality agreement. The Council argued that the effect of these arrangements was that regulation 3(2)(b) of the EIR did not apply to the requested information. Regulation 3(2)(b) provides that under the EIR environmental information is held by a public authority if it is held by another person on behalf of the authority. The Commissioner has found that the Council's analysis is correct and therefore the Council was not obliged to consider the requested information under the EIR.

Request and response

2. On 22 November 2013 the complainant wrote to the Council about the proposed redevelopment of the Whitgift Centre in Croydon. They expressed concerns about the process by which applications for the redevelopment would be considered and made the following request for

information (the Council's numbering of the different items of information sought is included as part of the request quoted below):

Failure to inform until the late stage of publication of committee report that the proposed development was subject was subject to a viability assessment by the applicant and not making available the applicant's [1] viability assessment (with redactions of confidential elements if necessary), [2] the Council officers' assessment of it or [3] a summary of the conclusions.

3. The Council responded to the requests on 20 December 2013 and confirmed that they had been considered under the EIR. It went on to address each of the requests, 1 – 3, in turn. With regard to requests 1 and 2, the Council advised that the information engaged the confidentiality of commercial or industrial information exception (regulation 12(5)(e)) and that, on balance, the public interest favoured maintaining the exception. In relation to request 3, the Council informed the complainant that a summary of the officers' conclusions in respect of the viability of the application was contained in a report that had recently been presented to its Strategic Planning Committee. The response included a link to where the report could be viewed on the Council's website.
4. The complainant wrote to the Council again on 16 January 2014 and asked it to reconsider its response to the requests. Among other points, the complainant stressed the strong public interest in disclosure of information relating to the proposed redevelopment. The complainant also queried whether there were further documents in the Council's control that summarised the viability assessment.
5. The Council provided the outcome of its internal review on 21 February 2014. The reviewer found that the developer's viability information covered by request 1 was only provided to the Council's external professional advisers, Deloitte, and not to the Council. She concluded that the information was not subject to the EIR as it was not held by the advisers on behalf of the Council. Notwithstanding this finding, the reviewer upheld the original application of regulation 12(5)(e) of the EIR to requests 1 and 2. She also introduced the voluntary disclosure exception (regulation 12(5)(f)) as a further ground for refusing to comply with the requests, considering that the public interest favoured maintaining each of the exceptions cited. With reference to request 3, the Council confirmed that it did not hold any additional documents that summarised the viability assessment or the independent assessment of it.

Scope of the case

6. The complainant contacted the Commissioner on 17 March 2014 to complain about the Council's decision to refuse to disclose information covered by requests 1 and 2. They also asked the Commissioner to consider whether in relation to request 3 the Council held additional information that had yet to be identified and could potentially be provided.
7. During the course of the Commissioner's investigation information that had previously been withheld was provided to the complainant. With regard to request 3, the Council also iterated that it did not hold any further information. It has therefore been left for the Commissioner to consider the Council's response to request 1.
8. As stated, the Council considers that regulation 3(2)(b) of the EIR does not apply to the viability information passed to Deloitte and therefore the information falls outside of the scope of the EIR. In the event that the information was found to be held for the purposes of the EIR, however, the Council has maintained that regulations 12(5)(e) and 12(5)(f) are engaged and that in all the circumstances the public interest favours disclosure. The Commissioner must initially decide whether from the standpoint of the EIR any viability information held by Deloitte is held on behalf of the Council. If, and only if, this was decided to be the case would there be a requirement to consider whether the information was disclosable under the EIR.

Reasons for decision

Background

9. The Council's website provides the following information on the regeneration of the Whitgift Centre and surrounding land¹:

The Whitgift Centre is one of the most prominent features of Croydon Town Centre [...] There has been limited coordinated investment in the Whitgift Centre and surrounding properties since the early 1990s and as a result, much of the retail provision is tired and no longer meets the needs of modern shoppers and occupiers [...]

¹ <http://www.croydon.gov.uk/planningandregeneration/regeneration/westfield-hammerson/whitgift>

In February 2014 the council granted outline planning permission and conservation area consent for proposals by Westfield and Hammerson to comprehensively redevelop the Whitgift Centre and surrounding land, replacing the existing Whitgift Centre and the former Alders department store and creating a renewed retail and leisure destination in Croydon.

[...]

In January 2013 Westfield and Hammerson formed a partnership known as 'Croydon Partnership' to take forward the scheme [...] Since its formation, Croydon Partnership has been seeking to negotiate for the acquisition of all necessary land and interests in the development site. Croydon Partnership has now acquired some significant land interests, but it is clear that all the land and interests needed to implement the Scheme are unlikely to be assembled by agreement within a reasonable timescale.

10. The Council has explained that in addition to the need for very significant financial investment, one of the most difficult issues facing proposals for redevelopment is the complex ownership of the relevant land interests.
11. The Council expects the realisation of the scheme will involve considerable private sector investment. It has further clarified that neither the Council nor any other public authority is to make financial contribution to the costs of the proposed redevelopment and nor will the Council achieve any significant financial return.

Regulation 3(2)(b) / 12(4)(a)

12. The complainant has not disputed the Council's decision to process the information requests under the EIR. The Commissioner similarly accepts that the EIR applies and has proceeded on this basis.
13. The EIR provides an access-regime to official information held by public authorities. Regulation 3(2) says that information is held by a public authority if the information (a) is in the authority's possession and has been produced or received by the authority, or (b) is held by another person on behalf of the authority. Regulation 12(4)(a) of the EIR clarifies that a public authority is not required to disclose information to the extent that it did not hold the information when an applicant's request was received.
14. The Council considers that there are two principal factors in support of its position that the requested information is not held. Firstly, it has clarified that the records were never physically retained by the Council but were only ever produced by the developers for Deloitte, which as stated were advisers employed by the Council in relation to the Whitgift

Centre redevelopment. Neither the developers nor Deloitte are public authorities as defined by the EIR.

15. Secondly, it has explained that the information was only shared with Deloitte under the terms of a confidentiality agreement that prevented the information being disclosed to the Council. As the Council explained to the complainant, the "confidentiality agreement acknowledges that the conclusions Deloitte reach may be explained orally to the Council but requires Deloitte to procure that no written records or notes are made or retained during the course of meetings or oral discussions which disclose, replicate, repeat or reproduce the confidential information." The Council considers that the existence of the confidentiality contract means it could not reasonably be argued that the information was held by Deloitte on behalf of the Council.
16. The Commissioner's role in this particular case is to decide whether the Council would in principle under the EIR hold any or all of the requested information that was in the care of Deloitte at the time the request was made. In his guidance 'Information held by a public authority for the purposes of the EIR (regulation 3(2))'² the Commissioner sets out his general approach to the consideration of whether information is held by a public authority. The guidance states that there are several circumstances in which information is held by another person on behalf of the public authority and therefore held by the public authority for the purposes of the EIR. Two of these would appear to have some relevance to the present case:

*22. **Information held by solicitors** – in cases where legal advice has been sought by a public authority client, the question is whether the file held by the solicitor is held on behalf of the public authority or whether the solicitor holds the information in its own right, in which case it would not be held for the purposes of the EIR. In general, documents held by a solicitor in connection with instructions they have received are held on behalf of the client.*

*23. **Other situations creating an agency arrangement** – these include anyone acting in a professional field who is recognised as acting as their client's agent. This may also extend to situations where another body carries out the functions of a public authority, either through statute or contractual arrangements. When an agency arrangement exists, the situation regarding information held by the*

²http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/information_held_for_the_purposes_of_eir.pdf

agent on behalf of the public authority client is similar to that between solicitor and client.

17. Upon receipt of the complaint the Commissioner wrote to the Council and suggested that its relationship with Deloitte could arguably be compared with these situations and particularly with a public authority's relationship with solicitors asked to provide legal advice. The critical point is that a third party, namely Deloitte, was acting on the specific instructions of the principal public authority. The Commissioner therefore invited the Council to expand on the reasons why it considered that the EIR would not extend to the requested information.
18. It is clear from the Council's submissions that the developer has gone to considerable lengths to protect its commercially sensitive information. Following receipt of the developer's application, in June 2013 the Council agreed to enter into a confidentiality agreement with the developer in order to obtain what was considered to be commercially sensitive information about the proposals. The developer was not prepared to disclose this information in the absence of such an agreement.
19. Deloitte was appointed by the Council in September 2012 to provide real estate advice on issues relating to the redevelopment of the Whitgift Centre. In August 2013 the Council instructed Deloitte to consider the potential viability of the developer's scheme with regard to the requirements for a compulsory purchase order. The developer was again concerned by the need to share what it considered was confidential information. To address this, the developer and Deloitte entered into an agreement and later a confidentiality agreement, which was signed by Deloitte in September 2013. By virtue of the undertaking, Deloitte became bound by a contractual confidentiality undertaking not to disclose to the Council the viability information it had received from the developer. As stated, the confidentiality agreement stretched to Council officers being asked not to take notes of the meeting at which Deloitte presented its initial findings on the viability of the scheme.
20. According to the Council it is vital that a common sense approach is adopted with regard to the question of whether the viability information is held. This should take account of the relationship between the Council, the developer and Deloitte. It argues:

The developer's viability information is not and has never been held by the Council in the ordinary sense of the word. The information was not generated by the Council. It was provided to the Council's consultant Deloitte on terms which prevented its onward transmission to the Council. The information was not provided to the Council by the developer, nor does the Council have any other means of obtaining the information (save that it appears that a limited amount of information

provided to Deloitte was information which could have been obtained from the public domain).

21. In the Council's view any decision that found the information was held for the purposes of the legislation would be contrary to a common sense approach in that it would require the Council to compel Deloitte to breach the confidentiality agreement it had entered into with the developer.
22. A number of differently constituted Information Tribunals have considered the situations in which information would be held by a public authority for the purposes of the EIR and FOIA. Although the particular factors and circumstances connected to each of the appeals vary, there is a broad consensus on the nature of the considerations that should underpin a finding. He considers that the following are particularly pertinent to the present case:
 - As recommended by the Council, a common sense approach should be adopted with regard to the question of whether information is held.
 - It will be necessary to consider the factual circumstances of a particular case with a view to determining whether there is a meaningful connection between the public authority and the requested information.
 - Insofar as this is possible, it is preferable to avoid adopting an unduly legalistic approach. However, the First-tier Tribunal in *Chagos*³ qualified this by finding that in some cases it will be important to "determine the exact nature of the legal relationship between a person holding information and the public authority, or to determine the legal structure pursuant to which information was created and held" (paragraph 61).
23. In *Holland*⁴ the Tribunal decided that there is nothing in the EIR, nor the Aarhus Convention from which the EIR derives, which prevents a public authority from "*externalising a function that could have been carried out internally, nor that would support a finding that any environmental*

³ *The Chagos Refugees Group in Mauritius Chagos Social Committee (Seychelles) v Information Commissioner and Foreign Commonwealth Office* (EA/2011/033, 21 November 2011)

⁴ *David Holland v Information Commissioner & The University of East Anglia* (EA/2012/0098, 29 April 2013)

information thereby arising must be taken to be held on behalf of the public authority” (paragraph 105). Following on from this the issue in the present case is whether the task left to Deloitte to undertake a viability review was effectively *externalised*, and therefore out of the EIR’s scope, due to the working arrangement between the developer, the Council and Deloitte.

24. Leaving aside for a moment the issue of the confidentiality agreements, the Commissioner considers that the status of Deloitte’s employment is potentially significant. As confirmed by the Council, Deloitte was appointed in order to provide advice on what was a complex and far-reaching proposal. Returning to the examples given above of situations in which information is held by another person on behalf of the public authority, it is correct to state that Deloitte is acting in a professional field as an agent of their client, the Council. Insofar as an agent is carrying out work for the purposes of its client, in this case assessing the viability of a development proposal, it is reasonable to describe the agent as an extension of the client. This would lend weight to the argument that information transferred to Deloitte that related to its work for the Council would be held on behalf of the Council.
25. For further guidance the Commissioner has found it helpful to refer to the Tribunal’s decision on *Holland*. This concerned a request for information held by the Independent Climate Change E-Mail Review (ICCER), conducted by Sir Muir Russell, which was set up and funded by the University of East Anglia (UEA) to inquire into allegations made against the Climate Research Unit at the UEA. The appeal related to the claim that ICCER was independent of the UEA and therefore UEA did not hold the information in question. The appellant challenged this position, arguing that any information held by Sir Muir, his solicitors, or any members of the ICCER review team or its staff was technically held on behalf of the UEA for the purposes of regulation 3(2)(b) of the EIR.
26. The Tribunal ultimately accepted on the balance of probabilities that the inquiry was intended to be and was in fact independent of the UEA and that the information received or generated by the ICCER was and is not held on behalf of the UEA. In coming to this judgment the Tribunal explained that the logical starting point would have been to analyse the contractual document setting out the terms of the relationship between ICCER and the UEA. However, owing to the absence of such a document, the Tribunal considered a relevant factor was statements given by witnesses that confirmed there was no expectation that the UEA had a claim to the requested information but that it was held by the ICCER on its own behalf.
27. Unlike the ICCER arrangement there can be no argument that Deloitte acted entirely independently of the Council with regard to its work

connected to the Whitgift Centre. In essence, Deloitte was operating in an advisory capacity on the instructions of the Council. To this extent the Commissioner considers there is a strong possibility that some of the information produced in relation to this advisory role would be held on behalf of the Council. However, the Commissioner also considers that the specific restrictions placed on the way the viability information could be shared means a more detailed analysis of the connection between the Council and the requested information is required.

28. In the Commissioner's view, two important inter-connected issues stand out when this analysis is carried out. Firstly, the Council did not expect to have any access to the viability information by virtue of Deloitte holding it. Secondly, the confidentiality agreements effectively ring-fenced the viability information. In the Commissioner's view the arrangement was designed to separate formally Deloitte's review of the viability information from any other work it was carrying out on behalf of the Council that may potentially be covered by the EIR.
29. The effect of these points is that the Commissioner has concluded the Council had no meaningful connection with the requested information at the time of the request. Ultimately, the Council's interests were not with the requested information itself but with ensuring that an objective viability review could be completed. It was on this basis that the Council agreed to *externalising* the review and accepting the stringent conditions imposed by the developer on the sharing of the information. Taking into account the specific factual circumstances of the case, the Commissioner has decided that the requested information is not held by Deloitte on behalf of the Council and therefore regulation 3(2) of the EIR does not apply.
30. The Commissioner understands that this finding will raise concerns about the possibility of public authorities creating arrangements to place information out of reach of the EIR. However, while the circumstances are not analogous, he has been guided by the Tribunal in Holland which found that there was nothing that prevented a public authority from *externalising* an environmental function. Secondly, the Commissioner considers that on most occasions a public authority will require possession of environmental information for its own business purposes and therefore the question of whether the information is held under the EIR should not arise.

Right of appeal

31. 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

32. 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.
33. 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

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