

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

Decision notice

Date: 9 December 2015

Public Authority: London Borough of Enfield
Address: Civic Centre
Silver Street
Enfield
EN1 3XY

Decision (including any steps ordered)

1. This case concerns the proposal to redevelop the Chase Farm Hospital site and specifically the financial viability assessment (FVA) produced to support the planning application. Only a redacted version of the FVA was published during the planning process and therefore the complainant has requested a complete copy. The London Borough of Enfield (the Council), which is the planning authority, refused the complainant's request on the basis that the withheld information engaged the exception to disclosure set out at regulation 12(5)(e) (confidentiality of commercial or industrial information) of the EIR and the public interest favoured maintaining the exception. During the Commissioner's investigation, the Council decided it could release some items of information in the FVA that had previously been withheld but maintained its reliance on regulation 12(5)(e) of the EIR in respect of the remainder. The Commissioner has found regulation 12(5)(e) is engaged in respect of the remaining withheld items in the FVA and decided that in all the circumstances the public interest favours withholding the disputed information.

Request and response

2. The Royal Free NHS Foundation Trust (the Trust) has submitted plans to redevelop the Chase Farm Hospital site in Enfield. These included a proposal to build up to 500 new homes and a primary school. A FVA was produced to support the outline planning application and, in response to

queries from local representatives, a redacted version of the FVA placed on the planning file.

3. The complainant wrote to the Council on 4 March 2015 and, referring to a recent decision of the First-tier Tribunal (Information Rights) that ordered the disclosure of information contained within an FVA prepared for a separate development proposal, stated that:

1. You should immediately publish the unredacted Financial Viability Assessment.

4. The Council responded on 11 March 2015. It explained that the withheld information was commercially sensitive information and would not therefore be placed in the public domain. No reference was made at this stage to the legislative basis for withholding the information.
5. On 18 March 2015, the complainant asked the Council to reconsider the decision to refuse the disclosure of parts of the FVA. Accordingly, an internal review was completed by the Council and the outcome provided to the complainant on 16 April 2015.
6. The reviewer upheld the original refusal of the request, explaining that the redactions in the FVA were covered by regulation 12(5)(e) of the EIR. Regulation 12(5)(e) is subject to the public interest test and the Council found that on balance the public interest favoured maintaining the exception. The reviewer considered important factors in the exercising of the public interest test were the amount of information that had already been made available about the Chase Farm proposal and the harm that disclosure could have on the negotiating position of the NHS Trust that submitted the application.

Scope of the case

7. The complainant contacted the Commissioner to complain about the Council's decision to withhold information contained within the FVA produced for the Chase Farm redevelopment proposal.
8. The Council has disclosed during the Commissioner's investigation items of FVA information that had previously been withheld. The Council has, however, maintained the position that the remaining redactions were correctly made and reiterated its reliance on regulation 12(5)(e) of the EIR.
9. The Commissioner's decision refers to the information that continues to be withheld and his analysis of the Council's grounds for applying regulation 12(5)(e) of the EIR follows.

Reasons for decision

Background

10. The Trust acquired Barnet and Chase Farm Hospital Farms Hospitals NHS Trust in 2014 and one of its first commitments was to redevelop Chase Farm Hospital. It was deemed that many of the buildings were in a poor state of repair and the existing hospital was outdated.
11. The website¹ of the Trust explains that the Chase Farm is a large site and much of it is underused. The intention was therefore to sell parts of the site for 500 homes and the proceeds used to help fund the scheme. The construction of a primary school was also included in the plans. The redevelopment would be part financed by government money and funds secured as part of the acquisition agreement.
12. Policy 3 (Affordable Housing) of the Council's Core Strategy states that it will seek to achieve a borough-wide target of 40% affordable housing units in new developments, applicable on sites capable of accommodating ten or more dwellings. The Trust did not propose incorporating the target level of affordable housing within the redevelopment, however. This was because it considered that meeting this target would affect the overall deliverability of the scheme. To support this position, the Trust instructed an FVA to be produced.
13. A shortfall against a local authority's affordable housing provision may in certain circumstances be approved where the developer is able to demonstrate to the satisfaction of the authority that the plans are unable to deliver a greater amount of affordable housing because of the cost to the developer of including affordable housing as opposed to market housing. To make this case, the developer may produce an FVA that provides analysis of the viability of the scheme based on projected costs. In this case, the Trust only planned to include 66 on-site affordable units, of which 53 flats were for keyworkers and 13 houses for social rent. This fell far below the Council's Core Strategy of 40%. However, the Trust considered that the feasibility of the scheme was predicated on its ability to raise sufficient funds from private housing in order to finance the redevelopment.

¹ <https://www.royalfree.nhs.uk/about-us/investing-in-our-future/chase-farm-hospital-redevelopment/chase-farm-hospital-redevelopment-qas/>

14. On 12 March 2015 the Council passed a resolution to grant outline planning permission and in the same month the Trust received government approval of the outline business case.

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

15. 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. It will not, however, cover information that is on emissions.
16. The construction of the exception effectively imposes a four-stage test, each condition of which must be satisfied in order 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 virtue of 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 element of the exception, the Commissioner considers that this test will inevitably be satisfied if the first three conditions are met.
17. If regulation 12(5)(e) of the EIR is found to be engaged on the basis that each of the tests is met, a public authority must then go on to consider the balance of the public interest in disclosure.
18. The Commissioner's guidance² on the application of regulation 12(5)(e) explains that the purpose of the exception is to protect any legitimate economic interests underlying commercial confidentiality. The guidance goes on to say that legitimate economic interests could relate to

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

retaining or improving market position, ensuring that competitors do not gain access to commercially 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.

19. The Commissioner agrees with the Council that the disputed information is not on emissions, which would otherwise bar the use of exception. He has therefore gone on to consider the four-stage test in regulation 12(5)(e) against the corresponding arguments advanced by the Council.
 - *(i) The information is commercial or industrial in nature*
20. The Council has highlighted that the withheld information includes details of forecasted residential land sale receipts, the costs of the development and the value of the land associated with the proposed new school. It considers that this information is commercial in nature and, following his approach in previous decisions on viability information, the Commissioner has accepted this position.
 - *(ii) Confidentiality is provided by law*
21. 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 common law of confidence applies in this situation.
22. For information to be protected by the common law of confidence, it must have the necessary quality of confidence and been shared in circumstances importing an obligation of confidence. Information will have the necessary quality of confidence where it is not trivial and is not in the public domain. An obligation of confidence may be explicit or implied, and is likely to depend on the nature of the information and the relationship between the parties. The Commissioner considers that a useful test to consider is whether a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence.
23. The withheld information is considered to comprise important commercial details, and therefore is clearly not trivial, and has not been made publicly available. The Council has further explained that the FVA has been treated as a 'confidential' document by all parties who have had access to the complete assessment. This was emphasised by the covering letter to the FVA which clearly marked the document as being commercially confidential and not for public release.

24. The Commissioner has considered the nature of the FVA, and the way in which the FVA was shared, and has decided that the common law of confidence does apply.

- *(iii) Confidentiality is protecting a legitimate economic interest*

25. It has been established that for this element of the test to be satisfied, disclosure of the confidential 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*. With regard to the risk of harm caused by disclosure, the Commissioner's guidance states:

33. Public authorities will therefore need to consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure. The timing of the request and whether the commercial information is still current are likely to be key factors. Broader arguments that the confidentiality provision was originally intended to protect legitimate economic interest at the time it was imposed will not be supported if disclosure would not actually impart on those interests at the time of the request.

26. To place its arguments in context, the Council emphasised the efforts made to ensure that as much information as reasonably possible was made available to the public and to answer all questions which were raised during the planning process. It considers that only the genuinely sensitive information in the FVA remains confidential.

27. The Council has explained that the economic interests at stake are those of the NHS Trust developer. To demonstrate a link between the harm to the Trust's economic interests and disclosure, the Council has explained that if for example assumptions relating to the value of the development were made available to the open market, this would enable potential bidders to tie their bids to those assumptions rather than entering into a truly competitive process. It would effectively remove the 'level playing field' and any bargaining position which the Trust would usually benefit from and is entitled to have.

28. The main consequence of this, according to the Council, is that the Trust's capital receipts will not be maximised and indeed could be reduced. No funding streams are available from elsewhere as the input from the Department of Health has already been agreed using the projected calculations included in the planning proposal. Consequently, the Council has argued that any reduction in forecast capital receipts will definitely put the whole scheme in jeopardy.

29. Where a public authority considers that a third party's interests are at stake, it should consult with the third party about the possible disclosure of information unless the authority has prior knowledge of the third party's views. It will not be sufficient where the exception is being claimed for a public authority to speculate about the potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party.
30. The Commissioner has been provided with a copy of a letter dated 16 January 2015 from Montagu Evans LLP - the chartered surveyors that prepared the FVA on behalf of the Trust - which built on the reasons why it considered it was not appropriate to release an unredacted version of the FVA. On the basis of this correspondence, the Commissioner is satisfied that the Council's arguments are an accurate reflection of the developer's concerns.
31. The nature and severity of the harm that it is claimed would arise through disclosure is clearly significant. The wider arguments for the application of regulation 12(5)(e) are also ones that are now familiar in the context of previous decisions of the Commissioner and the Tribunal in relation to requests for viability assessments. It has been accepted that viability information may engage the exception where the assumptions give a critical insight into a developer's business model, which could be exploited by competitors.
32. It is also noted in this case, however, that neither the arguments of the Council or the Trust (through Montagu Evans) drill down to a specific link between the precise categories of withheld information and the stated harm. This does weaken the force of the Council's case for finding that the exception is engaged. The Commissioner must therefore decide whether there is sufficient evidence for him to conclude that there would be an adverse effect on the Trust's economic interests. In the Commissioner's view, there is.
33. In making this finding, the Commissioner has been guided by the approach adopted by the Information Tribunal on *Christopher Waltho v The Information Commissioner* (EA/2014/0280, 9 September 2014)³. This considered a request for a copy of a viability appraisal provided to a planning authority by a developer in respect of a development and the District Valuer's report, commissioned by the planning authority, in

³[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1566/Waltho,%20Christopher%20EA.2014.0280%20\(16.06.15\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1566/Waltho,%20Christopher%20EA.2014.0280%20(16.06.15).pdf)

connection with that appraisal. On the way that evidence put before it should be tested, the Tribunal stated the following:

29. [...] Whilst the evidence put forward by the Council (and through them the developer) is limited, the Tribunal is entitled to draw inferences from all the material before it (including the closed material) and to subject the evidence by the Appellant to critical scrutiny in assessing both this element and the public interest. We must be satisfied that the adverse effect would be caused by disclosure on a balance of probabilities, which is still less than a certainty.

30. We are satisfied that the reason that the withheld material was subject to confidentiality at law was because there were reasonable grounds for saying its release would damage the Council's and the developers' economic interests. In so doing we are satisfied that as we are entitled to consider the documents as a whole the fact that some of the material might already repeat information in the public domain or reference figures that had low economic sensitivity as argued by the Appellant does not detract from our conclusion. The withheld material can be expected to contain the assumed and actual figures, percentages, methods, scheme structures including finance and timing of the developers proposal and the basis for those figures including justification/analysis. We are satisfied that there is commercial sensitivity in knowing the whole picture, the way that the scheme is structured, even the amount of detail provided will provide some insight into the robustness of the developer's proposal as well as the individual figures giving an insight into the developer's expectations, bargaining power, financial viability and the effort and expense that they are prepared to expend upon the scheme. The exemption is therefore engaged.

34. In accordance with the *Waltho* decision, the Commissioner is of the view that some inferences can be drawn from the nature of the withheld information and particularly considers that the information does provide an insight into the robustness of the Chase Farm proposal. The Commissioner has therefore concluded that disclosure would have an adverse effect and therefore the third stage of the test for the engagement of the exception is satisfied.
35. With regard to the fourth stage of the test, the Commissioner considers that there will invariably be an adverse effect on the confidentiality of the information where the preceding stages of the test are shown to be met. The Commissioner has therefore found that regulation 12(5)(e) of the EIR is engaged and has gone on consider the public interest test.

Public interest arguments in favour of disclosure

36. A number of decisions of the Tribunal and the Commissioner have acknowledged the importance of transparency where a public authority's decisions concern a development that will shape to a significant extent the local area. This importance is arguably magnified in this case because the development relates to a provider of critical service for the public.
37. The complainant has prefaced his own arguments for disclosure by referring to the decision of the Tribunal on *Royal Borough of Greenwich v IC Brownie* (EA/2014/0122, 30 January 2015)⁴. This recognised that transparency of a planning process would enable local people to better participate in decisions that would ultimately affect them. The complainant went on to make the following arguments in the context of the public interest test:
- Contrary to the Council's assertion, the redacted version of the FVA does not go a long way towards meeting the public need for disclosure. This is because it redacts the figures that are critical for a person to test the assumptions included in the business model.
 - The Council has explained that members of the Planning Committee were only provided with a redacted version of the FVA and argues that as a result the public is not disadvantaged by not seeing a complete copy. The complainant disagrees, contending instead that the public and the Planning Commission are not rival interests – both seeking the public good – and that both would benefit from knowing the full picture.
 - The Trust and the Council are both public bodies. In the view of the complainant, it goes against their fiduciary duty to the public to enter into a private agreement and conceal significant information.
38. The Commissioner accepts that each of these arguments is important.

⁴[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1478/Royal%20Borough%20of%20Greenwich%20EA.2014.0122%20\(30.01.15\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1478/Royal%20Borough%20of%20Greenwich%20EA.2014.0122%20(30.01.15).pdf)

Public interest arguments in favour of maintaining the exception

39. When considering where the balance of the public interest lies, the Council asserts it is necessary to recognise the considerable harm that would be caused to the Trust's interests as a result of disclosure. The Council considers that this harm should be placed against the relatively little benefit the public would receive from the disclosure because of the amount of information relating to the development that is already in the public domain. This includes, according to the Council, the methodology used for the viability assessment
40. The Council has also made reference to a contention made by the Trust that the scheme has huge public support and the desire not to jeopardise the scheme will be shared by many. It argues that there is no doubt the public would greatly benefit from a new hospital, new school and the additional affordable housing.

The balance of the public interest

41. In *The London Borough of Southwark v The Information Commissioner* (EA/2013/0162, 9 May 2014)⁵ the Tribunal considered viability information prepared in connection with a large redevelopment proposal at Heygate Estate. The Tribunal decided that regulation 12(5)(e) of the EIR was engaged and, in the context of the public interest test, found the following three issues were dominant and were of such importance as to dwarf other considerations:
 - The project must not be allowed to fail or be put in jeopardy.
 - The importance of public participation in decision making.
 - The avoidance of harm to the developer's commercial interests.
42. The Commissioner has equally found these factors form a helpful framework for determining where the balance of the public interest lies.
43. Any decision to alter in a significant sense the way in which healthcare is delivered will invariably be of concern to the public. This will therefore be reflected in the weight of the public interest invested in the disclosure of information that represents a key component of how a decision is reached. Further adding to this weight is the extent to which the

⁵[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1279/London%20Borough%20of%20Southwark%20EA.2013.0162%20\(09.05.14\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1279/London%20Borough%20of%20Southwark%20EA.2013.0162%20(09.05.14).pdf)

affordable housing element of redevelopment proposal of Chase Farm falls below the Council's core strategy target. In the Commissioner's view, the release of the requested information could help the public make an informed decision on whether a proposal to deviate from a strategy meant to assist the wider community was justified in the circumstances. Put simply, the case for disclosure is strong.

44. The Commissioner has also recognised, however, that the fundamental aim of the redevelopment was to improve a healthcare facility that according to the Trust created practical difficulties for staff and a poor quality environment for patients. Although the Commissioner has not been provided with any evidence that testifies to the huge public support for the scheme, he nevertheless accepts that the public would benefit from the successful delivery of the redevelopment.
45. In finding that regulation 12(5)(e) of the EIR is engaged, the Commissioner decided there was a significant risk of the Trust's economic interests being harmed through disclosure. Importantly, this harm relates to the ability of the Trust to carry out its plans in accordance with the assumptions and wider forecasts included in the FVA.
46. The Commissioner has ultimately concluded that the benefits of disclosure do not provide sufficient justification to support the release of core business information that could place the overall deliverability of the scheme at jeopardy. On this basis, the Commissioner has decided that in all the circumstances the balance of the public interest in disclosure is outweighed by the public interest in favour of maintaining the exception.

Right of appeal

47. 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

48. 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.
49. 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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