

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

Decision notice

Date: 15 February 2016

Public Authority: London Borough of Southwark
Address: PO Box 64529
London
SE1P 5LX

Decision (including any steps ordered)

1. The complainant has requested two reports produced by the District Valuer Service (DVS) for the London Borough of Southwark (the Council) in relation to the proposed development of the Heygate Estate. The Council provided the complainant with the reports prepared by the DVS subject to redactions made under the 'confidentiality of commercial or industrial information' (regulation 12(5)(e)) exception in the EIR. The complainant has asked the Commissioner to consider whether the Council was entitled to withhold this information. The Commissioner has decided that the withheld information engages regulation 12(5)(e) of the EIR and that in all the circumstances the public interest in disclosure is outweighed by the public interest in maintaining the exception. He does not therefore require the Council to take any steps.

Request and response

2. On 10 November 2014, the complainant wrote to the Council and requested information in the following terms:
 1. *The draft report provided to the council by the District Valuer Service on 16th July 2012, relating to its appraisal of the viability assessment submitted in conjunction with the Heygate planning application (re: 12/AP/1092).*
 2. *The interim report provided to the council by the District Valuer Service on 19th September 2012 relating to the same.*

3. *The final conclusions report provided to the council by the District Valuer Service on 16th November 2012 relating to the same.*

3. The Council replied to the request on 4 February 2015 and apologised initially for the delay in responding. In relation to requests 1 and 3, the Council provided a redacted version of the reports, citing the exception to disclosure set out at regulation 12(5)(e) of the EIR as the basis for withholding the various items of information. The exception is qualified by the public interest test and the Council found that, on balance, the public interest favoured withholding the information. With regard to request 2, the Council confirmed that the report related to a different site and application and was therefore not provided.
4. The complainant wrote to the Council on 16 February 2016 and asked it to reconsider the decision to refuse the disclosure of the complete reports specified in requests 1 and 3. The complainant also asked the Council to identify the development corresponding with the interim report mentioned in request 2.
5. Following an internal review, the Council wrote to the complainant on 1 April 2015. The reviewer upheld the way that the Council had handled requests 1 and 3. He also disposed of the query made in relation to request 2.

Scope of the case

6. The complainant contacted the Commissioner to complain about the Council's decision to provide only redacted, rather than complete, versions of the DVS reports referred to in requests 1 and 3.
7. The Council has confirmed its reliance on regulation 12(5)(e) of the EIR to withhold information in the reports and the Commissioner's analysis of the Council's position follows in the body of this notice.

Reasons for decision

Background

8. The DVS was commissioned by the Council to appraise a viability assessment produced by Savills L & P Limited for the developer, Lend Lease, which had signed a regeneration agreement with the Council in relation to the Heygate Estate. The Executive Summary of the viability assessment provided the following background information to the planning proposal:

1.2 The viability assessment relates to the Heygate Estate, a 1970s housing estate owned by Southwark Council, which provides 1,107 residential units, located within several buildings of up to 12 storeys in height. The majority of these apartments are now vacant.

[...]

1.4 Lend Lease have committed to deliver a minimum of 25% Affordable Housing within. The Heygate Masterplan and wish to express their determination to meet this vision through examining the financial viability of the proposals and the potential value enhancement options.

[...]

1.7 In line with the adopted National Planning Policy Framework (NPPF) and the Greater London Authority's (GLA's) strategic planning guidance for London, financial viability is a material consideration in determining planning requirements.

1.8 As such, viability appraisals can and should be used to analyse and justify planning applications to ensure that section 106 requirements do not make a scheme unviable.

1.9 We understand that the GLA's logic is that, if the residual value of a proposed scheme is reduced to significantly below an appropriate viability benchmark sum, (in brief, the viability benchmark sum is arrived at following consideration of; unconditional purchase price paid, at least 15-30% above Existing Use Value/Current Use Value, Alternative Use Value and/or Market Value) it follows that it is commercially unviable to pursue such a scheme, and the scheme is unlikely to proceed.

1.10 If a scheme is being rendered unviable because of section 106 requirements, it may be appropriate to look at reducing the burden of those requirements in order to facilitate viability.

1.11 Due to the scale and significant of this proposal as well as the long term involvement of both the Applicant and the Council, discussions surrounding the economic modelling of the redevelopment are well established. It is our understanding that, throughout the pre-application process, Lend Lease have provided the Council and a number of independent reviewers with copies of their bespoke development appraisal model in order to inform their ability to contribute towards strategic infrastructure.

1.12 As such, the format of Lend Lease's bespoke development appraisal model has been reviewed and accepted by; DTZ on behalf of Transport for London (TfL) and the GLA, and Drivers Jonas Deloitte (DJD) on behalf of SC Property. We also understand that the model and its functionality have been audited by Price Waterhouse Coopers (PWC) on behalf of SC Property.

1.13 Further to this in December 2011 the District Valuer Services, who have been instructed by Southwark Council as their independent reviewer for the viability assessment, reviewed the Lend Lease model and accepted it as a suitable development appraisal on which to test the viability of the proposal.

1.14 As such, in appraising the impact that providing affordable housing units alongside further section 106 contributions has on the viability of the scheme with a view to establishing what quantum and type of affordable provision and section 106 obligations the scheme could support (whilst remaining commercially viable), we have had regard to the bespoke financial appraisal Model 6.24 (the Model) provided to us by the Applicant.

9. The DVS was tasked with analysing, and where appropriate challenging, the data and calculations included in the viability assessment. The DVS entered into confidential discussions with the developer before providing a report to the Council.
10. The viability assessment was updated at various stages to reflect the negotiations between DVS and Lend Lease. The subjects of the requests are different versions of the appraisal report prepared by DVS, which were similarly informed by the continued negotiations between the parties.
11. In *Southwark v Information Commissioner and Lend Lease and Glasspool* (EA/2013/0162, 9 May 2014¹ & 18 March 2015²) the First-tier Tribunal (Information Rights) considered the Council's decision to

¹[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)

²[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1505/London%20Borough%20of%20Southwark%20EA.2013.0162%20\(10.3.15\)%20nd%20Decision.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1505/London%20Borough%20of%20Southwark%20EA.2013.0162%20(10.3.15)%20nd%20Decision.pdf)

disclose only a redacted version of Savill's viability assessment in response to a request.

12. The Tribunal found that parts of the viability assessment engaged regulations 12(5)(e) and 12(5)(f) (voluntary supply) and went on to consider the public interest test attached to the exceptions. Having exercised the public interest considerations, the Tribunal determined that the public interest favoured the disclosure of some, but not all, of the categories of withheld information. The Tribunal ordered that the parties to the appeal should in the first instance try to reach an agreement on the material that should be disclosed, otherwise the Tribunal would reconvene to settle the argument. Following receipt of additional submissions, the Tribunal held a further hearing and made a judgment on the redactions with which it did, and did not, agree.

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

13. 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.
14. The Council has explained that the confidentiality is protecting the legitimate economic interest of Lend Lease. Where a public authority considers that a third party's interests are 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. This principle was established by the Information Tribunal in *Derry City Council v Information Commissioner* (EA/2006/0014, 11 December 2006)³, with the Tribunal determining that it was not sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflected the concerns of the third party.
15. In this case the Council has provided the Commissioner with a copy of an email from Lend Lease that set out its view on the disclosure of the DVS reports:

We have highlighted in blue the elements that we consider should not be disclosed. The approach taken is consistent with what has

³ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i69/Derry.pdf>

been agreed with the ICO in relation to the Glasspool FOI request. That is the Financial Model, its inputs and outputs are confidential as they are commercially sensitive.

16. The Commissioner recognises that the purpose of the DVS' appraisal reports was to test the assumptions made in the viability assessment and accepts that both versions of the report draw on, and in many cases reproduce, specific viability information provided by Savill's on behalf of Lend Lease. As stated, the Tribunal in *Glasspool* determined that regulation 12(5)(e) of the EIR applied to parts of the viability assessment. The first question for the Commissioner is therefore whether the redactions in the DVS' reports correspond and are consistent with the Tribunal's findings on *Glasspool*. Where this is the case, the Commissioner must then go on to consider whether the balance of the public interest has changed since the determination of the Tribunal was made.
17. To answer this question, it is necessary to return to the judgment of the Tribunal itself, the relevant extracts of which are reproduced below:

23. The viability assessment has a number of appendices, most of which comprise the evidence held to support the assertions in the main text. The final one of these, Appendix 22, is different. It is a financial model developed by Lend Lease Corporation for use as an analytical tool on large projects. The model allows for different scenarios to be run and tested. It is a 'live' piece of work which will alter with time as assumptions change.

[...]

55. We take first the question of Lend Lease's development model referred to, but perhaps not confined to, Appendix 22. We accept that this is a trade secret, a commercial interest, incidentally, specifically identified in FOIA as potentially requiring protection. We also accept Mr Heaseman's evidence about the nature of the model and please and profit other developers might derive from its publication. In our judgment, the harm to Lend Lease's own interests, taken alone, outweighs, in the public interest balancing exercising, the benefits of disclosure. One might add that preventing disclosure of a trade secret might encourage other developers to maintain an open book approach to their local authority partners – although each case, as we have indicated, will always be considered on its merits.

56. We turn next to certain information contained in the viability assessment about sales and rentals. We are concerned here only with rights which will be the subject of commercial negotiation

between Lend Lease and other businesses. Lend lease's calculations in respect of these matters are commercially of great sensitivity. There is a real risk that future commercial customers would use Land Lease's projections to their advantage in negotiations. This would be damaging to Lend Lease's profit; and risk a knock on effect if not on the viability of the whole project, at least on the delivery of its social content. Again, weighing all the public interests in respect of this information, in our judgment, the public interest in maintaining the exceptions outweighs the public interest in disclosing the information.

57. The reasoning does not, in our judgment, apply to sales to private purchasers, who are much more likely to be influenced by the market rate at the time. Nor, in our judgment, does it apply to property destined for a social housing provider. It is true that a certain element of commercial negotiation is likely to be involved in such a transaction. On the other hand, there is a countervailing public interest in ensuring that social housing providers obtain a reasonable deal – and in actuality, Southwark, who are privy to the calculations, would almost certainly ensue that their partners, Lend Lease, did not take advantage of social housing providers.

58. The other information in the viability assessment seems to us to be less commercially sensitive; and the arguments against disclosure have much less force in respect of them, once we have safeguarded the operating model and the projections on commercial negotiations. When it comes to the rest of the information, in our judgment the balance is different and the importance, in this particular project, of local people having access to information to allow them to participate in the planning process outweighs the public interest in maintaining the remaining rights of Lend Lease and those subcontractors who contributed to that document. Again, we take into account that all of them were conscious that their work was always potentially subject to a freedom of information regime.

18. In the decision which reported on the later convened hearing, the Tribunal examined the proposed redactions and made the following observations:

21. Appendix 22 contains hundreds, if not thousands of specific figures applying the Land Lease model to the Heygate Estate development. In these circumstances it is unrealistic and artificial to consider each number separately. On its own, one figure looks innocent enough; but such individual assessments would amount cumulatively to the disclosure of most, if not all, of the model.

That is why we stated that the whole of Appendix 22 should be withheld and left the door open to the possibility of the same rationale also applying to other parts of the mountain of material before us. In respect of paragraph 55, this exercise, as Mr Pitt-Payne points out, should not be slavishly; and as Ms Morrison points out, the key is to protect the model.

19. Reflecting the purpose of the DVS' function, namely to appraise the assumptions made in the viability assessment, the reports are substantially shorter than the viability assessment itself. The greater parts of the reports have been disclosed but the Council has withheld various figures cited by the DVS. Among other items, the redactions include the proposed commercial rent values, financial gearing rates, base inflation percentages for the delivery period set against the assumed regeneration inflation figures, cost analysis summaries and construction costs.
20. The Commissioner is satisfied that the redacted information falls within the description of excepted information set out by the Tribunal in *Glasspool*. In coming to this position, the Commissioner has been mindful of the Tribunal's insistence that information will only be truly sensitive where it betrays Lend Lease's development model and will not extend beyond this, for example to the benchmarks against which Lend Lease and its professional advisors considered the viability information should be tested.
21. Therefore, following the lead of the Tribunal, the Commissioner has decided that the redacted information engages regulation 12(5)(e) of the EIR. He has therefore gone on to consider where the balance of the public interest lay at the time the requests were made.

Public interest test

22. In *Glasspool*, the Tribunal determined that on the basis of the public interest weighting exercise carried out the Council was not required to disclose parts of the Heygate Estate viability assessment that were subject to regulation 12(5)(e) of the EIR.
23. As explained above, the Commissioner considers that the withheld information contained in the DVS' reports reproduce, or is parasitic on, the information identified as sensitive by the Tribunal. The question that therefore naturally now arises is whether the circumstances had changed sufficiently by 10 November 2014, the date of the request considered in this case, to mean that the exercising of the public interest test would result in a different outcome.

24. The Tribunal in *Glasspool* found upon review of the relevant arguments provided that the following three public interest factors were dominant and were of such importance so as to dwarf other considerations (paragraph 39):
 - 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 Lend Lease's commercial interests.
25. The analysis of the weight of the competing public interest factors must take into account regulation 12(2) of the EIR, which applies a presumption in favour of disclosure.
26. The Tribunal considered that the public interest impacted differently on different parts of the requested information. Concerning the information that the Tribunal considered should be withheld, it decided that the severity and significance of the harm connected to the disclosure of the development model outweighed, in the public interest balancing exercise, the benefits of disclosure. Further, in relation to the rights which will be the subject of commercial negotiation between Lend Lease and other businesses, the release of the information would be damaging to Lend Lease's profit and risk a knock-on effect, if not on the viability of the whole project, at least on the delivery of its social content.
27. The complainant has powerfully argued for the disclosure of the information. Broadly speaking, his position has three parts. Firstly, the complainant has pointing to the growing significance of viability assessments in planning decisions and the corresponding importance of greater transparency and accountability in this area. Although not directly relevant to this case, the growing consensus relating to the need for a greater degree of transparency is reflected by the intention of the Royal Borough of Greenwich to publish in the future any viability study in which a developer has found it would not be economically viable to meet the target level of affordable housing. Secondly, the complainant considers there is a public interest in knowing how the DVS had appraised the assumptions made by the developer. Thirdly, the complainant considers that full disclosure will allow the public to understand and evaluate how the DVS' findings had been interpreted and used by the Council.
28. The Council, for its part, has emphasised Lend Lease's ongoing interest in the site and asserted that should the calculations, analyses and assessments be revealed, it is very likely to prejudice any future negotiations, such as disposals and sub-lettings, in relation to the development. The Council considers this will be very detrimental to the

competitive negotiating position of Lend Lease and, in turn, threaten the viability of the development as a whole.

29. The Commissioner considers the complainant has provided cogent arguments for disclosure and, as referred to above, the Tribunal in *Glasspool* acknowledged the value of public participation in planning decisions. The Tribunal though also recognised that it would not be appropriate to release specific information that could harm the legitimate economic interests of Lend Lease.
30. Since the request considered in *Glasspool* was originally made, and before the request here was submitted, the Council's planning committee resolved to grant outline planning permission for the Heygate Estate masterplan (15 January 2013). This therefore marked a significant change in the status of the planning proposal. Notwithstanding this, the Commissioner recognises that the regeneration of the Heygate Estate is a sizeable task and the majority of the development is only expected to be delivered by 2025.
31. The Commissioner understands that in November 2014 Land Lease was still required to negotiate, and come to agreements, with third parties in order to fulfil its plans. For this reason, the Commissioner considers that the Tribunal's arguments in *Glasspool* relating to the sensitivity of the withheld information applied equally forcefully at the time the request was made. As the Tribunal identified, it is necessary to strike a balance between promoting transparency and protecting information that could affect the ability of Land Lease to deliver the development effectively.
32. The Commissioner considers that at the time of the request the weight of the public interest considerations had not changed sufficiently to result in a fundamental shift of the weight of the public interest considerations. The Commissioner has therefore concluded that in all the circumstances the public interest in maintaining the exception outweighs the public interest in disclosure.

Right of appeal

33. 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

34. 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.
35. 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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