

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

Decision notice

Date: 22 March 2016

Public Authority: London Borough of Tower Hamlets
Address: Town Hall
Mulberry Place
5 Clove Crescent
London
E14 2BG

Decision (including any steps ordered)

1. With regard to planning applications submitted to develop the Bishopsgate Goodsyrd area, the complainant requested copies of (i) any financial viability assessment(s) produced in connection with the plans and (ii) any reports prepared to assess or verify the financial viability assessment. The London Borough of Tower Hamlets (the Council) has disclosed a copy of the developer's financial viability assessment (FVA) subject to extensive redactions made under regulation 12(5)(e) and 12(5)(f) of the EIR. The Council also confirmed that at the time of the request it did not hold any corresponding report that tested the assumptions made in the financial viability assessment.
2. The Commissioner's determination is that, with regard to request (i), the FVA engages regulation 12(5)(e) of the EIR and the public interest in disclosure is outweighed by the public in favour of maintaining the exception. In relation to request (ii) the Commissioner has found that the Council did not hold the information specified at the time of the request. He does not therefore require the Council to take any steps as a result of this notice.

Request and response

3. Referring to the planning applications submitted to the Council for the development of the Bishopsgate Goodsyrd area (references

PA/14/02011 and PA/14/02096), the complainant made on 4 November 2014 the following requests:

1. *copies of any Financial Viability Assessment(s)*
2. *copies of any reports prepared to assess or verify the above on behalf of either the LPAs [Local Planning Authorities] or Applicant*
4. The Council responded on 26 November 2014 and stated that the requests were being dealt with under the EIR. Having considered the requests under the legislation, the Council informed the complainant that it was refusing to disclose the relevant records it held. This was on the basis that that the viability information engaged the 'confidentiality of commercial or industrial information' (regulation 12(5)(e)) and 'voluntary supply' (regulation 12(5)(f)) exceptions to disclosure in the EIR. Both of the exceptions are qualified by the public interest test and the Council found that on balance the public interest favoured withholding the information. The Council further advised that the 'third party personal data' (regulation 13) exception applied to parts of the requested information.
5. The complainant wrote to the Council on 2 December 2014 and asked it to reconsider its response to the requests. The Council therefore carried out an internal review, the outcome of which was provided to the complainant on 30 January 2015.
6. The reviewer found that regulations 12(5)(e) and 12(5)(f) only applied to some parts of the viability assessment and not the whole document as previously claimed. The reviewer also concluded that regulation 13 of the EIR was not engaged. Accordingly, in line with the reviewer's conclusions, the complainant was provided with a redacted version of the viability assessment.

Scope of the case

7. The complainant has contacted the Commissioner and made a two-part complaint relating to the Council's handling of his information requests.
8. With regard to request 1, the complainant has asked the Commissioner to consider whether the Council was entitled to withhold information contained within the financial viability assessment. With respect to request 2, the complainant considers that the Council has failed to properly address the question of whether it holds copies of any of the requested reports and, if so, whether those reports should be disclosed.

9. The Commissioner's analysis of each aspect of the complaint follows in the body of this notice.
10. For reference, the Commissioner is aware that the same requests were also made to the London Borough of Hackney, which shares an interest in the proposed development. In effect, the request concerned the same information and therefore the Commissioner has proceeded on the basis that the relevant issues will be disposed of as part of this decision.

Reasons for decision

Background

11. The Council has provided the following information relating to Bishopsgate Goodsyards; the area to which the planning information relates:

Bishopsgate Goodsyards is a site allocated in the Council's Local Plan (Managing Development Document 2013) and the subject of Interim Planning Guidance 2010 adopted jointly by the Mayor of London, the London Borough of [Hackney] and this Council. There are sites allocated for specific types of development through the plan making process to ensure that the infrastructure necessary to support growth can be provided and to identify sites capable of accommodating more than 500 new homes. The local plan allocates this site for up to 2000 new homes, significant commercial and retail space and a new local park. Bishopsgate Goods Yard is one of the large site allocation at 4.4 hectares.

The site lies across the borough boundary between Tower Hamlets and Hackney and has been largely vacant, occupied by low intensity temporary uses since the Goods Yard was largely destroyed in a fire in 1965. There has been a long-standing aspiration from the Council, Hackney and the Mayor of London to see development come forward on this strategic site. The London Overground railway which cuts across part of the site was enclosed in a box when built in the early 2000s to ensure future development could take place around it.

12. A person seeking to develop an area is required to consider the planning obligations designated by the local planning authority, which may refer to contributions to infrastructure and community facilities. This may include a target requirement for larger schemes to provide a certain percentage of affordable housing. Where a developer considers it is not able to meet the prescribed obligations, a planning authority will normally require independently validated evidence of viability to justify

the shortfall against the target levels. Put simply, a developer will need to demonstrate that satisfying the planning obligations would jeopardise the viability of the project because it would reduce the profitability of the project to a level that would make the project unattractive.

13. In March 2012 the Department for Communities and Local Government published the National Planning Policy Framework (NPPF)¹. This set out the Government's planning policies for England and how these are expected to be applied, and was designed to promote sustainable development by simplifying the planning process in order to allow "people and communities back into planning." Under the heading 'Ensuring viability and deliverability', the NPPF emphasised that local authorities should give proper consideration to viability concerns:

173. Pursuing sustainable development requires careful attention to viability and costs in plan-making and decision-taking. Plans should be deliverable. Therefore, the sites and scale of development identified in the plan should not be subject to such a scale of obligations and policy burdens that their ability to be developed viably is threatened. To ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returned to a willing land owner and willing developer to enable the development to be deliverable.

[...]

176. Where safeguards are necessary to make a particular development acceptable in planning terms (such as environmental mitigation or compensation), the development should not be approved if the measures required cannot be secured through appropriate conditions or agreements. The need for such safeguards should be clearly justified through discussions with the applicant, and the options for keeping such costs to a minimum fully explored, so that development is not inhibited unnecessarily.

177. It is equally important to ensure that there is a reasonable prospect that planned infrastructure is deliverable in a timely

¹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6077/2116950.pdf

fashion. To facilitate this, it is important that local planning authorities understand district-wide development costs at the time Local Plans are drawn up. For this reason, infrastructure and development policies should be planned at the same time, in the Local Plan. Any affordable housing or local standards requirements that may be applied to development should be assessed at the plan-making stage, where possible, and kept under review.

Request 1 – financial viability assessment

14. The Council has applied regulations 12(5)(e) and 12(5)(f) of the EIR to the same items of information contained within the FVA. The Commissioner has initially considered the application of regulation 12(5)(e).

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. According to the Information Tribunal in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010)², the construction of the exception can effectively be read as imposing a four-stage test. All four of the following conditions must be met 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 the common law of confidence, contractual obligation, or statute.
 - (iii) The confidentiality is protecting a legitimate economic interest. Where the arguments refer to the economic interests of

²[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_\(0012\)_Decision_24-05-2010_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

a third party, it will not be sufficient for a public authority to speculate on the potential harm attached to disclosure. Instead, the public authority must have evidence that demonstrates the arguments genuinely reflect the concerns of the third party.

(iv) The confidentiality would be adversely affected by disclosure. Although this is a necessary condition, the Information Tribunal in the aforementioned *Bristol City Council* case considered that the disclosure of truly confidential information into the public domain would invariably harm the confidential nature of that information. As such, if the preceding three stages of the test are fulfilled, it will follow that the exception is engaged. Where this is found to be the case, a public authority must next go on to assess whether the balance of the public interest required disclosure.

17. The Council has responded to conditions (i) – (iv) in turn. To assist him with the process of testing the strength and relevance of the arguments, the Council has provided the Commissioner with a complete copy of the FVA.
 - *(i) Is the information commercial or industrial in nature?*
18. The Council has explained that the requested information relates to a pre-application negotiation in terms of a viability assessment (FVA) submitted by the developer to regenerate a substantial site within Tower Hamlets which extends into an area controlled by another authority, the London Borough of Hackney. The Council submits that the information contained in the FVA is commercial in nature as it relates to the detailed analysis of the proposed development.
19. The Commissioner's guidance on the exception states that for information to be commercial in nature, it will need to relate to a commercial activity, either of the public authority or a third party. He continues by saying that the essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services, usually for profit. The FVA refers to proposals submitted by a third party seeking to develop an asset for profit. The Commissioner is therefore satisfied that the FVA falls within the description of information that is deemed to be commercial in nature; a finding that is reinforced by the Information Tribunal in a number of decisions relating to planning viability information.
 - *(ii) Is confidentiality provided by law?*
20. Confidentiality in this context will include confidentiality imposed on any person by the common law of confidence, contractual obligation or

statute. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself.

21. While acknowledging that this is not in itself a decisive factor, the Council considers that the general expectation of confidentiality is demonstrated by the marking of the FVA as 'private and confidential'. It further states that the FVA would be covered by the common law duty of confidence. The common law of confidence will apply where information has the necessary quality of confidence and is shared in circumstances importing an obligation of confidence.
22. For information to have the necessary quality of confidence, the information must not be trivial and nor can it already be in the public domain. Both of these factors apply to the FVA. With regard to the creation of an obligation of confidence, this can be explicit or implied and may depend on the nature of the information and the relationship between the parties. The Commissioner considers that a useful test is to assess 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 Council has explained that the FVA was provided by the developer as part of the negotiation process on the basis that it was expected by both parties that certain information would be held in confidence by the other. In the Council's view, it is important that there was no legal obligation on the developer to provide the viability information to the Council, in its capacity as the local planning authority, at the negotiation and pre-application stage.
24. Returning to the test referred to above, the Commissioner is satisfied that a reasonable person would hold that the disputed FVA had been provided to them in confidence and consequently there was an obligation of confidence pertaining to the information. Accordingly, he accepts that the common law of confidence does apply.
 - *(iii) and (iv) Is the confidentiality protecting a legitimate economic interest and would disclosure have an adverse effect on the confidentiality?*
25. In the Commissioner's guidance he clarifies that legitimate economic interests could relate to 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.

26. When determining whether there is an economic interest that needs protection, a public authority must consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure. It is not enough that disclosure might cause some harm to an economic interest. Rather, a public authority needs to establish it is more probable than not that disclosure would cause some harm.
27. The Council's general position with regard to disclosure and the protection of legitimate economic interest was summarised as follows:

The Council asserts that the information contained in the FVA includes sensitive details about the structure of the commercial arrangements for the proposed development which, if released to the public domain, would prejudice the Council's position as a local planning authority which is trying to secure regeneration, housing and jobs in its area. Disclosure would prejudice the delivery of the regeneration of not only this important site but also may set a precedent with developers on other sites which could impede the delivery and proper planning of sites in the Council's area.

Should detailed commercial information from the FVA be made publicly available, this could prejudice the Council's negotiations with regard to negotiations with not only the Developer and third parties with regard to later phases of the Development, but could also establish unintended prejudicial precedents which could constrain the Council's negotiations in respect of other development sites.

Additionally, release of such commercially sensitive information to the public domain could impair the relationship between the Council and the Developer with detrimental consequences for the public interest in seeing the Development, and perhaps other developments, come to fruition.

28. The Council considers that the timing of the request is essential to understanding the nature, severity and likelihood of the harm occurring through disclosure. It explains that at that time the planning application had not yet been determined. The application was still in the process of being amended by the developer and was yet to be considered by the planning committee. This means that the development proposal did not have planning consent and, at that stage, no building contracts or contracts for the sale or letting of the development had been tendered or let.

29. To demonstrate the wider importance of confidentiality in planning matters, the Council has referred to the guidance note, Financial Viability in Planning (2012)³, produced by the Royal Institute of Chartered Surveyors (RICS). In the section on confidentiality, the guidance says:

4.3.1 Pre-application discussions usually proceed on the basis of treating commercial information provided by a developer (applicant) or their consultant as confidential. In order to encourage openness and transparency in the viability process both at pre- and post- application, it is also often the case that the viability reports submitted to a local planning authority are required to be classified as confidential in part or as a whole. This is to encourage the applicant to disclose the maximum amount of information, which can then be reviewed and reported upon. LPAs should therefore be asked to treat and hold this information on a similarly reciprocal basis and respect that disclosure of confidential information could be prejudicial to the developer (applicant) if it were to enter the public domain. Information will usually be disclosed to the LPA adviser but not to the general public as it may be commercially sensitive.

30. From the Council's perspective, it considers the interests that would be harmed relate primarily to the ability to negotiate affordable housing and planning obligations as part of the obligation, in the context of Development Plan policies. In this regard, the Council notes that policy 3.12 of the London Plan requires that the 'maximum reasonable amount' of affordable housing should be secured, taking into account the financial viability of the proposed development. The Council's local plan (Core Strategy 2010) requires 35-50% affordable housing (calculated by habitable rooms) on all sites with 10 or more dwellings, again subject to financial viability.
31. In the Council's view, disclosure at the time of the request would be highly likely to impede not only the effective progress of the proposed application but also the funding, negotiation and management of building contracts and the overall financial viability of the proposed development.
32. Echoing the point made in the RICS guidance note about the relationship between the principle of confidentiality and the sharing of information,

³http://10.11.25.1:8080/ProgressMessages/get_file?proxy=10.11.25.1&action=complete&index=148&id=21330749&filename=get_file

the Council asserts that if the information were to be released it may dissuade the developer from providing any further information to facilitate meaningful negotiations on this matter. Furthermore, it may set a harmful precedent in dissuading applicants from providing information connected to the proposals that went beyond the basic level of information required. This, in turn, would mean that negotiations on affordable housing and other planning obligations would be less comprehensive and potentially lead to the Council being less successful in securing the maximum benefits from the developer. The Council has further submitted it is likely that disclosure would affect the Council's ability to obtain full viability information from developers in relation to a number of other regeneration schemes that are currently being negotiated.

33. With regard to the economic interest of the developer, the Council has provided the Commissioner with copies of correspondence that identify the specific concerns raised by the developer about the disclosure of the withheld information. The developer has provided detailed explanations to support the position that regulations 12(5)(e) and 12(5)(f) apply but, for ease of reference, it supplied the Council with a summary of the main themes:
- a) Consultant's reports - would allow competitors to 1) exploit the approach and methodology adopted in relation to the viability of the proposed development, and 2) more easily take advantage of such research, saving the costs and time which have been shouldered by the developer.
 - b) Comparative information - would set a harmful precedent and hinder open discussions.
 - c) Information on separate negotiations - could be exploited by competitors to the detriment of the developer.
 - d) Pricing strategy for ground rents, annual rents, commercial incentives and information on yields in relation to commercial and residential use - sales and leases have also not yet been negotiated and disclosure of this information would provide potential purchasers and tenants with an unfair advantage over the developer, preventing the developer from negotiating such contracts on a level playing field. The other parties to the contracts would be aware of the price the developer expects/needs to achieve and could use that to their commercial advantage. Disclosure would also reveal details of the developer's finances which competitors could use to undercut the developer in relation to their own projects.

- e) Timing of sales – if known in advance, this information could be used by bidders and suppliers who could apply pressure in negotiations with the developer to settle on a lower price than they would otherwise contemplate if they did not have that knowledge. Furthermore, competing developers could bring forward their projects so as to release their product to the market first.
 - f) Costs – none of the main contracts for the development have been let and all remain to be negotiated. All of these future negotiations would be seriously impacted by the release of the FVA, which contains assumptions relating to the value of such contracts and deals. The other parties to the negotiations and tenderers, if they had access to the assumptions, would have an advantageous negotiating position. In addition, protracted negotiations on the contracts and deals will add risk to the timely delivery of the development and much needed housing.
 - g) Information on profit expectations – the same effects referred to at f) would equally apply to information relating to profit margins, the methodology for target profit and target returns. This highly confidential information could be used by bidders during the construction phase, potential purchasers and tenants and competitors alike to their own advantage and to the detriment of the developer. The disclosure of such information may also cause difficulties for the developer in seeking to raise finance for the proposed development.
34. In addition to the adverse effects of disclosure in relation to the Bishopsgate Goodsynd proposal, the developer has argued that it is also necessary to take into account the consequences of disclosure that go beyond this project.
35. Firstly, the developer notes that it (and particularly its constituent partners) has significant interests in the borough and is bringing the regeneration of several development sites. The developer considers that the information contained in the FVA could be used against it in future applications by objectors and competitors. This would be to the detriment of the developer's economic interests and the promotion of regeneration schemes within the boroughs. Secondly, the developer considers that disclosure would set a harmful precedent. The developer states that it has adopted an 'open book' approach and entered into meaningful discussions with the planning authorities during the pre-application phase in order to assist the process. It is vital, in the developer's view, that such open discussions are not hindered as they will help facilitate effective and timely planning decisions. Such discussions would be put at risk, however, if a developer thought that

confidential information could be placed in the public domain at an important and sensitive point of the planning application.

36. As illustrated, each of the envisaged instances of harm arising from disclosure put forward by the Council and the developer broadly fall into one of two groups; (a) the harm to the progression and delivery of the Bishopsgate Goodsyrd proposals itself, and (b) the harm to separate and future development projects.
37. With regard to the arguments relating to the Bishopsgate Goodsyrd application, the Commissioner has found helpful the approach adopted on FS50538429 (1 April 2015)⁴, in which he considered a request for copies of all Financial Viability Assessments the London Borough of Hackney had received in relation to two specified planning applications. Hackney had similarly applied regulation 12(5)(e) of the EIR to parts of the viability information produced by the developer and in connection with the third-part of the exception test, namely whether confidentiality was protecting a legitimate economic interest, the Commissioner said the following:

48. The Commissioner notes the circumstances at the time of request. He is aware that the second planning application had not been granted permission and the September 2013 Financial Viability Assessment was still subject to potential change and negotiation. He also notes that the project had not moved onto any actual development and was still therefore at proposal stage. [...] The Commissioner accepts that disclosure of this information at the time of the request would adversely affect the developer's ability to negotiate free, fairly and competitively with such third parties.

38. The Commissioner in the Hackney case expressed some reservations about whether the various categories of withheld information would attract the same level of sensitivity. Nevertheless, he ultimately concluded that disclosure of each of the items would harm the legitimate economic interests of the developer.
39. The Commissioner recognises that the circumstances of the cases, and the nature of the withheld information, differ. A point made in the Hackney case though, and one that the Commissioner considers equally holds here, is the significance of the timing of the request and

⁴ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043653/fs_50538429.pdf

particularly the fact that the planning application had not been granted permissions and negotiations between the planning authority and developer were ongoing. This was, and is, considered to lend weight to the claims pertaining to the sensitivity of the information. In the Commissioner's view, disclosure at the time of the request would affect the ability of the developer and the Council to negotiate successfully, which would harm the economic interests of both the developer and the Council. The Commissioner has therefore decided that, in accordance with this part of the test, confidentiality is required to protect legitimate economic interests.

40. The Commissioner is, however, more sceptical of the arguments relating to the damaging precedent set by the disclosure in the context of other planning applications. The Commissioner considers that a developer would understand that a planning authority will be subject to FOIA and the EIR. He has not also been provided with any specific evidence which demonstrates that the Council's ability to negotiate with other developers would be prejudiced as a result of disclosure. The Commissioner can though imagine occasions when a developer would be less likely to adopt an 'open book' approach if they considered that confidential information which went beyond the minimum required by the planning authority could be disclosed. He does not therefore reject completely the cogency of the argument.
41. Notwithstanding his scepticism about the wider effects of disclosure, the Commissioner has found that condition (iii) of the test inherent in regulation 12(5)(e) is met. As stated, in relation to condition (iv) the Commissioner considers that there will invariably be an adverse effect on the confidentiality of the information in question where the preceding three stages of the test are demonstrated to be satisfied. The Commissioner has consequently found that regulation 12(5)(e) of the EIR is engaged. He has therefore gone on to consider the public interest test.

The balance of the public interest

42. The complainant has argued that previous decisions of the Information Tribunal, especially in *Royal Borough of Greenwich v IC & Brownie* (EA/2014/0122, 30 January 2015)⁵ and *London Borough of Southwark v*

⁵[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)

IC, Lend Lease & Glasspool (EA/2013/0162, 9 May 2014)⁶. Each of the Tribunals emphasised the importance of local people having access to viability information so that they are better able to participate in the planning process and planning decisions.

43. With reference to the *Greenwich* case, the Tribunal was guided by the following factors when concluding that the public interest favoured the disclosure of information contained within a viability report:
- A confidentiality clause in the viability report did not add any significant weight against disclosure (paragraph 14).
 - The pricing and other assumptions embedded in a viability assessment are vital for the public's understanding of the difference between the viability and non-viability of a proposed project (paragraph 18).
 - There was insufficient evidence to support Greenwich's arguments that disclosure might undermine its ability to conduct future negotiations with other developers (paragraph 20).
 - Eventual sales prices will be dictated far more by the market at the time of disposal than by any assumptions recorded in a viability assessment (paragraph 22).
 - The argument against disclosure which says that those receiving the information would be unlikely to understand it should be rejected (paragraph 34).
44. The Tribunal in *Southwark* also acknowledged the strong public interest in the disclosure of planning information. The Tribunal determined that only particularly sensitive propriety information belonging to a commercial developer should be withheld and found that figures relating to social rented housing and the costs of housing for sale should be released.
45. As part of his investigation, the Commissioner has asked the Council to consider the approach adopted by the differently constituted Information Tribunals to viability information when setting out how it exercised the public interest test. In response, the Council has stressed the requirement to consider a case on its individual merits; considering that

⁶[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)

the severity of the harm arising from disclosure at the time of the request meant that the public interest favoured withholding the requested information. The developer, for its part, has emphasised what it considered to be the significant differences between the circumstances considered in the aforementioned Tribunal cases and the circumstances of the present case. It said:

3.1 [...] We consider that there is a clear and important distinction between those decisions and the facts in relation to the Application. Those decisions related to planning permissions which had already been granted. The level of affordable housing had already been settled and a S106 Agreement had been completed. In the Greenwich case, the developer was applying to vary the S106 Agreement following the grant of planning permission. The developer was applying to reduce the level of affordable housing and one could argue that it is in the public interest to be aware of all the facts as the developer was attempting to alter a public decision which had already been made.

3.2 The position is very different in relation to The Goodsyrd. The planning application was submitted in July 2014 and has been subject to consultation. As a result of discussions between BGRL, the two local planning authorities and the GLA, BGRL is currently working on amendments to the Proposed Development to positively address the consultation feedback. BGRL intends to submit amendments to the planning application in June 2015. As part of the package of amendments, the FVA will be updated to reflect the revised scheme.

3.3 Therefore, the application scheme is evolving. Full and frank discussions have commenced between BGRL and the two local planning authorities on the level of affordable housing and the S106 "package". These discussions are aimed at achieving a financially viable development with appropriate levels of affordable housing and S106 obligations. Discussions are still underway and as the scheme is evolving, matters are still subject to potential change and negotiation. Public disclosure of this information will seriously impede these discussions and could hinder the delivery of a strategic and important development.

3.4 In addition, at this early stage in the project, public disclosure of highly sensitive pricing information would prejudice BGRL's negotiating position and put it at an unfair disadvantage when negotiating contracts for the Proposed Development. At this time, no contracts have been entered into by BGRL for sale or letting of any part of the Proposed Development. Similarly, no

contracts have been tendered or agreed for the construction of the Proposed Development and it is notable that this point was not raised in the Greenwich decision as the development was already underway.

3.5 Another differentiating factor between The Goodsyard and the Greenwich and Lend Lease decisions was that those previous decisions involved the use of land owned by the public sector and it could therefore be argued that public interest is stronger in relation to the development of public land. That is not the case here. The Proposed Development is a purely private venture.

46. The principle underpinning the developer's arguments was similarly expressed by the Commissioner in his decision on FS50538429. While acknowledging the strong public interest in overall transparency and accountability, he found that on balance the public interest still favoured maintaining the exception:

*90. However, in this case, the Commissioner considers there is a stronger public interest in maintaining the exception **due to the specific circumstances at the time of the request and the very fact that no commercial negotiations had been entered into between the developer and its own prospective clients** [the Commissioner's emphasis]. As the Commissioner has stated above, the outstanding information would be very useful to a building contractor wishing to enter into an agreement with the developer over the construction of the development or very useful to, say, a third party which is interested in purchasing some or all of the development [...].*

91. The Commissioner has accepted that the disclosure of this information would adversely affect the developer's ability to compete fairly in the market place and secure the best deal and terms it possibly can. Disclosing truly commercial information is not in the public interest. It damages the commercial interests of third parties and would lead to negative consequences for the public authority. [...]

92. While the Commissioner accepts that there is a public interest in knowing how 106 agreements are reached and in the public being able to scrutinise the agreement to see whether more favourable terms could have been achieved by the planning authority concerned. In this case, due to the circumstances at the time of the request and the adverse effect disclosure would cause to the developer concerned, he is of the view that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exception.

47. The Commissioner recognises that there will often be a tension between, on the one hand, those interests that advocate public engagement through greater transparency and, on the other, the interests that seek to protect commercially sensitive information. A balance will therefore need to be struck that fosters greater public awareness of planning proposals while ensuring that a planning authority, which is ultimately responsible for making decisions on planning applications, has the ability to negotiate freely with a developer. In this case the Commissioner has found significant the Council's confirmation that at the time of the request the terms of the application could change depending on the negotiations.
48. This was very clearly then a critical phase of the planning process and for this reason the Commissioner has decided that in all the circumstances the public interest in disclosure is outweighed by the public interest in favour of maintaining the exception.
49. In light of this finding, the Commissioner has not been required to consider the Council's application of regulation 12(5)(f) to the same information.

Request 2 –reports prepared to assess the FVA

50. The Council has confirmed that the FVA dated August 2014 was the only relevant document at the time of the request and a redacted version was provided to the complainant. For completeness, however, the Council has confirmed that preparatory information and a subsequent report commissioned by the Council have been received from PNB Paribas. The Council has clarified that this information post-dates the requests in question and were not therefore considered.
51. The Commissioner's decision on whether a public authority has complied with the legislation must return to the circumstances as they stood at the time a request was made. This extends to the question of what information was technically held for the purposes of the legislation.
52. Based on the explanation provided by the Council, the Commissioner has accepted that the Council did not hold any information covered by this particular request at the time of the request.

Right of appeal

53. 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

54. 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.
55. 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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