

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

Decision notice

Date: 25 April 2016

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

Decision (including any steps ordered)

1. The complainant has requested from the London Borough of Southwark (the Council) copies of the section 106 Heads of Terms and any viability information produced in connection with the proposals for the regeneration of the Aylesbury estate. The Council directed the complainant to where the Heads of Terms could be viewed and provided a financial viability note with some information redacted in accordance with the 'confidentiality of commercial or industrial information' (regulation 12(5)(e)) and 'interests of the person who provided the information' (regulation 12(5)(f)) exceptions to disclosure in the EIR. The complaint to the Commissioner has two parts. In part A, the Commissioner has been required to consider whether the Council was entitled to withhold this information. In part B, the Commissioner has been asked to establish whether the Council holds additional viability information that should have been identified in response to the request.
2. The Commissioner has determined that (part A) neither regulation 12(5)(e) nor regulation 12(5)(f) of the EIR applies to the withheld information but has also decided (part B) that the Council does not hold any further information captured by the request. In light of his findings, the Commissioner requires the Council to disclose a complete version of the viability note.
3. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 9 March 2015, the complainant wrote to the Council and requested information in the following terms:

Ref applications 14/AP/3843-3844

[(i)] I would be grateful if you could forward me the 'Section 106 Heads of Terms' submitted with these planning applications for the comprehensive redevelopment of the Aylesbury estate and referred to in the applicant's covering letter of 26 September 2014 – I cannot see it on the website for either application.

[(ii)] I would also be grateful if you could send me any viability assessment, statement or document relating either or both of these applications.

5. The Council initially contacted the complainant on 9 March 2015 to confirm that the Heads of Terms requested at (i) could be viewed on its website and provided the complainant with a link to the document.
6. Following further correspondence from the complainant that confirmed he was still seeking the viability information, the Council issued its substantive response to request (ii) on 27 April 2015. The Council initially apologised for the delay in responding. It went on to explain that the decision had been made to release a redacted copy of the viability study of the Aylesbury estate, citing regulation 12(5)(e) of the EIR as the basis for withholding certain figures contained in the report. The exception is subject to the public interest test and the Council found that on balance the public interest favoured maintaining the exception.
7. The complainant subsequently asked the Council to reconsider its handling of request (ii). He explained that the viability study was of much less value to the public without the financial figures. The complainant further questioned whether the Council held any additional viability information that was captured by the scope of the request. The Council therefore carried out an internal review, the outcome of which was provided to the complainant on 12 June 2015.
8. The reviewer upheld the original application of regulation 12(5)(e) (confidentiality of commercial or industrial information) and also introduced regulation 12(5)(f) (interests of the person who provided the information) as a further ground for withholding the information. He did, however, find that the Council breached regulation 5(2) of the EIR by failing to respond within 20 working days after the date of receipt of the request.

Scope of the case

9. The complainant has contacted the Commissioner to complain about the Council's handling of request (ii), which asked for viability information produced in relation to the Aylesbury estate regeneration proposals. The complaint had two parts. Firstly (part A), the complainant disputed the Council's decision to withhold information in the viability study that was provided. Secondly (part B), he questioned whether there was additional viability information captured by the request that should have been identified and provided.
10. The Commissioner's analysis of each aspect of the complaint follows.

Reasons for decision

Background

11. A report produced for the Council's Planning Committee (23 April 2015)¹ provided the following background information to the Aylesbury estate regeneration plans:

5. Constructed between 1966 and 1977, the Aylesbury Estate covers an area of 28.5 hectares containing approximately 2700 dwellings. At the time it was built, the plans for the estate were considered innovative and aspirational – elevated walkways linking the blocks would enable people to walk from the Peckham 'Fives Estates' through Aylesbury and the Heygate to the Elephant and Castle. The walkways would separate pedestrians from the traffic, with parking garages at ground floor, and the decks becoming social spaces for the residents. On completion, the Aylesbury was one of the largest housing estates in western Europe.

6. However, over the following 30 years the estate became one of the most deprived areas in south London, with a high incidence of crime, ill health and low levels of employment and educational achievement.

7. In 2002 the council embarked upon plans for refurbishing the estate. However, structural surveys highlighted the extent of

¹ <http://moderngov.southwark.gov.uk/documents/s53358/Report.pdf>

works needed to the fabric and it was concluded that the cost of refurbishing the estate to an acceptable standard would be prohibitive. [...] It was decided that in order to secure a long term sustainable future for the area, a more comprehensive programme would be needed, and in 2005 the council took the decision to redevelop the estate.

8. Preparation of the Aylesbury Area Action Plan (AAP) began in March 2007. [...]

9. During the AAP preparation period, two early phases of redevelopment were put forward. Phase 1A in the south west corner of the estate has delivered 261 new homes, plus shops and a community centre (the Aylesbury Resource Centre). Site 7, in the north east corner of the estate is currently under construction, and will provide 147 new homes. [...]

10. In 2012 the council began the process of selecting its development partner to deliver the Aylesbury masterplan. Following a lengthy and rigorous procurement process, the council selected Notting Hill Housing Trust (NHHT). In April 2014 a development partnership agreement and business plan were agreed by the partners to secure the comprehensive regeneration of the Aylesbury estate by 2032. NHHT will be working with Barratt London to deliver this comprehensive scheme.

11. The guiding objective of the AAP is to deliver a new neighbourhood, better integrated with the wider area, with a mix of housing types and tenures. It aims to replace the 2700 properties with around 4,200 new houses and flats, together with new shops, community facilities, workspaces, open spaces and other infrastructure.

[...]

13. The future phases of the Aylesbury redevelopment would be delivered through two applications – a full application for the first development site (FDS) [14/AP/3843] and an Outline application for Phases 2, 3 and 4. Together, these developments have the potential to transform the area, achieving the AAP objective for an attractive, mixed neighbourhood where people would choose to live.

Part A of the complaint

Withheld information

12. The Council considers that the withheld information is covered by both regulation 12(5)(e) and regulation 12(5)(f) of the EIR. The Commissioner has initially reviewed the application of regulation 12(5)(e).

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. If the exception to disclosure is found to apply, the public authority must go on to consider the public interest test.
14. In *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012, 24 May 2010)², the Information Rights Tribunal considered that the construction of the exception could be read as imposing a four-stage test. All four of the following conditions must be satisfied 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 a third party, it will not be sufficient for a public authority to speculate on the potential harm attached to disclosure. Instead, it is imperative that a public authority has 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

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)

in the *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.

15. The Council has responded to the Commissioner's request for full supporting submissions by stating the following:

Southwark considers the information is commercial in nature.

Confidentiality is provided by the common law of confidence.

The Confidentiality is protecting the third parties legitimate economic interest. We attach correspondence with the third party concerning their interests.

The confidentiality would be adversely affected by disclosure of this information.

16. With regard to the correspondence with the third party specified above, the Commissioner has seen a copy of a covering letter from NNHT which specifies that only a redacted version of the viability study should be disclosed.
17. The Commissioner's guide to the EIR³ explains the principle behind the law is that giving the public access to environmental information will encourage greater awareness of issues that affect the environment. Greater awareness, the guide says, helps increase public participation in decision-making; the EIR makes public bodies more accountable and transparent and it builds public confidence and trust in them. It is therefore essential that a public authority is able to justify fully any decision to refuse to make environmental information available.
18. The Commissioner considers that the submissions provided in relation to regulation 12(5)(e) of the EIR are too limited in terms of detail to support the view that disclosure would have an adverse effect. The Commissioner has nevertheless been mindful of the approach adopted by the Information Tribunal in *Christopher Waltho v The Information Commissioner* (EA/2014/0280, 9 September 2014). On the way that evidence put before it should be tested in respect of the application of regulation 12(5)(e) and the claimed confidentiality of viability information, the Tribunal stated:

³ <https://ico.org.uk/media/for-organisations/guide-to-the-environmental-information-regulations-2-3.pdf>

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 developer's 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 developer's 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.

19. The question for the Commissioner is therefore whether the inferences that can reasonably be drawn from the withheld information, in combination with the arguments that have been provided by the Council and the NNHT, are sufficient for him to find that the exception does apply.
20. The Council has explained that it did not require the developer to produce the viability information as the proposed development exceeded its target level of affordable housing. Instead, the developer, NHHT, submitted the viability figures in response to a request from the Greater London Authority (GLA) as part of its policy on maximising housing. The Council has further explained that at the date of the request no planning permission was in place. Planning permission was in fact approved in April 2015 subject to legal agreement and granted in August 2015.
21. As identified by the complainant, the viability document is brief when compared with other viability assessments. This is apparently because it

is only a summary viability note. The withheld information comprises various cost and percentage figures relating to the development application. This includes revenue assumptions relating to, for example, private and affordable housing and details of the acquisition and construction costs.

22. The Commissioner has found that the information is made up of generalised or global figures relating to the proposed development. They do not therefore provide an in-depth picture of the developer's assumptions and projections. As such, the withheld information does not reveal details of the developer's financial model in a way that it has previously been found could be exploited by competitors or interested parties. In some cases as well, the Commissioner considers that the figures will be based on industry standard assumptions. The Tribunal in *Waltho*, for example, accepted that there are certain industry norms, including the expectation that the profit margins would be between 15-28% (a smaller development built quickly has less uncertainty and a developer would expect a lower profit (paragraph 21)). Importantly, a profit margin figure when presented in isolation may not indicate the profit margin that the developer would be prepared to undertake projects. This would therefore reduce the value of the information to a competitor.
23. From an analysis of the Council's submissions, the letter of the developer and his own observations, the Commissioner has no doubt that the withheld information is commercial in nature and is also prepared to accept that confidentiality is likely to be provided by the common law of confidence (even if this point has not been specifically made out). The Commissioner though considers that the assertion that confidentiality is required to protect the developer's legitimate economic interests has not been substantiated. The third stage of the test built into the exception is not therefore satisfied, meaning that regulation 12(5)(e) of the EIR is not engaged. The Commissioner has therefore gone on to consider the Council's application of regulation 12(5)(f) of the EIR.

Regulation 12(5)(f) – interests of the person who provided information to the public authority

24. Regulation 12(5)(f) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure.

25. The purpose of the exception is to protect the voluntary supply to public authorities of information that might not otherwise be made available. The Information Tribunal in *John Kuschmir v Information Commissioner and Shropshire Council* (EA/2011/0273, 25 April 2012)⁴ considered that the exception can be broken down into the following five-stage test:

- Would disclosure adversely affect the interests of the person who provided the information to the public authority?
- Was the person under, or could they have been put under, any legal obligation to supply the information to the public authority?
- Did the person supply the information in circumstances where the recipient public authority, or any other public authority, was entitled to disclose it apart from under the EIR?
- Has the person supplying the information consented to its disclosure?
- In all the circumstances, does the public interest in maintaining the exception outweigh the public interest?

26. With regard to the first stage of the test, the Commissioner's guidance⁵ on regulation 12(5)(f) explains that the threshold necessary to justify non-disclosure, because of an adverse effect, is a high one. The effect must be on the interests of the person who voluntarily provided the information and it must be adverse.

⁴http://www.informationtribunal.gov.uk/DBFiles/Decision/i750/2012_04_25%20Mr%20Kuschmir%20decision.pdf

⁵ https://ico.org.uk/media/for-organisations/documents/1638/eir_voluntary_supply_of_information_regulation.pdf

27. The Commissioner's guidance goes on to state that in considering whether there would be an adverse effect in this context, a public authority needs to identify harm to the third party's interests which is real, actual and of substance, and to explain why disclosure would, on the balance of probabilities, directly cause the harm. There is no requirement for the adverse effect to be significant, as the nature and severity of the harm will be reflected in the consideration of the public interest test. The public authority must, however, be able to explain the causal link between disclosure and the adverse effect, as well as why it would occur.
28. The Commissioner has asked the Council to describe how disclosure would adversely affect the interests of a person who provided the information. In response, the Council has stated that 'disclosure of this information would adversely affect the interest of Notting Hill Housing Trust.' No further explanation was provided to the Commissioner, or in the initial request correspondence to the complainant, which demonstrated the causal link between disclosure and the adverse effect.
29. The paucity of detail means that the Council's submissions do little to support the position that the first stage of the test is satisfied. The Commissioner considers it likely, however, that the nature of the adverse effect envisaged by the Council is likely to share some characteristics with the adverse effect cited in the application of regulation 12(5)(e) of the EIR.
30. The Commissioner found there that the Council had failed to demonstrate that disclosure of the withheld information would have an adverse effect. By extension, therefore, the same or similar arguments will not carry weight in terms of the application of regulation 12(5)(f). The Commissioner has therefore decided that the engagement test in regulation 12(5)(f) of the EIR is not met.
31. In summary then, the Commissioner has found that neither regulation 12(5)(e) nor regulation 12(5)(f) of the EIR apply to the information redacted in the viability note.

Part B of the complaint

Scope of viability information held

32. The complainant considers that the redacted viability note provided in response to his request is unexpectedly short given the size of the scheme. He has therefore questioned whether there is further viability information that is captured by his request.
33. The request asks for *any* viability assessment, statement or document. It is plain then that the request is broad in scope and would arguably

cover all recorded viability information that was produced in relation to the development. It is therefore for the Commissioner to decide whether, on the balance of probabilities, the Council holds additional information that should have been identified and provided in response to the request.

34. In the view of the Commissioner, it is significant that the viability information was drawn up not at the request of the Council but instead to comply with the GLC's policy on maximising housing. For this reason, the Council did not undertake its own analysis of the viability information. Two further points indicate that the Council does not hold additional information. Firstly, it has clarified that NHHT had not provided a viability assessment or statement with regard to any other area of the development. Secondly, and in any event, the Council has confirmed that for completeness it has reviewed the entire contents of the file relating to the development.
35. The Commissioner is satisfied, based on these explanations, that there is nothing to suggest that the Council does, or did, or indeed should, hold further information.

Right of appeal

36. 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

37. 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.
38. 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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