

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

Decision notice

Date: 9 August 2016

Public Authority: London Borough of Barnet
Address: North London Business Park
Oakleigh Road South
London
N11 1NP

Decision (including any steps ordered)

1. The complainant has requested the council to disclose the Financial Viability Assessment (FVA) for the redevelopment of the Sweets Way estate. The council disclosed some information but refused to disclose other information citing regulations 12(5)(c), 12(5)(e) and 12(5)(f) of the EIR.
2. The Commissioner's decision is that regulation 12(5)(c) of the EIR does not apply. In relation to regulations 12(5)(e) and 12(5)(f) of the EIR, the Commissioner has decided that these exceptions apply. However, the public interest in maintaining these exceptions is outweighed by the public interest in favour of disclosure.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation:
 - The council should disclose the remaining withheld information to the complainant.
4. The council must take these steps 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

5. On 12 August 2015, the complainant wrote to the council and requested information in the following terms:

"I request information under the Freedom of Information Act 2000. Please forward this request to the appropriate department(s).

Earlier this year, over 140 families from the Sweets Way estate in Barnet were decanted, following the council approving Annington's application to replace the existing homes with up to 288 new ones, of which only 59 are termed 'affordable'.

Annington purchased the Sweets Way properties from the Ministry of Defence in 1996 and leased it back to the MoD.

Request

1. Please provide information on the following:
 - a. A full breakdown of how much Annington paid the MoD for Sweets Way;
 - b. Information on the market value of Sweets Way at the time of sale;
 - c. If Sweets Way was sold at a loss, please provide information detailing the decision making process, including emails and other correspondence;
 - d. All conveyancing documents relating to the sale, including documents setting out the terms of the sale
 2. Please provide details of Annington's financial viability assessment for Sweets Way development approved in December 2014."
6. The council responded on 29 September 2015. In relation to question one, the council confirmed that it does not hold the requested information and so regulation 12(4)(a) of the EIR applies. In relation to question two, the council released a redacted version of the FVA to the complainant, confirming that information had been withheld under regulations 12(5)(c), 12(5)(e), 12(5)(f) and 13 of the EIR.
7. The complainant contacted the council to request an internal review. The complainant stated that he had no complaint about the application of regulation 13 of the EIR but wished the council to review its decision in relation to 12(5)(c), 12(5)(e) and 12(5)(f) of the EIR.
8. The council carried out an internal review and notified the complainant of its findings on 30 November 2015. It stated that it remained of the opinion that the remaining withheld information is exempt from disclosure under the exceptions cited.

Scope of the case

9. The complainant contacted the Commissioner on 19 December 2015 to complain about the way his request for information had been handled. The complainant stated that he had no complaint about the council's application of regulation 13 of the EIR but wished to challenge the application of the other exceptions cited.
10. The Commissioner's investigation has focussed on question two of the request, the remaining withheld information and the application of regulations 12(5)(c), 12(5)(e) and 12(5)(f) of the EIR.
11. The Commissioner will first consider the application of regulation 12(5)(e) of the EIR. He will then go on to consider the application of the other exceptions cited if it is found that regulation 12(5)(e) of the EIR does not apply to some or all of the remaining withheld information.

Background

12. At the time of the request Sweets Way was a residential housing estate in Whetstone in the Borough of Barnet, comprising of around 160 houses. The council confirmed that the estate has never been owned by the council but was originally owned by the Ministry of Defence (MoD). The MoD sold the properties to Annington Homes (Annington) for redevelopment and at the time of the request the properties were owned by Annington.
13. The council explained that the Sweets Way estate was used as short term/temporary housing generally for people who were owed a duty of housing, such as people who had presented as homeless. People were placed into the housing by Barnet Homes. Barnet Homes is an ALMO (Arm's Length Management Organisation) of the council. It is its own data controller and is a separate public authority for the purposes of the Data Protection Act, FOIA and EIR. Barnet Homes handles the council's homelessness duties, temporary housing and social housing.
14. The council advised that people were placed on the Sweets Way estate by Barnet Homes on a temporary basis (so not on secure tenancies) although some people had lived there for several years. No residents had been placed there by the council itself. The occupiers had tenancies with Annington (or Notting Hill Housing who managed the properties on Annington's behalf).
15. Annington wished to redevelop the Sweets Way estate and had plans to knock down the existing properties and build around 288 new properties

of which they proposed around 20% would be affordable housing. To undertake this development they needed vacant possession and so began the process of serving notice to quit to the occupiers.

16. The council's involvement in the site is as local planning authority. Annington applied for planning permission for the redevelopment of the site. As part of this application they had to show the level of affordable housing that they proposed to provide. To substantiate the level of affordable housing Annington submitted an FVA.
17. The council confirmed that residents on the estate were unhappy that they were being evicted. Although it was temporary accommodation some had lived there for several years and felt most aggrieved at the situation. Residents and other people protested and some occupied a number of the vacant properties. There was extensive local and some national press coverage and a known celebrity became involved with the cause. Annington undertook enforcement proceedings through the courts (without Barnet Homes or council involvement) to evict the protesters who were squatting.
18. The council confirmed that the FVA was submitted to the council in August 2014 with the affordable housing levels agreed by Committee in December 2014. A formal decision was then later made in July 2015 to grant planning permission. It understands that evictions were completed by the end of September 2015.

Reasons for decision

Regulation 12(5)(e)

19. Regulation 12(5)(e) of the EIR states 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.
20. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the council must demonstrate that:
 - the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.

21. This exception is also subject to the public interest test. In addition to demonstrating that this exception is engaged, the council must also explain how it considered the public interest for and against disclosure and how it reached the view that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception.
22. Dealing with the first bullet point, the council stated that the requested information is commercial in nature, as it relates to the commercial activity of Annington and the redevelopment of the Sweets Way estate. The Commissioner is satisfied that the requested information is commercial in nature. The requested information discusses the financial viability of the proposed development, the costs of the scheme to Annington and what it considers it can offer in affordable housing.
23. Turning now to the second bullet point, the council advised that the requested information is subject to confidentiality provided by law. It argued that the requested information is not trivial in nature; it relates to Annington's plans to redevelop the site and is of significant importance to Annington, the council and the wider public. The council also stated that the requested information is not in the public domain and was only shared with the council in circumstances creating an obligation of confidence.
24. The Commissioner considers "provided by law" includes confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
25. The Commissioner has not been provided with any evidence that an explicit contractual clause relating to confidentiality existed between the council and Annington. She is however satisfied that due to the nature of the withheld information, it is covered by a common law duty of confidence. It is not trivial in nature, has the necessary quality of confidence and was provided in circumstances where it was expected that the contents would be treated as private and confidential.
26. Concerning bullet points three and four, the council confirmed that the requested information sets out Annington's financial approach to such schemes and provides its detailed calculations. Disclosure would allow Annington's competitors to use this information to their advantage. It would enable them to see and use Annington's detailed complex methodology. Competitors would be able to see Annington's assumptions, pricing structure and risks and use them to Annington's disadvantage by undercutting them on pricing and exploiting areas of weakness. Annington would not have the same benefit from information about its competitors and would therefore be commercially disadvantaged.

27. The council also explained that Annington intends to sell the site to a redevelopment company once planning permission is obtained. The remaining withheld information would hinder Annington's ability to negotiate free and fairly with interested developers and would hinder the deal it can secure. The withheld information would give interested developers an insight into how Annington had assessed the proposed redevelopment of the site and would enable those interested in buying the site to tailor any bids accordingly. This would lead to Annington receiving a poorer deal.
28. The Commissioner is satisfied that regulation 12(5)(e) of the EIR applies in this case.
29. In the recent First-tier Tribunal hearing of *Mr Jeremy Clyne v The Information Commissioner and London Borough of Lambeth 9EA/2016/0012* ("the Clyne decision") a very similar request was considered. In paragraphs 30 to 57 of this decision similar information is considered to the remaining withheld information in this case and whether disclosure would adversely affect the developer.
30. Although the tribunal did not wholly accept that disclosure would have the effects described or at least to the extent claimed, overall, it concluded that the exception was engaged. Due to the similarities between this request and the request considered by the tribunal in the Clyne decision, the Commissioner has adopted the same position here.
31. At paragraph 61 of the Clyne decision the tribunal stated:

"We consider that the common law confidentiality protects a legitimate economic interest in the requested material, which reveals how the developer has priced the scheme. Disclosing the requested information to the public may conceivably attract attention which the developer may then have to invest time in dealing with, and may provide competitors or those involved in future negotiations with information that be of some interest and value to them albeit we consider that it would be highly unlikely to affect negotiation outcomes to the detriment of the developer. We are persuaded here by Mr Joyce who explained that developers tend to be very secretive about pricing schedules. We would accept where confidentiality protects a legitimate economic interest, disclosure causes an adverse effect for the developer because it would be by disclosing the confidential information, albeit, we consider the adverse effect to be limited extent. We accept the Council's arguments here that from a commercial perspective a risk of harm has an effect on financials or the way the business is run and as such is harm itself."
32. The Commissioner will now go on to consider the public interest test.

33. The council stated that it acknowledged the presumption in favour of disclosure that should be applied under the EIR, the importance of openness and transparency and enabling the public to participate in important decision making. It also stated that it understood the proposals attracted press coverage and a lot of local interest; including opposition.
34. However, in this case, it considered the public interest rested in maintaining the exception. It argued that disclosure would damage the relationship between the council and the developer and this is not in the interests of the wider public. Disclosure would also damage the commercial interests of Annington and increase the chances of the redevelopment and its viability being jeopardised or unsuccessful. The council stated that it was not in the interests of the wider public to allow that to happen, as this redevelopment would be providing much needed affordable housing for the local area. It also argued that the remaining redactions are minimal and do not prevent the public from examining the scheme and its viability.
35. The Commissioner's decision is that the public interest in maintaining this exemption is significantly outweighed by the public interest in disclosure. She will now explain why.
36. The council has confirmed that at the time of the request planning permission had already been granted and the level of affordable housing agreed. The objective of the EIR is to allow the affected community to have relevant information in time to participate effectively in environmental decision making, which would include before planning permission has been finalised. The complainant and the affected community have been denied access to information of significant public importance and information which would have assisted them in examining the proposals put forward more closely and participate effectively in the decision making process.
37. The Commissioner also considers there is much importance in transparency of viability assessments to enable members of the public to interrogate the reasons why a developer is unable to fulfil the core policy strategy on 40% affordable housing. In this case only 20% affordable housing had been secured, which is significantly below the council's target. The Commissioner considers there is a strong public interest in the council justifying why and in assisting the public to understand more closely why the policy in general is falling significantly short of its targets. The Commissioner considers access to the developer's FVA is the main route for doing that.

38. As the tribunal stated in the Clyne decision:

"There is a deficit if only developers and planning departments have access to the information needed to form an opinion."

And:

"The value of receiving the requested information is not lessened by either the planning application having gone through a thorough consultative process and decided by the planning committee, or BNPP having conducted an extensive and expert independent review of viability."

39. The Commissioner also notes that the estate was also used to house some of the most vulnerable people in society and many had lived there for several years (whether on a temporary basis or not). The developer's plans caused considerable upset and worry for these people and attracted local and national interest.

40. The Commissioner acknowledges that the remaining withheld information is Annington's confidential information detailing how they priced the development for the purposes of the viability assessment. She accepts that there are public interest arguments in favour of maintaining the exception. However, she considers these are outweighed by the strong and compelling arguments in favour of disclosure.

41. The Commissioner does not accept that disclosure would endanger the development from proceeding. Planning permission had already been granted by the council at the time of the request and the Commissioner does not accept that disclosure would adversely affect Annington's negotiating power going forward. It was accepted in the Clyne decision that FVA's become so quickly outdated and any negotiations would be far more likely driven by competitive processes and the economics of supply and demand. The Commissioner is of the view that this is even more so in this case. The FVA was almost 12 months old by the time planning permission was granted. Market conditions, costs and values will have changed over this period. Third parties wishing to enter into commercial negotiations with the developer will carry out their own research and conduct their own financial analysis rather than rely on outdated information.

Regulation 12(5)(f)

42. 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 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.

43. The council supplied limited arguments in support of the application of this exception and informed the Commissioner that this exception applies to the remaining withheld information for the same reasons 12(5)(e) applies. It stated that Annington was not under any legal obligation to supply the remaining withheld information to the council and has not consented to its disclosure.

44. The council advised that disclosure would adversely affect Annington's interests for the same reasons described in its analysis of regulation 12(5)(e) of EIR and the public interest rests in maintaining this exception.

45. The Commissioner is satisfied that in this case Annington was not under any legal obligation to provide this information to the council and, for the same reasons outlined in paragraphs 30 and 31 above, the exception is engaged.

46. However, she considers the public interest in favour of maintaining this exception is outweighed by the public interest in favour of disclosure, for the reasons she has already explained in paragraphs 32 to 41 above.

Regulation 12(5)(c)

47. Regulation 12(5)(c) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect intellectual property (IP) rights.

48. At paragraph 21 of the following guidance, the Commissioner states that the onus is on a public authority to identify the specific IP right that would be adversely affected and its owner:

https://ico.org.uk/media/for-organisations/documents/1632/eir_intellectual_property_rights.pdf

49. The guidance goes on to say that there are three main forms of IP rights: copyright, database rights, and copyright in databases. But there are many other forms of IP rights, including design rights, patents, trademarks and publication rights. The guidance states that a trade secret is not an IP as such. A trade secret is a form of confidential commercial or industrial information given additional protection under

the common law. It may also be protected by IP rights, but its status as a trade secret is not relevant for the purposes of this exception and is more appropriately addressed by regulation 12(5)(e) of the EIR.

50. In this case the council has not identified the specific IP right that would be adversely affected by disclosure despite the onus being on the council to do so. The Commissioner cannot consider whether this exception applies without such information and the relevant submissions required to demonstrate that a specific IP right applies and would be adversely affected by disclosure.
51. Many of the arguments submitted are more applicable to regulation 12(5)(e) of the EIR and the Commissioner has already addressed the application of this exception above.
52. Without further more detailed arguments to first identify a specific IP right and, then demonstrate the harm that disclosure would cause, the Commissioner can only conclude that regulation 12(5)(c) of the EIR does not apply in this case.

Procedural matters

53. The Commissioner notes that the complainant's request was received by the council on 12 August 2015. However, the council did not respond until 29 September 2015. As regulation 5(2) of the EIR stipulates that a public authority has 20 working days to respond to a request, the Commissioner has recorded a breach of regulation 5(2) in this case.

Right of appeal

54. 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

55. 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.
56. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF