

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

Decision notice

Date: 14 August 2019

Public Authority: Greater London Authority
Address: City Hall
London
SE1 2AA

Decision (including any steps ordered)

1. The complainant requested information concerning Crossrail 2 – a proposed rail route in South East England - specifically in relation to one of the routes proposed along the Northern line in London. The public authority withheld the information held within the scope of the request relying on the exceptions at regulations 12(4)(d) and 12(5)(e) EIR.
2. The Commissioner's decision is that the public authority was not entitled to rely on the exception at regulation 12(4)(d). The public authority was however entitled to rely on the exception at regulation 12(5)(e).
3. No steps required.

Request

4. On 18 November 2017 the complainant submitted a request for information to the public authority in the following terms:
 1. "Correspondence between the Mayor's office and Transport for London regarding Crossrail 2's proposed route through Tooting.
 2. Correspondence between the Deputy Mayor Val Shawcross and Transport for London regarding Crossrail 2's proposed route through Tooting."
5. The public authority responded on 21 December 2017. It disclosed a redacted version of the information in scope. The redacted information was withheld relying on the exception at regulation 12(4)(d) EIR.
6. On 4 April 2018 the complainant requested an internal review of that decision¹.
7. The public authority wrote to the complainant with details of the outcome of its internal review on 18 May 2018. The review upheld the original decision and clarified that the names and addresses redacted from the disclosed information were considered exempt on the basis of regulation 13 EIR.

Scope of the case

8. The complainant contacted the Commissioner on 22 July 2018 to complain about the public authority's handling of his request, specifically the decision to withhold the redacted information.
 9. On 20 December 2018, the public authority voluntarily disclosed some additional information to the complainant. The relevant information had either been previously withheld or was considered to fall outside the scope of the request and had been provided to add context to the disclosed information. The public authority disclosed a revised version of
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¹ He had in the interim submitted a similar request to the public authority on 28 February 2018 in relation to Crossrail 2's proposed route through Tooting. He received a response to that request on 22 March 2018. However, that response is not the subject of this decision notice.

the redacted documents released to the complainant on 21 December 2017 which included the additional information disclosed on 20 December.

10. The complainant had also confirmed on 28 September 2018 that he was not challenging the application of the exception at regulation 13 EIR to the names and addresses redacted from the chain of emails released to him on 21 December 2017.
11. During the course of the Commissioner's investigation the public authority additionally relied on the exception at regulation 12(5)(e) EIR. The complainant was invited by the Commissioner to respond to the public authority's submissions in support of the application of this exception which he did on 22 April 2019.
12. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to rely on the exceptions at regulations 12(4)(d) and 12(5)(e) EIR. The Commissioner has referred to the complainant's submissions at the relevant parts of her analysis below.

Reasons for decision

Background

13. The public authority helpfully contextualised the request with some background information which is summarised below.
14. Crossrail 2 is a proposed railway linking the national rail networks in Surrey and Hertfordshire via an underground tunnel through central London. The central tunnelled section of the route would serve stations between Wimbledon in the south, and New Southgate and Tottenham Hale in the north, providing an interchange with other London Underground, Overground and National Rail services.
15. Crossrail 2 is jointly sponsored by the Mayor of London and the Secretary of State for Transport. The project is being developed by Transport for London (TfL) and Network Rail, with support from the Department for Transport (DfT).
16. A key aim of Crossrail 2 is to provide relief to the southern section of the Northern Line underground line between Morden and Kennington. The most crowded section anywhere on the London Underground is the northbound section between Tooting and Stockwell in the weekday

morning peak and it has been acknowledged that a Crossrail 2 station in this area would significantly help relieve this congestion.

17. The last round of public consultation on Crossrail 2 was held in autumn 2015 and included questions about an alternative station location at Balham underground station after it had been identified that ground conditions in the Tooting area would make it significantly more difficult to build a station at Tooting Broadway than originally thought. Balham underground station is two stops further up the Northern line from Tooting Broadway. The findings of the consultation were published in March 2016.
18. Key decisions have yet to be made on a number of areas of Crossrail 2 including the route, stations and ventilation shaft locations, and work is ongoing to develop the overall scheme. TfL and the DfT announced the start of an Independent Affordability Review in March 2018 to examine ways of making the scheme more affordable.
19. Following the conclusion of the review Crossrail 2 will update their business case. Subject to a positive outcome on this business case, they plan to move the project forward and proceed with further formal public consultation.
20. The Independent Affordability Review produced a draft interim report setting out a series of recommendations which has been submitted to the Mayor and the Secretary of State for Transport for review. Work is still ongoing as additional information and content will be added in order to complete the report.
21. Crossrail 2 cannot be built before formal consent has been given by the Government. Crossrail 2 expect to submit their application between 2021 and 2022.

Withheld information

22. The public authority explained that because many members of the public colloquially refer to the whole of the Greater London Authority (GLA) as being "the Mayor's Office" (or Office of the Mayor), the scope of the request was interpreted to include all relevant areas of the GLA including the Deputy Mayor's Office.
23. The information in scope falls into two categories: Email correspondence held by the GLA Transport team relating to the handling and response to a public petition about Tooting Broadway Market and concerns about how it would be affected by the proposed Crossrail 2 work in the area, and copies of Crossrail 2 Programme Board agendas and papers held by

two members of the GLA Corporate Management Team who were both members of the Programme Board.

24. The withheld information² was redacted from the Crossrail 2 Programme Board specifically the "Case scheme option" document which sets out the case for a station at either Balham or Tooting Broadway.

Application of regulation 12(4)(d)

25. Regulation 12(4)(d) states:

"A public authority may refuse to disclose information to the extent that the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data."³

Public authority's submission

26. The public authority's submission in support of the application of the exception is summarised below.
27. The exception is engaged on the basis that the withheld information constitutes information which is still in the course of completion. The public authority is not relying on either the second or third limbs of the exception (ie unfinished documents or incomplete data).
28. The withheld information relates to the discussions about proposals for an alternative route of Crossrail 2 in South London and whether a station between Wimbledon and Clapham Junction should be located at either Tooting Broadway or Balham Underground stations on the Northern Line. The Independent Affordability Review will lead to an updated business case for Crossrail 2 and further public consultations before the formal consent to proceed is sought from Parliament.
29. The withheld information discusses options, suggestions and recommendations relating to Balham-Tooting route alternatives. While this information was considered at Programme Board meetings in 2016 and 2017, at the time of the request and currently, key decisions have yet to be made on many areas of Crossrail 2 including the route,

² For the purposes of this notice, "the withheld information" refers only to the information the public authority considers exempt on the basis of regulations 12(4)(d) and 12(5)(e) EIR. It does not include the names and addresses withheld on the basis of regulation 13 EIR.

³ <http://www.legislation.gov.uk/ukxi/2004/3391/regulation/12/made>

stations and ventilation shaft locations. Furthermore, the withheld information forms part of the proposals and advice that are being considered as part of the Independent Affordability Review.

30. In support of its position the public authority drew the Commissioner's attention to the following comment in her guidance on the application of the exception:

"The fact that the exception refers to both material in the course of completion and unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of completion."

31. Furthermore, the route planning for Crossrail 2 between Wimbledon and Clapham Junction, and the deliberations between a station at either Balham or Tooting Broadway underground stations, are very much ongoing and in the course of completion.
32. In response to the Commissioner's enquiries the public authority stressed that the information released to the complainant on 21 December 2017 and 20 December 2018 reflects information that has previously been released by Crossrail 2 and is therefore already in the public domain. While the exception can technically be applied to a wide range of information relating to Crossrail 2, where information can be released or published to aid public understanding and engagement without undermining the live and ongoing decision-making process, it is sensible to do so.
33. With respect to the balance of the public interest, the public authority acknowledged there is always a general public interest in disclosing environmental information derived from the purpose of the EIR itself.
34. More specifically it acknowledged that the Crossrail 2 project as a whole is a matter of significant public interest because of its scale, complexity, the potential costs involved and the impact it will have on individual communities, businesses and individuals across London and beyond.
35. In terms of the withheld information it acknowledged that there is a public interest in disclosing the information so those affected by the proposals are kept informed of matters which will affect them and their communities. This will contribute to an informed public debate on pertinent issues about the route options being considered and aid public understanding of an important project and matters of public concern. This in turn helps ensure that Crossrail 2 and the associated public

authorities involved in developing the route remain accountable to the public in respect of its decision making.

36. The public authority however argued that Crossrail 2 is entitled to have a degree of safe space in which to work candidly and freely without being concerned that information could be released in a form where it is potentially misleading, incomplete or otherwise prejudicial to the overall aims of the project. Disclosing the withheld information in relation to such a high profile project that is subject to public and media scrutiny would be likely to lead to misinterpretation or potentially mislead the public into thinking a final decision has been made about the Tooting/Balham route option. This would be likely to have negative implications for residents and property owners along or near the proposed route areas such as affecting the value of properties.
37. While the information could be contextualised this would not be sufficient to guarantee to correct any misleading impressions or confusion that would be created within the local community.
38. As the decision-making process is still live disclosure of information regarding the Tooting-Balham route options would result in unproductive public debate and interrogation of Crossrail 2 on un-adopted positions and potentially abandoned arguments. This would be likely to make it more difficult to bring the Independent Affordability Review process to a proper conclusion in a timely manner. Following conclusion of the Independent Affordability Review, Crossrail 2 plan to move the project forward and proceed with formal consultation. As with previous Crossrail 2 consultations information including maps showing the proposed route options will likely be published to accompany the consultations.
39. Furthermore, the considerable amount of information which is proactively published by Crossrail 2 about the route options being considered and indeed any other aspect of the project goes a considerable way towards meeting the public interest in openness and transparency.
40. On balance therefore, in the circumstances, the legitimate public interest in public scrutiny and accountability will be met by the timely publication of correct and complete information following the conclusion of the Independent Affordability Review to inform public consultations. It is important for the public to know exactly what strategies and options are being taken forward rather than releasing options or information which in the end may not be relevant.

Complainant's submission

41. The complainant's submission is reproduced below along with a summary of the public authority's rebuttal.
42. In his letter of 4 April 2018 requesting an internal review the complainant argued as follows:

"There is a clear and overriding public interest in lifting the redactions....The public has a right to know what routes have been considered, as it could affect them personally and/or professionally, and they have a right to know which routes have been discounted, or deemed less favourable, and for what reasons.

It is also known that the Mayor of London owns a home in the Wandsworth area – as declared on his register of interests. Therefore, it is in the public interest to lift redactions relating to considered routes through Tooting so that the public can understand if that interest may or may not have factored in to decision making processes regarding the route of Crossrail 2 through Tooting."

43. The first part of the submission is addressed generally in the public authority's public interest considerations above. With respect to the second part of the submission the public authority argued that while it agrees there would be significant public interest in favour of the disclosure of any information which might indicate any conflict of interest, the withheld information does not refer to whether the Mayor's home is near either proposed route.
44. In an email of 24 December 2018 to the Commissioner the complainant argued as follows:

"TfL research into the ground conditions at Tooting published three years ago under the last administration (linked below) found that the geology of the area meant one possible construction method for tunnels in the area that involved ground freezing would raise "tunnel safety" issues (pp. 12).

https://consultations.tfl.gov.uk/crossrail2/october2015/supporting_documents/Tooting%20Broadway%20Station%20Geological%20Issues.pdf

It is also expected that developing a Crossrail 2 station at Tooting Broadway will cost the taxpayer significantly more than an alternative proposed for Balham (pp.13).

Considering that public safety and cost concerns have previously been raised about developing a Crossrail 2 station at Tooting Broadway, I

believe it is in the public interest to know why Crossrail 2 stakeholders have put the option back on the cards since a change of leadership at TfL and City Hall.

Any redactions touching on the matters of public cost concerns and potential tunnel safety should be lifted.”

45. The public authority explained that ground freezing is a safe and commonly used method for underground construction and has been used on numerous infrastructure projects across the world. The escalator tunnel at Tottenham Hale station was constructed using this method in the late 1960s as it had similar ground conditions to those Crossrail 2 are facing at Tooting Broadway.
46. During the previous route-wide public consultation in 2015 Crossrail 2 believed that a station at Tooting Broadway would cost approximately £500 million more than a station at Balham. Since that time more work has been done to understand the costs and benefits of a station at Tooting Broadway.
47. In addition, Crossrail 2 have been continuing their work to reduce the cost of the scheme through savings in the design and delivery in order to ensure the best value for money. This is following the Government’s announcement of an Independent Affordability Review in the 2017 Autumn Statement.
48. The public authority provided a further statement in confidence⁴ to the Commissioner in further rebuttal of the argument that there is a stronger public interest in disclosure due to concerns regarding the cost of the Tooting Broadway route.
49. With respect to redactions in relation to cost concerns and tunnel safety, the public authority explained that none of the withheld information relates to matters of tunnel safety and as such it does not consider this to be a particularly pertinent public interest consideration in this case.
50. Furthermore, it does not consider that there is a stronger public interest in disclosing the estimated cost difference between the two routes at a point in time where work is ongoing to understand the potential costs of a station at Tooting Broadway.

⁴ The public authority explained that the statement is part of the information withheld in this case and is therefore considered exempt on the basis of regulation 12(4)(d).

The Commissioner's considerations

Is the exception at regulation 12(4)(d) engaged?

51. The Commissioner has first considered whether the withheld information engages the exception at regulation 12(4)(d) on the basis that the request relates to material which is still in the course of completion.
52. In the recent Upper Tribunal decision in *Highways England Ltd v Information Commissioner & Mainstay* (the *Highways England* case)⁵, the Upper Tribunal made a number of observations in relation to the meaning of 'material' in regulation 12(4)(d). Of relevance to this case is the view that "'material' [within the meaning of regulation 12(4)(d)] must have a physical existence. It is not apt to describe something incorporeal, like a project, an exercise or a process. That is what the [Aarhus] implementation Guide says and it is surely right as a matter of language."⁶
53. As mentioned, the withheld information was redacted from the Crossrail 2 Programme Board specifically the "Case scheme option" document which sets out the case for a station at either Balham or Tooting Broadway. The document contains proposals for an alternative route of Crossrail 2 in South London and whether a station between Wimbledon and Clapham Junction should be located at either Tooting Broadway or Balham Underground stations on the Northern Line. Therefore, the Commissioner considers that the case scheme option document is the relevant 'material' in the circumstances of this case for the purposes of the application of regulation 12(4)(d).
54. Turning now to whether the material (ie the case scheme option document) is a 'material in the course of completion'. The Upper Tribunal in the *Highways England* case also made a number of observations in relation to the meaning of 'material in the course of completion'. Of relevance to this case are the following:

"The [Aarhus] Convention does not clearly define 'materials' in the course of completion. However, it is clear that the expression in the course of completion relates to the process of preparation of the

⁵ [2018] UKUT 423 ACC
https://assets.publishing.service.gov.uk/media/5c7fad1640f0b6332c6c6851/GIA_1589_2018-01.pdf

⁶ Paragraph 23

information or a document and not to any decision-making process for the purpose of which the given information or document has been prepared....it is the material that must be in the course of completion, not the project.....The words 'in the course of completion' suggest that the term refers to individual documents that are actively being worked on by the public authority. Once those documents are no longer in the 'course of completion' they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved."⁷

"The exception must..... be applied restrictively. It must not be engaged so widely as to be incompatible with the restrictive approach required by EU law. But it must not be engaged so narrowly that it defeats its purpose of allowing public authorities to think in private."⁸

"It is not engaged when a piece of work may fairly be said to be complete in itself.....The piece of work may form part of further work that is still in the course of preparation, but it does not itself require further development. One factor that may help in applying this approach in some cases is whether there has been a natural break in the private thinking that the public authority is undertaking. Is it moving from one stage of the project to another? Another factor may be whether the authority is ready to go public about progress so far."⁹

55. The case scheme option document was produced in August 2016 following the publication in 2015 of a Transport for London (TfL) commissioned appraisal of ground conditions at Tooting Broadway.¹⁰ The Commissioner considers that the case scheme option document which also included an appraisal of ground conditions at Tooting Broadway was completed in 2016 and it is a separate, albeit, connected document to the overall Crossrail 2 project. The Independent Affordability Review was commissioned by TfL in March 2018 after the complainant submitted his request in November 2017. Therefore, the Commissioner has not taken

⁷ Paragraph 8

⁸ Paragraph 31

⁹ Paragraph 32

¹⁰

https://consultations.tfl.gov.uk/crossrail2/october2015/supporting_documents/Tooting%20Broadway%20Station%20Geological%20Issues.pdf

the affordability review into account for the purposes of determining whether regulation 12(4)(d) is engaged.

56. Consequently, the Commissioner has concluded that the case scheme option document is not 'a material in the course of completion' within the meaning of regulation 12(4)(d).
57. Taking all of the above into account the Commissioner finds that the public authority was not entitled to engage the exception at regulation 12(4)(d).
58. In view of her finding that the exception is not engaged, the Commissioner has not considered where the balance of the public interest lies further to the provision in regulation 12(1)(b) EIR.

Application of regulation 12(5)(e)

59. Regulation 12(5)(e) states:

"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."¹¹

Public authority's submission

60. The public authority's submission in support of the application of the exception is summarised below.
61. In order to build Crossrail 2 TfL would need to acquire areas of land along the proposed route. As transport infrastructure takes a long time to plan, design and build, TfL and Crossrail 2 need to ensure that the land required both above and below ground is protected. This is done through a process called safeguarding.
62. Safeguarding is an early part of the planning process which allows the Government to issue a Direction to local planning authorities asking that TfL is notified of any proposed development along the identified safeguarding route for Crossrail 2 that might impact upon the plan for the delivery of the project.

¹¹ <http://www.legislation.gov.uk/ukxi/2004/3391/regulation/12/made>

63. This is a fundamental mechanism to protect the land needed for the project and is increasingly important in cities such as London where there is significant development with bigger buildings and deeper foundations. Safeguarding does not necessarily prevent developments taking place, rather it ensures that plans can accommodate proposed infrastructure of strategic importance.
64. In order to successfully engage the exception it needs to be established that the withheld information is commercial or industrial in nature, the withheld information is confidential under the common law of confidence, contract or a statutory bar, the confidentiality is protecting a legitimate economic interest and the confidentiality will be adversely affected by disclosure.
65. The public authority argued its position further to the criteria above under the following two sub-headings; "The information is commercial or industrial in nature/Confidentiality is provided by law" and "The confidentiality is protecting a legitimate economic interest/the confidentiality would be adversely affected by disclosure."

The information is commercial or industrial in nature/Confidentiality is provided by law

66. The withheld information relates to discussions about proposals for an alternative route of Crossrail 2 in South London and whether a station between Wimbledon and Clapham Junction should be located at either Tooting Broadway or Balham Underground stations on the Northern Line. It discusses options, suggestions and recommendations relating to Balham-Tooting route alternatives. This includes details of the areas potentially impacted or affected by either of the route options and regeneration of the areas affected by each option, disclosure of which would provide advance information directly affecting numerous residential, commercial and community use properties. These properties which are located across each route option will be the subject of future acquisitions if the necessary powers are confirmed by the Government for the future delivery of Crossrail 2.
67. In the context of the project, once land has been safeguarded it becomes protected and no development should take place without Crossrail 2 being notified to determine whether it would have an impact on the future ability to build or add to the future costs associated with operating the railway.
68. The general consensus and considered view in the property industry is that releasing details of future infrastructure investment and the land

required for future transport infrastructure will inevitably lead to an upward pressure and increase in land values.

The confidentiality is protecting a legitimate economic interest/the confidentiality would be adversely affected by disclosure

69. All land and property has an existing value which is a figure for what it is worth in its current form. Anything that might change the status of that land and gives greater certainty about the future development prospects will add to the value of that land. The 'hope value'¹² will inevitably increase as the likelihood of new alternative, more profitable, uses of that land become more and more certain.
70. Crossrail 2 is currently waiting on a decision from Government as to how the project may be taken forward. It is therefore a working assumption that the necessary Crossrail 2 powers to take the project forward would be confirmed via a hybrid bill process similar to that already in place for the current Crossrail 1 project being delivered. Crossrail 2 is a multi-billion pound strategic transport scheme of national significance. Releasing information regarding the possible future safeguarding of land without the land having the benefit of statutory safeguarding could end up costing the project some £2bn in additional land values. It would severely diminish TfL's ability to secure land at its current estimated value potentially preventing TfL from securing best value for public funds and could ultimately affect the ability to deliver Crossrail 2 altogether. Given that Crossrail 2 has undergone a rigorous Independent Affordability Review at the behest of the Government to understand ways to obtain value for the taxpayer when delivering the route, disclosure of the withheld information would effectively undermine all the work that has been done to date.

Public interest test

71. With respect to the balance of the public interest the public authority acknowledged the importance of accountability and the strong argument it provides for the release of information that enables the public to satisfy themselves that best value is achieved through the expenditure of public funds. In recognition of the public interest in transparency and accountability, following on from Crossrail 2's lengthy public consultation

¹² Described as a value reflective of speculative future planning permissions. See House of Commons, Housing, Communities and Local Government Committee Land Value Capture Tenth Report of Session 2017–19.

in 2015, their strategic plan has always encompassed regularly updating publicly available information about the route options and engaging with as many of the affected home and business owners as possible. Once the scheme has been given full ministerial approval Crossrail 2 will undertake another formal public consultation.

72. With respect to the public interest in maintaining the exception, the public authority explained that Crossrail 2 is a significant project offering nationwide benefits. It would support the regeneration and development of up to 200,000 new homes across London and the South East as well as support 60,000 new jobs across the UK supply chain while under construction and 200,000 jobs across London and the South East once operational. Londoners are facing far longer commutes and businesses are struggling to recruit and retain the people they need to grow and prosper. Good transport links are vital so people can get to work. Previous transport improvements have shown the potential benefits of investing in under-developed areas with Crossrail 1 spurring major housebuilding in anticipation of the new railway.
73. Disclosing information about the potential locations of construction site, ventilation shafts and other construction infrastructure at this stage would only serve to significantly increase the cost of the project and bring into question the viability of being able to deliver the project at all.
74. Therefore, on balance, disclosing the withheld information relating to route options between Wimbledon and Clapham would adversely affect the commercial and legitimate economic interests of Crossrail 2 and TfL in way that would lead to increased costs being passed on to the taxpayers. Consequently, there is a stronger public interest in maintaining the exception.

Complainant's submission

75. The complainant's submission is reproduced below.

"I re-iterate that the TfL geological research into a possible Crossrail 2 station, published in 2015 and previously shared in relation to this case, raised significant concerns about the extra cost of constructing a station around Tooting Broadway as opposed to Balham.

These extra costs, like the potential land inflations caused by disclosure of information, would have to be borne by taxpayers. It is in the public interest that it be understood what research, if any, has motivated the decision of authorities to favour the more expensive of the two options.

It would also be interesting to understand how the GLA arrived at its predicted "£2bn of additional land values" figure.

A far greater concern than cost is that of public safety. The TfL research cited above said one possible construction method for tunnels in the Tooting Broadway area which involved ground freezing would raise "tunnel safety" issues.

The public interest in disclosure of any research or ongoing concerns about the safety of constructing a station near Tooting Broadway is vital.

Lastly there is clearly concern in the Tooting Broadway area about the impact a Crossrail 2 station would have on local heritage - particularly the future of the historic Tooting Market. There are numerous articles available on this issue, but I would particularly draw your attention to a blog from local MP Rosena Allin-Khan on the issue:

<https://www.drrosena.co.uk/crossrail-2.html> "

The Commissioner's considerations

Is the exception at regulation 12(5)(e) engaged?

76. The Commissioner has considered whether the exception is engaged with reference to the four criteria which must be met, namely; the withheld information is commercial or industrial in nature, the withheld information is subject to a duty of confidence under either the common law of confidence, contract, or a statutory bar, the confidentiality is protecting a legitimate economic interest and, that economic interest and thereby its confidentiality would be adversely affected by disclosure of the information.
77. The Commissioner accepts that the withheld information which reveals details of the areas potentially impacted or affected by Crossrail 2 route options including residential and business properties is commercial in nature relating as it does to potential acquisitions of these properties by TfL.
78. Consequently, the Commissioner considers that any reasonable person in the public authority's position would treat as confidential, information that would likely undermine its ability to acquire these properties at their market, rather than, 'hope value'. The Commissioner therefore finds that the withheld information is subject to the common law of confidence.
79. The Commissioner considers that to satisfy the third criterion, disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. In the Commissioner's

view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities – ie more probable than not - that some harm would be caused by the disclosure.

80. This approach is supported by the requirement in the EU Directive¹³ to interpret the exceptions in a restrictive way. In addition, the implementation guide for the Aarhus Convention gives the following guidance on legitimate economic interests:

“Determine harm. Legitimate economic interest also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors.”

81. This is consistent with the regulation 12(5) exceptions in the EIR which require that “disclosure would adversely affect” the relevant interests identified in each exception.
82. Taking all of the above into account, the Commissioner invited the public authority to comment on the view that; given it is public knowledge a station is going to be located at either Tooting Broadway or Balham, people interested in that property market area including land and property owners and developers are likely to be able to work out the potential Crossrail 2 routes to a reasonable degree of accuracy without the benefit of the withheld information.
83. The public authority argued that while people might be able to infer the approximate locations of certain infrastructure and construction sites, there is no information in the public domain to enable them to precisely identify the exact location of all sites since decisions have not yet been made on the proposed routes.
84. Furthermore, as well as the land identified for future safeguarding, the withheld information shows the reasoning behind why one route is the preferred option over the other. This information is materially different to anything currently in the public domain and also provides the necessary clarity a developer would require to begin developing the land in order to maximise its value ahead of any opportunity to safeguard that land.

¹³ European Directive 2003/4/EC on public access to environmental information.

85. The public authority added that the withheld information is contained within the results of the Independent Affordability Review of Crossrail 2 and updated Strategic Outline Business case which are being used to inform the Secretary of State's decision. It is expected that these will be made publicly available once the Secretary of State has made their decision.
86. In the Commissioner's view the key question in this case with respect to satisfying the third criterion is whether, given it is more likely than not that people interested in that property market area including developers will be able to work out to a reasonable degree of accuracy the potential Crossrail 2 route along the Tooting Broadway or Balham alternatives, would disclosing the withheld information significantly influence land and property values along potential Crossrail 2 routes?
87. The Commissioner accepts that the withheld information is materially different to related information in the public domain and, more importantly, that it provides the necessary clarity a developer would require to begin developing the land in order to maximise its value ahead of any opportunity to safeguard that land. While developers will already have a good idea of possible safeguarding routes, the Commissioner has attached more weight to the view that releasing information regarding the possible future safeguarding of land without the land having the benefit of statutory safeguarding could end up increasing the cost to the public purse of what is already a multi-billion pound transport scheme. Once the withheld information is disclosed, developers could seek to obtain land along the preferred route, possibly apply for planning permission from the local authority but choose not to develop the site in order to obtain the additional 'hope value' for the land when TfL comes to purchase it for Crossrail 2.
88. The Commissioner is therefore satisfied that the four criteria necessary for the engagement of regulation 12(5)(e) have been met in this case.

Balance of the public interest

89. Consequently, further to regulation 12(1)(b) EIR, the Commissioner next considered whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
90. The Commissioner has effectively accepted that large sums of public money will potentially be saved if the withheld information is not released at this point. There is a strong public interest in delivering Crossrail 2 without unnecessarily inflated costs. Therefore, although there is a public interest in revealing whether the public authority

favours the more expensive of the two options at either Tooting Broadway or Balham and the accompanying reasons, that is outweighed by the public interest in not significantly inflating the cost of delivering Crossrail 2.

91. It is also the case that there will be a public consultation following conclusion of the Independent Affordability Review and information including maps showing the proposed route options will likely be published to accompany the consultation.
92. The public authority considers that ground freezing is a safe and commonly used method for underground construction and has been used on numerous infrastructure projects across the world. It further argued that none of the withheld information relates to matters of tunnel safety in any event. The Commissioner is satisfied that the withheld information is unlikely to substantively inform the debates on tunnel safety issues and the impact a Crossrail 2 station would have on local heritage - particularly the future of the historic Tooting Market. Even if the Commissioner is wrong on this point, she is satisfied that any limited contribution the withheld information could add to those debates is outweighed by the strong public interest in not significantly inflating the cost of delivering Crossrail 2 by releasing details of possible safeguarding route options.
93. The Commissioner has therefore concluded that on balance the public interest in maintaining the exception outweighs the public interest in disclosing the withheld information.

Right of appeal

94. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

95. 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.
96. 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

Gerrard Tracey
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