

Environmental Information Regulations 2004

Decision notice

Date: 16 March 2016

Public Authority: Westminster City Council
Address: Westminster City Hall
64 Victoria Street
London
SW1E 6QP

Decision (including any steps ordered)

1. The complainant has requested a full copy of a viability report in relation to a planning application regarding a development site in London. The Council disclosed this report, however it redacted some information from it ("the withheld information.") citing regulation 12(5)(e) of the EIR as a basis for non-disclosure.
2. The Commissioner's decision is that the exception as set out in the above regulation is engaged, however the public interest in all the circumstances of the case favours disclosure of the withheld information.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - To disclose the withheld information to the complainant.
4. The public authority 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 10 June 2015, the complainant wrote to the Council and requested information in the following terms:

"...to disclose the full Cabinet Member report of February 2014 and the full viability report and supporting documentation."

6. The Council responded on 5 August 2015. It provided both requested documents to the complainant, however it had redacted some information (the withheld information) from the viability report, citing the exemptions under sections 41 and 43(2) of FOIA and the exception under regulation 12(5)(e) of the EIR.
7. On 2 October 2015, an internal review of the Council's decision was sought by the complainant's client. However, the Council informed the Commissioner that it did not carry out an internal review as it stated that it would only carry out such a review by request of the original applicant.
8. The complainant had raised the matter with the Commissioner on 22 September 2015, however they stated that they were still awaiting a response from the Council and would provide the Commissioner with full submissions once they had received that response.
9. As the Council had not provided a response, on 23 November 2015 the Commissioner contacted the Council to discuss the matter. The Commissioner decided to exercise his discretion in respect of the lack of internal review and to proceed with the complaint so as not to incur further delays.
10. The Council provided the Commissioner with its submissions in respect of its application of the FOIA exemptions and EIR exception on 15 January 2016.

Scope of the case

11. The complainant contacted the Commissioner on 22 September 2015 to complain about the way their request for information had been handled.
12. The Commissioner has considered the Council's application of the exception set out under regulation 12(5)(e) of the EIR, however he has not considered its application of the exemptions under FOIA. This is because the Commissioner considers that the entirety of the withheld information falls under the below regulation of the EIR as it is information that relates to:-

'measures, (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities

affecting or likely to affect the elements and factors such as land, landscape.....”.

The Council accepts that this is the case.

Reasons for decision

13. 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.
14. 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.
15. 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.
16. The Council confirmed that the withheld information is clearly commercial in nature. The Financial Viability Assessment Report was produced in respect of the developer's proposal for the development site including the planning obligation provision, and the financial implications and analysis of it, i.e. the costs, revenues, incomes and profits that the proposed development will generate. It is the financial implications, facts, figures, breakdown and analysis which have been redacted. As a result, the withheld information comprises information relating to the commercial activities associated with the development proposal for both the Council and the developer.
17. It is further considered by the Council that the information remains commercially relevant at this time, given that certain aspects of the development are still subject to negotiation between the Council, the

developer and relevant third parties. Consequently, it is considered that the redacted financial information is commercial in nature, and thereby fulfils the first criteria of this exception.

18. In relation to the second element of this exception, the Commissioner considers that “provided by law” includes confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
19. The Commissioner is not aware of any statutory duty of confidence, and the report does not contain any provision or obligation relating to confidentiality. Therefore the Commissioner has considered the common law of confidence, which has two key tests:
 - does the information have the necessary quality of confidence?
 - was the information imparted in circumstances creating an obligation of confidence?
20. For the common law duty of confidence to apply the information must have the necessary quality of confidence, meaning the information should not be trivial in nature and should not already be in the public domain.
21. The Council informed the Commissioner that the information contained within the report was supplied to the Council to demonstrate the developer’s assessment of the viability of their proposal for the development site. This information was provided in confidence at the time of the proposal in the expectation it would be used for the consideration of the planning application against relevant market values. This information was not otherwise publicly available, and was provided in confidence, i.e. in the expectation it would not be disclosed to the public at large until such time as the negotiations had been fully completed and the information was no longer commercially sensitive.
22. The Commissioner is satisfied that the information is not trivial in nature and that it is not already in the public domain. He is also satisfied that the circumstances in which the information was imparted to the Council would give rise to an obligation of confidentiality on the part of the Council until the negotiations were complete. Therefore the Commissioner is satisfied that the information is subject to confidentiality provided by law and therefore fulfils the second element of the exception.

Is the confidentiality protecting a legitimate economic interest?

23. Turning now to the third and fourth element of this exception, in the Commissioner’s view, in order to satisfy this element of the test, disclosure of the confidential information would have to adversely

affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.

24. In his 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 that some harm **would** be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets 'would' to mean 'more probable than not'.
25. The Council argued that disclosure of the information would result in all parties "showing their hand" at a time when negotiations are still in progress, and the actual development has not been started. Therefore disclosure would adversely affect the developer's legitimate economic interests in terms of their ability to negotiate with third parties such as:
- Leaseholders in existing properties within, or adjacent to the proposed development, would be able to use the financial information within the report for leverage in negotiations ongoing at this time.
 - Buyers for residential properties, development site, existing asset, the freehold and registered providers for affordable housing units
 - Construction companies / other developers for material and labour.
26. Further, the Council argues that its legitimate economic interests would be adversely affected by any delay or interruption of this negotiation process in terms of:
- The further time and resources dedicated to this ongoing matter,
 - Properties within the borough remaining empty (and thereby not generating council tax, business rates etc for the public purse), and
 - Lack of confidence in the confidentiality of the planning application process by future developers, thereby reducing the number of developers who may otherwise wish to work with the council in the future.

As a result, the Council considers that confidentiality of this information is required at this time to protect the legitimate economic interests of the parties as set out above.

27. Significantly, the Council also considers that the wider public's legitimate economic interests would be adversely affected by any delay or interruption of the development, which includes community regeneration and affordable housing.

28. The Commissioner, having considered all these points and having perused the withheld information, considers that disclosure of the withheld information would adversely affect the commercial interests of the Council as a result of the circumstances at the time of the request. However, the exception under regulation 12(5)(e) of the EIR is subject to the public interest test, therefore the Commissioner has considered the public interest arguments both in favour of maintaining the exception and in favour of disclosing the withheld information.

Public Interest Test

Public interest arguments in favour of disclosure

29. The council recognises the need for transparency in relation to its decisions, and information relied upon for them, particularly where it would further the understanding of, and thereby the public debate, in relation to this planning application.
30. However, the Council has informed the Commissioner that it already proactively publishes non-confidential information in relation to planning applications online, therefore it considers that this would be sufficient to satisfy the public interest in terms of openness and transparency.
31. The Commissioner considers that there will always be a significant level of public interest in a public authority's decision to allow re-development of land and property, as the public will want to be reassured that the re-development is either necessary or in the best interests of the community served by the public authority.
32. In this case, the number of affordable homes to be provided on this development, as well as their location, is an important local issue on which reasonable views are held strongly on both sides, therefore the Commissioner considers that there is a strong public interest in furthering public understanding and debate in relation to the planning application.
33. In this case also, the Council owns the freehold interest in the land proposed for development, and therefore the complainant argues that, as both the decision maker and the property owner, it should act with the utmost transparency in order to demonstrate objectivity and lack of bias. The Commissioner considers that there is a strong public interest in the Council acting in such a manner and "playing its cards face up."

Public interest arguments in favour of maintaining the exception

34. Organisations are required to provide commercially-sensitive information during the planning process. If they cannot be assured of

the confidentiality of that information they would be reluctant to provide it to the Council, which would undermine the Council's ability to fulfil its role. Further, a lack of confidence in the process may result in developers choosing not to work with the Council in future because of the risk to their commercial interests through untimely disclosure. This would thereby reduce the cost-effective options that may be available to the Council to negotiate the best price as a result.

35. At this present time the negotiations of the developer's leasehold interest and third party interests are still in progress, and development is yet to start. As a result disclosure at this time could undermine the Council's commercial position in respect of such negotiations, thereby impacting directly on the public purse.
36. Further, should the adverse impact on legitimate economic interests of any party resulting from disclosure cause any further delay, or impediment to this development, then this will impact on the public purse in terms of time and resources already spent for no resulting development. Further any subsequent proposals may be tailored in light of this information being in the public domain, thereby reducing the income the Council may otherwise have been able to negotiate.
37. A delay in development will impact on the provision of affordable housing, which would otherwise be of benefit to the wider public.

Balance of the public interest arguments

38. The Commissioner has considered the competing arguments. The importance placed on transparency is conveyed by regulation 12(2) of the EIR, which expressly states that a public authority should apply a presumption in favour of disclosure. To that end, there is a public interest in disclosure to the extent that it would permit scrutiny of the way in which the Council disposes of existing assets and spends public money. Therefore the arguments surrounding transparency and accountability do carry some weight.
39. However, there will often be a tension between those interests that, on the one hand, promote public participation in decisions relating to planning matters and those that, on the other, seek to ensure that a public authority is able to carry out its commercial activities effectively. In the case of truly commercially sensitive information, any disclosure that could jeopardise the sale of land from which a public authority will gain or the delivery of a project designed to benefit the local community is unlikely to be in the public interest.
40. Furthermore, the Commissioner recognises that the Council has already disclosed the majority of the viability report and this goes some way to meeting the public interest in disclosure.

41. The Council has argued that organisations would be reluctant to provide commercially sensitive information to the Council if they could not be assured of the confidentiality of that information. However, the Commissioner considers that it would be unlikely that these organisations would not engage at all with Councils on major development opportunities. The suggestion that disclosure might lead developers in future to choose not to work with the Council does not seem realistic to the Commissioner. As developers have an incentive to make the most persuasive case available to them in relation to proposed development sites, it is difficult to fathom how developers could make a convincing argument regarding the viability of such developments without using such quantified information.
42. The Council has also argued that subsequent development proposals may be tailored in light of the withheld information being in the public domain. The Commissioner is doubtful of this. According to planning legislation, planning applications for development proposals are considered on their own merits. Therefore there is no reason why scrutiny of developers' proposals should become less rigorous or why Councils should not be able to negotiate an income with regard to a particular site just because information relevant only to a different site is already in the public domain.
43. As regards the public interest in maintaining the exception the Commissioner has considered all of the above arguments as well as the Council's argument that, as negotiations of the developer's leasehold interest and third part interest are still in progress, disclosure could undermine the Council's position in respect of such negotiations. The Commissioner considers that the arguments for withholding the information are strong given that the leasehold arrangements are still in progress and the development has yet to start.
44. Although the above public interest arguments in favour of maintaining the exception are strong, particularly in relation to current negotiations, the Commissioner, having taken all arguments into account, considers that the public interest in disclosing the withheld information is stronger than that in maintaining the exception. He is particularly persuaded by the fact that the development proposal, particularly in relation to affordable housing, is a local issue of such importance. The Council has disclosed the majority of the viability report and the withheld information consists of financial analysis, figures and costs breakdown. As the Information Tribunal stated in the

case of Royal Borough of Greenwich v the Information Commissioner & Brownie¹: -

“We find it particularly hard to accept that the pricing and other assumptions embedded in a viability appraisal are none of the public’s business. They are the central facts determining the difference between viability and non- viability. Public understanding of the issues fails at the starting line if such information is concealed, and discussion of the “point in time” nature of the viability models is frustrated.”

45. The Commissioner agrees with the Tribunal on this point and considers that public understanding of the current issues, which is vital in order to inform public debate, cannot be furthered without disclosure of the withheld information. It is for this reason as well as taking into account the other arguments in favour of disclosure, that the Commissioner has decided that, in all circumstances of the case, the public interest in maintaining the regulation 12(5)(e) exception is outweighed by the public interest in disclosing the withheld information.

¹ EA/2014/0122

Right of appeal

46. 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

47. 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.
48. 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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