

## Freedom of Information Act 2000 (Section 50) Environmental Information Regulations 2004

### Decision Notice

Date: 7 December 2009

**Public Authority:** London Development Agency  
**Address:** Palestra  
197 Blackfriars Road  
London  
SE1 8AA

### Summary

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The complainant requested information regarding the amounts paid by the London Development Agency ('the LDA') for certain sites and to whom. The LDA confirmed that it held information of the description specified but initially refused to disclose it under section 21 of the Freedom of Information Act ('the Act'). It later retracted its reliance on section 21 instead citing section 43(2) of the Act. During the course of the investigation the Information Commissioner ('the Commissioner') found that the information is environmental information and asked the LDA to reconsider the request. The LDA maintained that the information is not environmental maintaining its reliance on section 43(2) of the Act. However, it stated that if the matter fell to be considered under the Environmental Information Regulations ('the EIR') the information would be exempt under regulation 12(5)(e). The Commissioner found that regulations 12(5)(e) is not engaged. He therefore requires the LDA to now disclose the withheld information to the complainant.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Act. This Notice sets out his decision.
2. The EIRs were made on 21 December 2004, pursuant to the EU Directive on Public Access to Environmental Information (Council Directive 2003/4/EC). Regulation 18 provides that the EIR shall be enforced by the Information Commissioner. In effect, the enforcement provisions of Part 4 of the Freedom of the Act are imported into the EIR.

## The Request

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3. The complainant made an information request by email on 23 July 2008. The Commissioner does not have a copy of this request but the LDA in its response have quoted it as follows:

“1. How much was paid to the Peabody Trust under the cpo for the Clays Lane estate? Was anyone else, such as Newham Council, paid money for this land?  
2. How much was paid for the Clays Lane Travellers' site and to whom was it paid?  
3. How much was paid for the Park Village estate and to whom?  
4. How much was paid and to whom for the Eastway cycle circuit and land?  
5. How much was paid and to whom for the Manor Garden allotments?  
6. How much was paid and to whom for the Waterden Road Travellers site?”

4. Following the initial response and the response to the request for review in which the LDA applied section 21, section 43(2) and section 12(1) of the Act, the complainant clarified his request on 15 September 2008 to:

“The confirmation of names of the freeholders/leaseholders and how much they were paid, for the following pieces of land:

1. Clays Lane estate
2. Park Village estate
3. Eastway cycle circuit and land
4. Manor Gardens allotments
5. Waterden Road Travellers site
6. Clays Lane Travellers site
7. Eastway Sports Centre
8. East Marsh.”

The complainant specifically stated that he did not want details of payments to individuals, such as individual tenants of Clays Lane estate, individual allotment holders or traveller households but is only interested in the totals paid to the freeholders or leaseholders of the sites as a whole.

5. The LDA responded on 26 September 2008 in which it is clear that payments for the land are comprised of two elements, namely 'land value' and 'compensation'. It provided names of the leaseholders or freeholders that either have or will be recipients of payment for land covered in the request but withheld the information relating to the monetary value of each purchase under section 21 of the Act, as land value information is included in the Title Deed for each land interest which is available on request from the Land Registry. It also withheld the information relating to compensation payments under section 43(2) of the Act, disclosure would, or would likely to, prejudice the commercial interests of the LDA.

6. The complainant requested a review of the response to the clarified request on the day it was received, namely 26 September 2008.
7. On 23 October 2008 the LDA responded as follows:
  - It retracted its reliance on section 21 of the Act after speaking directly to the Land Registry and learning that all land relating to the Olympic park has been put into a number of larger scheme titles and there are no individual land titles shown on the land registry which may at one time have contained information about individual land titles for each site. It instead relied on section 43(2) of the Act to withhold this information.
  - It stated that it does not hold the requested information in respect of the freehold interest in relation to Eastway cycle circuit and land, EastwaySports Centre, Manor Gardens allotments, and East Marsh as the London Development Agency has never acquired the freehold interest in respect of these sites.
  - It also maintained its reliance on section 43(2) of the Act stating that disclosure of total compensation amounts is likely to adversely affect the LDA's bargaining position in ongoing negotiations on similar plots of land and therefore the ability to obtain best value for public funds.
  - In relation to the public interest test it stated that although there is a public interest in the scrutiny of how public money is spent and that the transparency of decision making is important, the public interest in ensuring that the LDA is able to negotiate freely with any other landowners leans in favour of not providing the information at this stage whilst negotiations are ongoing.

## The Investigation

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### Scope of the case

8. On 13 November 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the LDA was correct to apply the exception at 12(5)(e) of the Regulations and whether it responded to the request in accordance with the relevant procedural requirements.
10. The Commissioner has not considered the application of section 21 the Act as the time of the response to the internal review the LDA were no longer relying on this exemption.
11. The Commissioner has not considered the application of section 12(1) of the Act as the LDA did not rely on this provision of the Act in response to the clarified request of 15 September 2008.

## Chronology

12. The Commissioner commenced the investigation by writing to the LDA on 17 September 2009. The Commissioner conveyed his view that the information is environmental falling within the scope of the Regulations and requested that the LDA review the case and consider disclosing the information. The Commissioner also requested that if the LDA was not willing to disclose the information, it provide the Commissioner with a copy of the withheld information and details of which exception of the Regulations it is relying on and submit a full rationale as to why the exception applies. The Commissioner also requested that the LDA provide public interest arguments considered in favour of disclosure and in favour of maintaining the relevant exception under the Regulations.
13. On 30 September 2009 the LDA requested that the Commissioner state the reasons why the opinion had been formed that the withheld information is environmental information falling within the scope of the Regulations.
14. The Commissioner responded on 6 October 2009 providing an explanation of why the withheld information is environmental information falling within the scope of the Regulations and requested that the LDA respond fully to the letter of 17 September 2009 by 15 October 2009.
15. At the LDA's request, the Commissioner granted a 14 day extension to the original deadline stressing that if the LDA is not prepared to disclose the withheld information, full arguments in support of an exception in the Environmental Information Regulations 2004 should be provided by 29 October 2009 as the Commissioner may proceed to a decision based on the information provided by that date.
16. On 29 October 2009 the LDA responded to the effect that it is unable to agree that the withheld information is environmental as to contend that payment information is environmental information stretches the words of Regulation 2(1)(c) beyond any natural, intended or reasoned meaning and therefore the primary response to the complaint will be under the Freedom of Information Act. The LDA stated that it had reviewed the case and given consideration to disclosing the requested information but maintained its reliance on section 43(2) of the Act. In the final paragraph of the letter the LDA stated that if the matter fell to be considered under the EIR;

“...the LDA submits that the exception provided for in Regulation 12(5)(e) would apply, in that release of the information would adversely effect “the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”, and that the balance of public interest favours non-disclosure”.

## Analysis

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### Substantive Procedural Matters – Is it environmental information?

17. The Commissioner notes that the LDA initially refused the request for the information because it considered it exempt under section 43(2) of the Act. However the Commissioner considered that the information was environmental information which falls under the scope of the EIR.
18. The Commissioner's decision is that the information is environmental information falling within Regulation 2(1) of the EIR. Regulation 2(1)(c) provides that;  
  
“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –  
  
(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements’
19. The factors referred to in (a) include;  
  
‘the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements’.
20. The Commissioner does not believe that it is necessary for information to have a direct effect on the environment for it to be environmental, only that it needs to be linked to the relevant parts of regulation 2(1). Each of 2(1)(b)(c)(e) & (f) will ultimately link back to one or more element(s) under 2(1)(a) The Commissioner does not apply a proximity / remoteness test in terms of the proximity of the information to the environment. There is a proximity / remoteness style test, but that this is a test of the proximity / remoteness of the information itself to the relevant element, factor, measure, activity, analyses etc under 2(1)(a) to (f). He considers that the phrase “any information...on” should be interpreted widely and in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIRs enact.<sup>1</sup> It is not necessary for the information itself to have a direct effect on the elements of the environment. What is relevant instead is that the information should be on the element, measure etc in question. The relevant Oxford English Dictionary definition of “on” is “In reference to, with respect to, as to, concerning, about”. The Commissioner's view, in line with the purpose expressed in the first recital of the Directive, is that “any information ...on...” will usually include information concerning, about or relating to the

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<sup>1</sup> Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and , eventually, to a better environment.

measure, activity, factor etc in question. In other words information that would inform the public about the element, measure etc under consideration and would therefore facilitate effective participation by the public in environmental decision making is likely to be environmental information.

21. The Commissioner is satisfied that information regarding the sale of land, including the amount of compensation paid as a result of a compulsory purchase order (CPO), falls within the definition of environmental information for the purposes of the Regulations as provided in Regulation 2(1)(c). The information in this case is the amount paid for land purchased as part of the 2012 Olympic development. The sale of land is under these CPOs is a measure, as defined in Regulations 2(1)(c), it is an activity likely to affect the elements and factors referred to in 2(1)(a), i.e. the land and the landscape, and the information in question is on that measure.

### Exceptions – Regulations 12(5)(e)

22. Regulation 12(5)(e) provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely effect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
23. For the exception to apply, a public authority must prove that the withheld information satisfies the following three elements:
- Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is the confidentiality provided to protect a legitimate economic interest?
  - Would the confidentiality be adversely affected by disclosure?
24. The LDA did not provide any arguments as to why this exception applies for the Commissioner to consider. It failed to make a case as it merely stated that if the matter fell to be considered under the EIR then the exception would apply as stated in paragraph 16. The LDA did not submit that the withheld information was confidential therefore the Commissioner considers that the exception is not engaged. The LDA cannot expect their section 43 arguments to be simply carried over to 12(5)(e). The Commissioner considers that the Information Tribunal supports this approach, he notes the statement in Department of Health v Information Commissioner [EA/2008/0019] that;
- “If a party wishes to rely upon an exemption it is up to them to establish that this is valid”. (paragraph 98).
25. The Commissioner wishes to highlight the warning (see paragraph 15) he gave to the LDA; that he would move to a decision based on the information provided and that he expected full arguments to be provided for any EIR exception relied upon.

## Public interest

26. As the Commissioner has found that the exception is not engaged, it has not been necessary to assess the public interest in this case.

## Procedural Requirements

27. Given that the Commissioner's decision is that the information is environmental information falling within Regulation 2(1) of the EIR, the refusal notice which the LDA issued breached the requirements of Regulation 14(3), which requires that a public authority that refuses a request to provide environmental information specifies the exception it is relying upon in the refusal notice.
28. The LDA also breached Regulation 5(1) for not providing the information on request.

## The Decision

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29. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act as follows:
- The LDA incorrectly considered the information under the provisions of the Freedom of Information Act 2000 rather than the Environmental Information Regulations 2004.
  - In providing a refusal notice which referred to exemptions under the Act rather than exceptions under the Regulations the LDA breached Regulation 14(3) in that it did not provide a refusal notice stating which exception it was relying upon when refusing the information.
  - The LDA was incorrect to apply Regulation 12(5)(e) to the information.
  - The LDA breached Regulation 5(1) for not providing the information on request.

## Steps Required

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30. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose to the complainant the withheld information.
31. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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32. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.



## Right of Appeal

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33. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 7<sup>th</sup> day of December 2009**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### Regulation 2 - Interpretation

#### Regulation 2(1) In these Regulations –

“the Act” means the Freedom of Information Act 2000(c);

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate record authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive 2003/4/EC(d) on public access to environmental information and repealing Council Directive 90/313/EEC;

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on –

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c) ; and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of elements of the environment referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given in paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means –

- (a) a body referred to in section 80(2) of the Act; and
- (b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(a);

“transferred public record” has the same meaning as in section 15(4)of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

## **Regulation 12 - Exceptions to the duty to disclose environmental information**

**Regulation 12(5)** For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

- (a) international relations, defence, national security or public safety;
- (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
- (c) intellectual property rights;
- (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
- (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;
- (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; or
- (g) the protection of the environment to which the information relates.