

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 July 2013

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

Decision (including any steps ordered)

1. The complainant has requested a copy of a financial viability assessment relating to a large housing development at the Elephant and Castle in London.
2. London Borough of Southwark (the "council") refused the request, withholding the information under the exception for the confidentiality of commercial or industrial information. During the course of the Commissioner's investigation the council applied additional exceptions, namely those relating to intellectual property rights and the interests of the person providing the information.
3. The Commissioner's decision is:
 - The exception for commercial confidentiality is engaged but the public interest favours disclosure;
 - the exception for intellectual property rights is not engaged; and
 - the exception for interests of the person providing the information is engaged but the public interest favours disclosure.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the requested information to the complainant, excluding any personal data as defined in section 1(1) of the Data Protection Act 1998 (DPA).
5. 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.

Background

6. The Heygate Estate in the Elephant and Castle area of London was built in the 1970s and was formerly home to more than 3,000 people.
7. In July 2010 the council signed a regeneration agreement with a commercial partner, Lend Lease. This paved the way for a £1.5bn project to transform the Heygate Estate. The "Heygate Estate Masterplan" aims to deliver approximately 2,500 new homes, shops, restaurants and community facilities, and create over 5,000 jobs and central London's largest new park in 70 years.¹ The regeneration has been described as being the biggest in western Europe².
8. Public concern about the proposed regeneration has been widely reported with the focus being on the number of affordable homes being delivered and whether the council has secured best value for public land which was previously utilised for council housing³. Significant opposition to the scheme is represented by a number of interest groups and websites which critique the council's handling of the regeneration⁴. At the time of the request, the complainant, a spokesperson for the Heygate Estate Leaseholders Group, was one of the few remaining residents on the Heygate Estate⁵.
9. An outline planning application (reference: 12/AP/1092) relating to the development was submitted to the council by Lend Lease in March 2012. At the time the complainant submitted their request for information

¹

http://www.southwark.gov.uk/news/article/1113/planning_permission_granted_for_elephant_and_castle_masterplan

² <http://www.bbc.co.uk/news/uk-england-london-19371334>

³ See, for example: <http://www.independent.co.uk/news/uk/home-news/15bn-revamp-of-sink-estate-reveals-social-cleansing-plan-8482307.html> and <http://www.bbc.co.uk/news/uk-england-london-21338296>

⁴ See, for example: <http://southwarknotes.wordpress.com/heygate-estate/>;
<http://www.35percent.org/blog/>

⁵ <http://www.bbc.co.uk/news/uk-england-london-19371334>

planning permission had not been granted. Outline planning permission for the development was subsequently granted in January 2013⁶.

Request and response

10. On 10 May 2012, the complainant wrote to the council and requested information in the following terms:

"I am requesting a copy of the Financial Viability Assessment submitted with the planning application which was made on 28th March 2012 – reference no. 12/AP/1092."

11. The council responded on 8 June 2012 and refused to provide the information, citing the exception for the confidentiality of commercial or industrial information.
12. Following an internal review the council wrote to the complainant on 16 August 2012 stating that it was maintaining its position.

Scope of the case

13. On 19 August 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
14. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld the requested information. The complainant confirmed that they were not interested in receiving any third party personal data which may form part of the withheld information and asked the Commissioner to exclude such information from the scope of their request and from his investigation.
15. After being advised by the Commissioner that the complaint had been received the council confirmed that it wished to rely on additional exceptions to withhold the requested information, namely the exceptions for intellectual property rights and adverse affect to the interests of the information provider.

6

http://www.southwark.gov.uk/news/article/1113/planning_permission_granted_for_elephant_and_castle_masterplan

16. During the course of the Commissioner's investigation the council disclosed some of the requested information to the complainant, namely appendices 1-3, 5 and 21. It also provided the complainant with a redacted copy of the main body of the requested Viability Assessment. The Commissioner has considered whether the council has correctly applied exceptions in withholding the balance of the requested information.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

17. The council has applied this exception to the entirety of the withheld information, which consists of the Viability Assessment and number of appendices.
18. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect "the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".
19. The Commissioner considers that in order for this exception to be applicable, there are a number of conditions that need to be met. He has considered how each of the following conditions apply to the facts of this case:
- 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?
20. In dealing with the complaint, the council consulted with Lend Lease and sought its views as the interested party. The council provided the Commissioner with a copy of correspondence from Lend Lease which, in some detail, clarifies why it considers the information should not be disclosed. Whilst the Commissioner has considered the submission provided by Lend Lease in evaluating the application of exceptions, he is mindful of the recommendations of the code of practice issued under regulation 16 of the EIR (the "EIR code"), particularly, paragraph 45 which states:

"In all cases, it is for the public authority that received the request, not the third party (or representative of the third party) to weigh the public

interest and to determine whether or not information should be disclosed under the EIR. A refusal to consent to disclosure by a third party does not in itself mean information should be withheld, although it may indicate interests involved.”⁷

Is the information commercial or industrial in nature?

21. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity either of the public authority concerned or a third party. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit.
22. The Commissioner notes that the viability assessment was produced for the purposes of supporting an application by Lend Lease to further its commercial ends. The document contains financial details about Lend Lease’s business plans, including information about valuations, development costs, cash flow details, funding and financing costs, which were submitted in support of its proposals for development.
23. The complainant has argued that, whilst the council has claimed that the development is commercial in nature, it has simultaneously claimed that the scheme is public in nature in order to exercise its compulsory purchase order (CPO) powers. The complainant has argued that CPO powers are not applicable to commercial or industrial developments and, were the information commercial or industrial in nature then it would not be able to exercise these powers.
24. The Commissioner considers that the information is clearly commercial in nature, and has concluded that this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

25. In relation to this element of the exception, the Commissioner has considered whether the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.
26. The council has argued that there are a number of aspects in which the withheld information is subject to confidentiality provided by law.

⁷ <http://archive.defra.gov.uk/corporate/policy/opengov/eir/pdf/cop-eir.pdf>

Firstly, it has identified that the report is headed "Strictly Private and Confidential" and the pages are watermarked "Confidential". The council also referred to a specific clause within the withheld report which makes the council's obligation of confidentiality explicit.

27. The council confirmed that it has treated the report as confidential and that this was explicitly clear upon receipt as well as being implicit in its general practice. The council explained that it has imposed controls on the use and distribution of the report and its internal and external disclosure. It stated that internal access has been on a need to know basis and its distribution has been limited, based on an agreement with Lend Lease.
28. In relation to external disclosure, the council confirmed that, with Lend Lease's agreement, the report was provided to the District Valuation Service (DVS) for the purposes of an independent review. The Commissioner understands that DVS' access to the report carried with it an obligation of confidence, comparable to that owed by the council.

Does the information have the necessary quality of confidence?

29. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
30. On the basis of the council's submissions, the Commissioner is satisfied that distribution of the withheld information has been limited and that it is not otherwise accessible.
31. Having viewed the withheld information, it clearly relates to a significant development which will have an effect on the local area. The Commissioner therefore considers that the information in question is not trivial. He is satisfied that the information does have the necessary quality of confidence and, as a result has gone on to consider whether the information was shared in circumstances importing an obligation of confidence.
32. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*⁸ suggested that the 'reasonable person' test may be a useful one. He explained:

⁸ *Coco v A N Clark (Engineers) LTD* [1969] RPC 41.

"if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence".

33. In *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association* (EA/2010/0012), the Tribunal accepted evidence that it was "usual practice" for all documents containing costings to be provided to a planning authority on a confidential basis, even though planning guidance meant that the developer was actually obliged to provide the information in this case as part of the public planning process.

34. In applying the "reasonable person" test in this instance the Tribunal stated:

*"in view of our findings ... that at the relevant time the usual practice of the council was that viability reports and cost estimates like those in question were accepted in confidence (apparently without regard to the particular purpose for which they were being provided) ... the developer did have reasonable grounds for providing the information to the Council in confidence and that any reasonable man standing in the shoes of the Council would have realized that that was what the developer was doing."*⁹

35. On the basis of the explanations provided by the council, the content of the withheld information and the above criteria, the Commissioner accepts that the information was shared in circumstances importing an obligation of confidence. From the arguments supplied by the council, the Commissioner considers that the circumstances gave rise to an explicit obligation of confidence due to the wording used in the report, and due to the assurances shared between Lend Lease and the council when discussing the information in question. The Commissioner therefore concludes that the requested information is subject to a duty of confidence which is provided by law and considers that this element of the exception is satisfied.

⁹ Published online here:

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_\(0012\)_Decision_24-05-2010_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

Is the confidentiality provided to protect a legitimate economic interest?

36. The Commissioner considers that to satisfy this element of the exception, disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to protect.
37. 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 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 probably than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) 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".

38. The council has argued that disclosure would cause harm to both its own legitimate economic interests and to those of Lend Lease.
39. The Commissioner will not accept speculation from a public authority regarding harm to the interests of third parties without evidence that the arguments genuinely reflect the concerns of the third parties involved. As noted above, and in line with this approach, the council provided detailed submissions from the developer itself. The Commissioner has first considered the council's own submissions.

The council's view

40. The council has argued that disclosure would cause harm to its own commercial interests, including the commercial interest in achieving the value of the sale of the leasehold in the land to Lend Lease, reflected in the conditional development agreement. The council has further argued that it has an interest in negotiating levels of compensation (that are fair to both sides) to those whose homes might be, as part of the development, subject to compulsory purchase orders.
41. More generally, the council has stated that it has an interest both as a responsible public authority and a body with commercial interests in its area, in securing the regeneration of a less favoured site (for which it has twice before sought a developer), the encouragement of local employment on the project and the improvement of the quality of housing in the area on behalf of local residents.

42. In relation to the legitimate economic interests of Lend Lease, the council made reference to the Commissioner's guidance, which states:

"Legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income."¹⁰

43. The council has argued that the interests of Lend Lease mirror the description provided in the Commissioner's guidance as the withheld information relates to the financial viability of the proposed development (ie whether it proceeds and on what basis); and its ability to pursue the scheme, having invested money and time in it, is also a legitimate economic interest.

44. The council has further argued that there are factors which have not yet been settled which could threaten the scheme and which disclosure could affect. The council provided the Commissioner with examples of unsettled factors which were present at the time of the request. The council explained that the effects brought by disclosure could be either direct, by altering assumptions or counterparties' knowledge; or indirect by weakening the position of Lend Lease relative to competitors. The council submitted that these factors combined to produce the likelihood that disclosure would harm Lend Lease's economic interests.

45. The Commissioner notes that the report contains a variety of categories of information and that it has been withheld in its entirety. In its submissions, Lend Lease provided arguments in relation to specific elements of the report and the council also reiterated and endorsed these in its own submission. The Commissioner has considered the relevant arguments as they relate to each part of the withheld information.

10

http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/eir_confidentiality_of_commercial_or_industrial_information.ashx

Lend Lease's methodology and approach to planning

46. The council has argued that disclosure of the titles of appendices and the names of suppliers and advisors would provide Lend Lease's competitors with important insight into its methodology for preparation of this viability assessment (and others it might prepare for other bids/applications). Such insights would enable competitors more easily and quickly and at no effort or cost, to replicate Lend Lease's approach and mode which it has developed through its own time and expense over many years. In turn, both the council and Lend Lease has argued, competitors would be able to benchmark and replicate Lend Lease's model to improve their competitive position to the detriment of Lend Lease. As a result of disclosure, therefore, Lend Lease's commercial advantage would be lost.

Profit on cost and internal rate of return (IRR)

47. The council, following representations from Lend Lease, argue that where percentage figures are given for cost return on the development (ie profit as a percentage of costs) and IRR used to measure profitability for capital budgeting, disclosure of this information would be harmful to Lend Lease's commercial interests.

48. The council has argued that disclosure would enable competitors to assess how Lend Lease is saving costs and the income it needs to be profitable, therefore, enabling them to outbid Lend Lease on land purchases and to undercut it in contract bids.

Valuations

49. The council has argued that valuation assumptions and sale prices for types of dwelling are shown by figures for average market values per dwelling type in a given development and the related square footage. Disclosure of this information would allow others to reduce their selling prices of comparable properties, driving down Lend Lease's prices or preceding sales, affecting its case flow and putting future phases of the project at risk.

Purchase and sales prices, rentals, discount and yield information

50. The council notes that figures for ground rents show the pricing strategy for ground rents, for which no contracts have yet been negotiated. Similarly, annual rents and rent-free periods for commercial leases have also not yet been negotiated and disclosure of this information would provide potential tenants with an unfair advantage over Lend Lease. The council has argued that disclosure of the information would reveal details of Lend Lease's finances which competitors or suppliers could exploit in any negotiations.

Fees Costs and budget information

51. The council has argued that disclosure of figures for maintenance costs, management costs and repair costs would provide bidders for such work with an unfair advantage in negotiations with Lend Lease. Disclosure would enable bidders and suppliers to distort the market, submit over-priced bids, act in an uncompetitive way and lead to Lend Lease paying more than it would otherwise need to – this would be detrimental to its economic interests. The council has argued that the same would hold true for information relating to professional, marketing and disposal fees and information on profit margins, financial costs and target returns.

Other financial information

52. The council considers that other detailed figures within the withheld information show the basis upon which Lend Lease carries out its financial modelling and economic modelling. The council has argued that disclosure of this information would allow competitors to forecast Lend Lease's approach to costing and pricing for assets. This would give competitors an advantage over Lend Lease in the competitive environment, to Lend Lease's detriment.
53. The council has further argued that, in relation to residential site values, the timing of sales, if known in advance, could be used by bidders and suppliers involved in the construction phase. Potential buyers could also apply commercial pressure in negotiations with Lend Lease at those times to negotiate a lower price than they would otherwise contemplate if they did not have knowledge (which, without disclosure, they would not have) that Lend Lease needed to confirm all sales by a specific deadline. The council submitted that disclosure, in this instance, would give buyers and unfair advantage to the detriment of Lend Lease who would be denied the opportunity to negotiate on a level playing field.
54. More generally, the council has argued that in a poor market, as it is considered exists at present, the value of information is considerable and competitors can be expected to scrutinise any information that is disclosed. It is highly likely, therefore, that the disclosure of the withheld information would result in the identified economic detriment to the interests of Lend Lease.

The Commissioner's conclusions

55. The Commissioner considers that the withheld information contains financial modelling information and details of Lend Lease's strategy in respect of the proposed development which are of significant commercial value. Disclosure of the withheld information would provide parties negotiating with Lend Lease with a competitive advantage in

these negotiations which would be to the detriment of Lend Lease's economic interests.

56. The Commissioner further considers that, if disclosed, the detail contained within the withheld information would provide third parties with knowledge which would not otherwise be available in a competitive market.
57. The Commissioner notes that effective financial modelling is at the heart of the information which regulation 12(5)(e) seeks to protect. The Commissioner considers that it is Lend Lease's skill and experience which allows it to produce competitive pricing whilst providing a competitive return. The Commissioner is, therefore, satisfied that disclosure of the information could weaken Lend Lease's edge by allowing competitors to copy the most innovative or successful parts of the model and use this and other financial information to the detriment of Lend Lease's economic interests.
58. The Commissioner has concluded that the council's arguments are persuasive and that the release of the information would adversely affect the interests of Lend Lease.

Would the confidentiality be adversely affected by disclosure?

59. The Commissioner considers that the disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publically available. In turn, this will also harm the legitimate economic interests which the Commissioner has identified above, which the confidentiality provided by law is there to protect.
60. The Commissioner has, therefore, concluded that this element of the exception is engaged and, as a result, finds that the exception is engaged.
61. However, as the viability report was provided by Lend Lease to the council under the common law of confidence, it is only Lend Lease's interests as the confider that are relevant under this exception. The Commissioner has, therefore, discounted any arguments under this exception about the council's commercial or legitimate economic interests and factored these out of the public interest considerations.

Public interest test

62. Having determined that the exception available at regulation 12(5)(e) is engaged, the Commissioner is required to consider the public interest test.

63. Regulations 12(1) and (2) of the EIR provide:

"(1) ... a public authority may refuse to disclose environmental information requested if-

- (a) an exception to disclosure applies under paragraphs (4) or (5); and*
- (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.*

(2) A public authority shall apply a presumption in favour of disclosure."

64. As the Information Tribunal noted in *Bristol City Council v the Information Commissioner (EA/2010/0012)*, regardless of the fact that disclosure of the requester information would involve a breach of confidence by the council, there is nevertheless a presumption that it should be disclosed to the requester and only withheld if, in all the circumstances at the time of the request, the public interest in maintaining its confidentiality outweighed the public interest in its disclosure¹¹.

65. In considering the public interest in this case, the Commissioner has had regard for submissions made by the complainant, the council and Lend Lease and has also taken into account the specific content and wider context of the withheld information.

Public interest in disclosure

66. The council has submitted that there is a general public interest in transparency, particularly in relation to planning matters.

67. The council has also identified a specific factor, namely that, as the council is technically the owner of the land as well as the local planning authority with responsibility for approving the associated planning application, there is a potential conflict of interest. Disclosure would

11

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_\(0012\)_Decision_24-05-2010_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(0012)_Decision_24-05-2010_(w).pdf)

enable the public to see that the council has handled the matter appropriately.

68. In relation to the council's arguments regarding its ownership of the land in question, the Commissioner notes that, in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association (EA/2010/0012, 24 May 2010)*, the Tribunal considered that the fact that the council itself owned the site to be developed "gave rise to a need for 'particular scrupulousness' on the part of the Council" and added substantial weight in favour of disclosure.¹²
69. The Commissioner further considers that the scale of the development – a £1.5bn regeneration scheme set to run over 15 years, the biggest in Western Europe, is also a factor which increases the need for public scrutiny¹³. The Commissioner considers that the council must have been aware that such a vast scheme, with the attendant repercussions for the local community would attract public interest and would be subject to enhanced levels of scrutiny.
70. The Commissioner notes that the council has also provided Lend Lease with grant funding (at least £15 million) to undertake the demolition of the existing Heygate Estate¹⁴. In total, the council has spent some £47.529 million in progressing the redevelopment¹⁵.
71. The Commissioner is further aware of other publically reported concerns that the council might not have achieved the best value for public resources in the disposal of its land to Lend Lease. Although some of these reports have emerged after the request was made, the Commissioner considers that they are relevant public interest considerations since they relate to matters which would have been known to the council when the request was made¹⁶.

¹²

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol CC v IC & PBSA \(00 12\) Decision 24-05-2010 \(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(00_12)_Decision_24-05-2010_(w).pdf)

¹³ See, for example: <http://www.bbc.co.uk/news/uk-england-london-19371334> and <http://www.london-se1.co.uk/news/view/4669>. Although post-dating the request, subsequent concerns have also been raised by Members of Parliament – see: <http://www.bbc.co.uk/news/uk-england-london-20061007>

¹⁴ See page 27,

http://www.southwark.gov.uk/download/8171/proofs_of_evidence_jon_abbot_final-proof

¹⁵ Ibid., page 30.

¹⁶ See: <http://www.independent.co.uk/news/uk/home-news/15bn-revamp-of-sink-estate-reveals-social-cleansing-plan-8482307.html> and <http://www.bbc.co.uk/news/uk-england-london-21338296>

72. Following the Tribunal decision in *EA/2010/0012*, the Commissioner's guidance sets out that he considers that the particular public interest in public participation in planning matters is likely to carry a significant amount of weight in favour of disclosure in such cases. In particular, the Commissioner notes that the Tribunal gave weight to the Directive (2003/4/EC) which gave rise to the EIR, and in particular to recital (1) which provides the underlying rationale for disclosure of environmental information:

*"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."*¹⁷

73. The National Planning Policy Framework (NPPF), which sets out the Government's vision for how local planning authorities should handle planning matters, states:

*"The planning system can play an important role in facilitating social interaction and creating healthy, inclusive communities. Local planning authorities should create a shared vision with communities of the residential environment and facilities they wish to see. To support this, local planning authorities should aim to involve all sections of the community in the development of Local Plans and in planning decisions...."*¹⁸

74. The Commissioner considers that disclosure of the information would, in this instance, enable the community affected by the development to understand and participate in the council's decision making and would assist the council in meeting one of the goals of the NPPF.

75. The Commissioner also considers that the fact that the council was intending to take account of evidence presented to them by Lend Lease which the public were not going to be able to see or comment on directly is a further relevant factor in favour of disclosure.

17

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_\(00_12\)_Decision_24-05-2010_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(00_12)_Decision_24-05-2010_(w).pdf)

¹⁸ Paragraph 69, published

here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6077/211650.pdf

76. In a decision notice issued to the London Borough of Waltham Forest (ICO reference: FER0449366), the Commissioner found that the public interest favoured the disclosure of a viability assessment submitted in relation to a large scale redevelopment¹⁹. In that case, the Commissioner found that there was concern within the local community that the council had endorsed a development which did not satisfy the minimum percentage of affordable housing required in its policy. The Commissioner found that this provided a significant public interest weighting in favour of disclosure, to assist the community in understanding the rationale for the council's decision.
77. The Commissioner notes that similar concerns have been reported in relation to the Heygate Estate redevelopment. In this case, the council's Core Strategy states that developments should provide as much affordable housing as is reasonably possible and that developments in the Elephant and Castle area, such as that proposed in the Heygate Masterplan, should provide at least 35% affordable housing²⁰.
78. The Heygate Masterplan proposes to deliver at least 25% affordable housing, falling short of the council's policy objective. The Commissioner considers that further weight to the public interest in disclosure is added by the fact that the Heygate Estate formerly provided over 1,000 council houses. The Commissioner considers that public understanding of the rationale for the disposal of such assets and the apparent shortfall in the Masterplan's provision for social housing would be aided by disclosure.
79. The complainant has argued that the requested information was submitted to the council almost a year prior to their request and that it has been superseded by subsequent viability assessments. Given the nature of market forces and economic fluctuations, viability assessments quickly become outdated and need to be revised. The complainant has argued that it is, therefore, unreasonable to claim that any calculations or financial information contained in the requested version of the assessment would still be relevant or would otherwise affect the commercial interests of Lend Lease.

Public interest in maintaining the exception

80. The council has argued that there is a significant public interest in maintaining the confidentiality of the withheld information, given the

¹⁹ http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fer_0449366.ashx

²⁰ http://www.southwark.gov.uk/download/5823/adopted_core_strategy

adverse effects that disclosure could have on Lend Lease's economic interests and the project as a whole.

81. The council has argued that future negotiations and discussions could be impeded by disclosure as a number of important land and other interests remain to be negotiated with third parties. Disclosure of the information, therefore, could prevent, delay or affect the progress of the development.
82. The council considers that disclosure would affect Lend Lease's working relationship with the council which would not be in the interests in ensuring the success of the project or in turn the interests of residents as a whole.
83. The council has further submitted that the planning process and compulsory purchase process both separately test the viability, suitability and legality of the development. The District Valuer has produced an independent assessment of the conclusions reached in the viability assessment and this ensures a significant degree of protection of local residents. The council directed the Commissioner to the Information Tribunal decision in *Department of Work and Pensions v Information Commissioner (EA/2010/0073)*, paragraph 91 of which makes a similar point²¹.
84. The council has also argued that the possible prejudice to a forthcoming compulsory purchase order inquiry relating to the scheme, if information were disclosed, would exceed the inquiry's requirements and be likely to prejudice the council's position in respect of negotiations arising from the same.
85. In relation to the apparent discrepancy between the levels of affordable housing set within the council's policy and that delivered by the Masterplan, the council directed the Commissioner to a report to the council's planning committee, paragraph 149 of which states:

"At 25% the level of affordable housing proposed is below the level set by SP policy 4.4. The applicant has submitted a detailed financial appraisal to demonstrate that a scheme providing 35% affordable

21

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i438/DWP%20v%20IC%20\(0073\)%20Decision%2020-09-2010%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i438/DWP%20v%20IC%20(0073)%20Decision%2020-09-2010%20(w).pdf)

housing would be unviable and would produce a very substantial overall deficit. ²²

86. In short, the council has argued that, whilst the levels of affordable housing in the redevelopment are below that set in its policy, the viability assessment outlines that this represents the best possible outcome that could be achieved and that

"...in the light of the viability evidence ...an appropriate balance has been struck between ensuring the deliverability of the scheme and securing as much affordable housing as is realistically possible." ²³

87. In its submissions to the council Lend Lease has argued that a significant amount of information has already been made available to the public in order to assist the understanding of the issues and to enable participation in debate about these matters.
88. Lend Lease has argued that there is a significant public interest in maintaining the confidentiality of the information because of the adverse affect that disclosure could have on the project and Lend Lease. Lend Lease has specifically argued that disclosure could impede future discussions and negotiations between itself and third parties resulting in damage to the progress of what is still a live project and harm to its economic interests.
89. Lend Lease has further argued that disclosure of the information would not aid transparency and public understanding as the modelling involved is so extremely complex that it would only be of use to experts.

Balance of the public interest

90. The Commissioner recognises that there is some inherent public interest in preserving confidentiality. He considers that such public interest should be given more weight where, as in this case, a public authority can demonstrate that disclosure would undermine its relationship with a particular company, and that relationship is in itself serving the public interest.
91. The Commissioner notes that further weighting is given to the public interest in maintaining the exception by the fact that the scheme is

²²

<http://modern.gov.southwark.gov.uk/documents/g4301/Public%20reports%20pac%20Tuesday%2015-Jan-2013%2018.00%20Planning%20Committee.pdf?T=10>

²³ Ibid., paragraph 167.

ongoing, with many factors still yet to be decided and that disclosure could cause disruption. Delays in progressing the scheme could result in further public expenditure and ineffective use of public resources. It could also result in harm to Lend Lease's commercial interests.

92. In relation to the impact of disclosure on the inquiry into compulsory purchase orders associated with the scheme and the damage to the council's negotiating position with regard to compensation, the Commissioner has already rejected arguments in this regard in relation to the engagement of the exception. He, therefore, considers that the possibility of harm to the council's economic interests is not something which can be considered in relation to the balance of the public interest.
93. The Commissioner has noted Lend Lease's arguments that disclosure would have an effect on the ongoing nature of the scheme and its ability to conduct negotiations in a way which would optimise its economic and commercial interests. He is mindful that the purpose of the exception is to protect legitimate economic interests and, the severity and frequency of the harm is a relevant public interest factor.
94. However, having viewed Lend Lease's arguments in this regard the Commissioner considers that they are either generic in nature, with the attributed harm not being linked to the specific requested information and, where a link is made, the imagined effects are too speculative and qualified by "could" or "may". Whilst he has found that the exception is engaged the Commissioner does not consider that it has been shown that disclosure will result in severe or frequent or sustained harm to Lend Lease's legitimate economic interests. He has, therefore, not accorded the argument regarding the live nature of the scheme with much weighting in his consideration of where the balance of the public interest lies.
95. Whilst acknowledging that it is a relevant factor in favour of maintaining the exception, in relation to the damage that disclosure would do to the council's relationship with Lend Lease or to other prospective partners, the Commissioner is sceptical about the severity of any such damage. A development of this magnitude provides lucrative opportunities for private companies and the Commissioner does not consider that a company would not pursue such an opportunity, in spite of the potential for details of its economic interests to be disclosed. Similarly, paragraphs 46 to 53 of the code of practice issued under regulation 16 of the EIR, make it clear that public authorities should not contract out of their obligations under the EIR and should not accept information in

confidence unless it is necessary to do so²⁴. So, even where an authority has legitimately accepted information in confidence, it still needs to be mindful of the presumption in favour of disclosure which the EIR sets.

96. In relation to the complainant's assertion that the withheld information has been superseded by newer versions of the viability assessment and that it has lost its commercial value, the Commissioner has not factored this into the public interest balance. This is because, in deciding that the exception is engaged, he has already found that the information is of commercial value.
97. With regard to the council's assertion that the general public interest in transparency and accountability and the specific interest in reassuring the public that the scheme has been managed appropriately, the Commissioner notes that the planning process and other factors do provide some solace in this regard. In relation to Lend Lease's argument that disclosure of the detailed information would not assist transparency or public understanding of the issues because of the information's complexity, the Commissioner has not afforded this significant weight. The Commissioner considers that the argument diminishes the likelihood of the information being used in a way which would harm Lend Lease's interests, hence undermining Lend Lease's central argument that disclosure would be likely to result in harm.
98. The Commissioner further considers that the fact that information is complex or obscure is not in itself legitimate grounds for it being withheld. Where information falls into this category authorities are free to preface disclosure with narratives or caveats which clarify the relevant context.
99. In any event, with a scheme of such magnitude in both the size of the development, the timescale and the levels of public resource involved (both public land and financial expenditure), the Commissioner considers that the council should expect to be subject to a high level of scrutiny. In relation to the District Valuer's report, the Commissioner notes that this has not been published by the council or otherwise been made available to the public.

24

http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/environmental_information_regulations_code_of_practice.pdf

100. The Commissioner notes that the scheme will not deliver the level of affordable housing required by the council's own core strategy. In this respect alone, there is a significant public interest in demonstrating to the public that the council's decision to progress with the scheme is nevertheless justified.
101. The Commissioner notes that the viability assessment provides a mechanism for addressing any shortfall in the provision of affordable housing. He also notes that other factors were considered by the council in assessing the appropriateness of the development, for example, the need to build a strong, competitive economy. The council has submitted that these other considerations were balanced against the public interest in securing affordable housing.
102. However, the Commissioner considers that, despite these other factors, the focus of public debate and concern has been on the levels of affordable housing provision delivered by the scheme. Disclosure of the viability assessment would inform this debate and reassure the public that the council's decision to allow Lend Lease's proposals to proceed were based on a correct analysis of the facts presented.
103. In relation to the disposal of the council's land, land which would previously have been a public resource which provided council housing for significant numbers of residents, there is a public interest in knowing that the decision to sell this resource to a private company was based on a sound evaluation of relevant factors and represented good value and an effective use of a public resource. Disclosure of the requested information would provide the public with the same level of detail available to the council in its decision making which, in turn, would facilitate public engagement with the scheme and provide reassurance that the council gave due consideration to the relevant factors.
104. The Commissioner accepts that it is in the public interest for authorities to secure best value when disposing of assets and that, in the current economic climate, this presents particular difficulties. It is arguable, therefore, that the council should be allowed to progress the regeneration without this process being jeopardised. However, the Commissioner is also mindful that, given the fact that the asset in question is a public resource and that Lend Lease is a private company which stands to profit from the regeneration, there is a compelling, countervailing argument in favour of making this process as transparent as possible. Whilst it may be that the regeneration will free council resources which were previously tied up with maintaining the Heygate Estate, the Commissioner considers that size of the redevelopment and the number of residents affected should provide a trigger for transparency and engagement with council tax payers.

105. The Commissioner further considers that, as the planning authority responsible for adjudicating on Lend Lease's planning application (which the viability assessment was created to accompany) and the authority responsible for the significant land disposal associated with the scheme, there is a further argument for a high level of scrutiny to be directed to the council's actions. Whilst the Commissioner is not suggesting that there is a conflict of interests in play, the public perception that a public authority might be subject to such a conflict and the potential damage to an authority's reputation which might ensue provides an argument in favour of transparency and disclosure. The Commissioner considers that disclosure in this case would address the general mismatch between the resources of the developer and those of residents directly affected by the scheme and council tax payers within the borough²⁵.
106. The Commissioner notes that an independent report published by Spinwatch alleges that the council's consultation with the local community was deficient and raises concerns about the relationship between the council and Lend Lease²⁶. Whilst the Commissioner does not endorse the veracity of these conclusions, he considers that the reputation of public institutions and their legitimacy and effectiveness in carrying out their role can be damaged by public perceptions. As it is not in the public interest for public authorities' actions to be perceived or potentially constrained by such perceptions, disclosure would provide reassurance about the council's conduct and would serve the interest in transparency and accountability.
107. The Commissioner considers that the significant expenditure of public funds, the need for public reassurance, confidence and engagement with the council's decision making in relation to the scheme, the disquiet about the levels of affordable housing which will be delivered and concerns about the value for money provided by the disposal of public land combine to produce a heavy public interest weighting in favour of disclosing the information.
108. Having considered the relevant arguments the Commissioner has concluded that the public interest in transparency and accountability and in disclosure of the information, in this case, when combined with the

²⁵ A comparable argument was considered valid in relation to another request for a viability assessment in Bristol City Council v Information Commissioner (EA/201/0012):
[http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol CC v IC & PBSA \(00 12\) Decision 24-05-2010 \(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i392/Bristol_CC_v_IC_&_PBSA_(00_12)_Decision_24-05-2010_(w).pdf)

²⁶ <http://www.spinwatch.org/index.php/component/k2/item/5458-the-local-lobby-and-the-failure-of-democracy>

general presumption in favour of disclosure, outweighs the public interest in maintaining the exception.

Regulation 12(5)(c) – Intellectual property rights

109. Under regulation 12(5)(c), a public authority may refuse a request for information where disclosure would adversely affect intellectual property rights.

110. The Commissioner's guidance describes intellectual property (IP) rights as follows:

*"IP rights arise when owners are granted exclusive rights to certain intangible assets. Although there are many forms of IP rights the main ones relevant to requests will be copyright, database rights and copyright in databases."*²⁷

111. To establish that there would be an adverse effect on IP rights, the Commissioner considers that a public authority must demonstrate that:

- the material is protected by IP rights:
- the IP rights holder would suffer harm. It is not sufficient to merely show that IP rights have been infringed:
- the identified harm must be as a consequence of the infringement or loss of control over the use of the information: and
- the potential harm or loss could not be prevented by enforcing their IP rights.

The material is protected by IP rights

112. The council has argued that information redacted from the disclosed version of the main body of the viability assessment appendices 4, 6, 7, 9, 10, 12, 14, 15, 16, 17, 19, 20 and 22 of the viability assessment should be withheld under this exception.

113. The council considers that the withheld information is protected by IP rights on two counts: (i) a database right, on the basis that there has

27

http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_intellectual_property_rights.ashx

been substantial investment by Lend Lease in obtaining, verifying or presenting the content of the database, and (ii) copyright on the basis that by reason of the selection or arrangement of the contents of the database constitutes the author's own intellectual creation.

114. The council considers that the withheld information falls into two groups of IP information, that belonging to Lend Lease and that belonging to Lend Lease's advisors. It has argued that all the relevant information appears to be covered by the copyright of Lend Lease or other third parties.

115. For the details of its arguments in this regard, the council directed the Commissioner to Lend Lease's submission, which the council confirmed that it endorsed.

116. Lend Lease has argued that the withheld information was developed by and is proprietary to Lend Lease and/or its advisors and includes rights protected by copyright. Lend Lease also confirmed that it considered that some of the information is also covered by the law protecting 'know how' and trade secrets. The Commissioner has considered this latter category of information first.

Trade secrets and know how

117. Lend Lease has argued that the innovative elements of the withheld report, in particular, details contained in appendix 4 and 22 benefit from protection as trade secrets. It argued that the concept of trade secrets is widely defined by case law and includes information liable to cause real or significant harm to its owner if disclosed, where such information is used in business and where its owner has limited its dissemination. Lend Lease has argued that these conditions are satisfied in the case under consideration.

118. In making this case, Lend Lease has also made reference to a Tribunal decision which confirmed that a financial model with detailed information on costs, pricing structures and profits amount to a trade secret because of the significant amount of time and money invested in its preparation and its unique modelling structures. Disclosure of this category of information, Lend Lease argues, would put competitors at an unfair advantage, to Lend Lease's detriment.

119. The Commissioner notes that the Tribunal decision cited by Lend Lease (*DWP v Information Commissioner, EA/2010/0073*)²⁸ relates to the application of the exemption contained in section 43 of the FOIA (commercial interests).
120. Whilst he accepts that the information in question may well be commercially sensitive, the Commissioner questions whether regulation 12(5)(c) is intended to encompass trade secrets or whether the correct exception for the consideration of such arguments is under Regulation 12(5)(e) or 12(5)(f). The Commissioner has considered the council's application of regulation 12(5)(e) above and regulation 12(5)(f) below.
121. In general, recognised intellectual property rights are provided specific and identifiable rights of protection within the UK. Trade secrets, whilst recognised in English Law, are not provided with the clearly identifiable rights which, for instance, the award of a patent or a trade mark does.
122. The Intellectual Property Office website states that where trade secrets do not fall within one of the intellectual property rights (eg copyright, database rights, patents etc) then protection is afforded by the law of confidence and the use of non-disclosure agreements. A trade secret has no specific intellectual property protection of its own²⁹.
123. The Commissioner considers that as trade secrets or 'know how' have no specific intellectual property protection of their own, Lend Lease and hence the council were wrong to apply regulation 12(5)(c) to the identified information. Trade secrets are not automatically protected as intellectual property rights under 12(5)(c), although they would engage the exception at 12(5)(e). However, the council has not engaged 12(5)(e) in withholding this element of the information. In respect of information withheld because the council has identified it as a trade secret, the Commissioner has concluded that the exception is not engaged. He has gone on to consider Lend Lease's arguments in respect of information withheld because it is considered to be subject to IP rights.

28

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i438/DWP%20v%20IC%20\(0073\)%20Decision%2020-09-2010%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i438/DWP%20v%20IC%20(0073)%20Decision%2020-09-2010%20(w).pdf)

29 <http://www.ipo.gov.uk/types/patent/p-about/p-need/p-need-secret.htm>

Information protected by IP rights

124. As noted above, Lend Lease (and the council) has argued that the identified information is subject to copyright, because of the selection or arrangement of the contents of the withheld database information and by virtue of database rights. The Intellectual Property Office describes these two categories of IP rights as follows:

*"For copyright protection to apply, the database must have **originality** in the selection or arrangement of the contents and for database right to apply, there must have been a substantial investment in obtaining, verifying or presenting its contents. It is possible that a database will satisfy both these requirements so that both copyright and database right apply."³⁰*

Database Rights

125. The Commissioner has first considered whether the withheld information constitutes a 'database'.

126. Section 3A(1) of the Copyright Designs and Patents Act 1988 ('the CDPA') defines a database as a "collection of independent works, data or other materials" which "are arranged in a systematic or methodical way and...are individually accessible by electronic or other means". For the purposes of the CDPA, a database is considered original

"...if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation"³¹ (section 3A(2)).

127. The Commissioner notes that neither the council nor Lend Lease has provided any submissions in this regard, despite the council explicitly confirming that it is relying on the information being subject to database rights and copyright on the basis of the selection or arrangement of the contents of the database. In the absence of any arguments which link the specific withheld information to these criteria the Commissioner is not in a position to conclude whether the conditions are satisfied.

³⁰ <http://www.ipo.gov.uk/types/copy/c-otherprotect/c-databaseright.htm>

³¹ <http://www.legislation.gov.uk/ukpga/1988/48/contents>

128. As the Commissioner considers that he is not obliged to generate arguments on behalf of public authorities he has concluded that it has not been shown that database rights apply to the withheld information.

129. He has, therefore, gone on to consider whether the withheld information can be more broadly categorised as being subject to IP rights.

IP Rights

130. In relation to copyright protection, Lend Lease has argued that the withheld information is the result of bespoke research and the input of Lend Lease and/or their advisors which is based on their experience and expertise in the property market, as well as being the output of labour and money. Even if certain component items of the information are available to the public, Lend Lease considers that the collection of the information has created a new set of information which is of value to Lend Lease and/or its advisors and is, therefore, protected by IP rights.

131. The Commissioner understands that Lend Lease has invested time and resources in compiling and presenting the information contained within the viability assessment. The Commissioner also accepts that, in the broader context of commercial interaction between public authorities and partners or prospective partners, there will often be an element of information sharing. Tender submissions for public sector contracts will routinely contain information which is the outcome of labour and expense, which reflects a prospective bidder's unique solution and representations of its financial structures and methodologies.

132. Whilst the Commissioner acknowledges that, in this instance, the elements of the withheld information identified by Lend Lease represents the results of its research and contains commercial information which is particular to Lend Lease he does not consider that it necessary follows that the information is protected by IP rights. The Commissioner considers that the contention that the information is subject to IP rights remains to be proved.

133. Lend Lease's arguments in this respect move from the initial premises that the information is the outcome of its time and expenditure to the further premise that the information is commercially confidential in nature. Lend Lease then concludes that, as disclosure of such information would be against the wishes of the business and would be likely to lead to damage to that enterprise, the public interest favours averting such results.

134. It is unclear why Lend Lease considers that the above argument demonstrates that IP rights are applicable, however, the Commissioner does not consider that the confidentiality of the information is a relevant

factor in considering whether the information is subject to IP rights. It is certainly not a factor which, in isolation, the Commissioner considers is sufficient to demonstrate that IP rights are applicable. The Commissioner has considered the issue of the confidentiality of the information in his analysis of regulation 12(5)(e), above. He has, therefore, discounted this strand of Lend Lease's argument.

135. In relation to Lend Lease's conclusion that there is a public interest in avoiding the damaging impact of disclosure on its commercial interests, the Commissioner has also discounted this argument as public interest factors can only be considered once it has first been shown that an exception is engaged.
136. Lend Lease has also referred to the fact that copyright protects the original and literary work of an author, including the skill, effort and time involved in its creation and the time needed for its production. Lend Lease has argued that the skill involved in and innovative nature of the viability assessment, particularly the financial model and business plan clearly meet this requirement.
137. The Commissioner accepts that the information identified by Lend Lease represents the fruits of its own research and expertise, and that it reflects a unique submission in respect of the proposed development. As copyright protects any written work, the Commissioner has concluded that this element of the exception is engaged. He has gone on to consider whether the IP rights holder would suffer harm.
- Harm must be suffered by the right holder*
138. The Commissioner considers that a disclosure which simply infringes IP rights is not sufficient to engage the "would adversely affect" test in this exception: there must be some real loss suffered by the owner of the IP right, such as a monetary loss. Secondly, the harm in question has to be suffered by the holder of the IP right because the right holder can no longer rely on their IP rights to control the use of the information.
139. In relation to this point the council has argued that disclosure would enable competitors to understand Lend Lease's methodology with regard to meeting its property accommodation proposals and to understand Lend Lease's view of the entire property development market which it uses to inform its strategy decisions. The council considers that, as a result, competitors would be able to use this information to their benefit, to the detriment of Lend Lease.
140. The council also directed the Commissioner to Lend Lease's submissions in this regard. In addition to harm to its own IP rights, Lend Lease has argued that information provided to it by its advisors is also subject to

IP rights and that disclosure of this would result in harm to their interests.

141. Where there is potential that a third party would suffer a loss, the Commissioner adopts a similar approach to when a public authority is claiming that a third party would suffer harm under regulation 12(5)(e) (commercial confidentiality). The Commissioner expects that, in such scenarios, arguments which originate from the relevant third party need to be provided and that speculation about potential harm will not be sufficient. As Lend Lease has not provided evidence that its arguments have originated from the relevant third parties, the Commissioner has, therefore, discounted this element of its submissions.
142. Whilst the Commissioner accepts that disclosure could have the identified effects, in order for the exception to be engaged any harm must be a result of an infringement of copyright in the viability report. Disclosure under the EIR would not in itself result in an infringement but unauthorised copying or utilisation of the information afterwards for commercial gain would. The Commissioner has gone on to consider whether this element of the exception is engaged.

The identified harm would be a consequence of the infringement of IP rights
143. IP rights exist to reward either the creativity or significant work or both that goes into producing the relevant material. It gives the right holder control over how the information is used and by whom. It follows that the harm defined by the exception must result from the right holder losing that control.
144. The council has not provided any arguments of its own in relation to this element of the exception but has, instead, directed the Commissioner to Lend Lease's submissions, confirming that they are endorsed by the council.
145. Having viewed Lend Lease's arguments, the Commissioner notes that this focuses on the harm that disclosure of information subject to IP rights would cause to its legitimate economic interests. Reference is made to disclosure resulting in the IP rights holder (ie Lend Lease) being unable to exploit the information for monetary/reputational benefit; however, it is not explained how this will occur beyond the initial disclosure under the EIR (which, as noted above, would not infringe IP rights).
146. Ascribed harm to a party's legitimate economic interests resulting from the information being made accessible via EIR disclosure is a separate category to information being subsequently exploited for commercial

gain, via reutilisation or copying. Whilst the former scenario would be a relevant factor in considering the engagement of regulation 12(5)(e), it is not a decisive factor in the engagement of regulation 12(5)(c).

147. Although Lend Lease has argued that the information would be beneficial to competitors operating in a similar market it has not provided evidence or made a case that the information would be reused in a way which would infringe IP rights. The Commissioner accepts that the information may be of benefit to other parties but there is no evidence and Lend Lease has not provided arguments which demonstrate that this would result from IP rights being infringed rather than from an initial disclosure made under EIR.

148. Having considered the arguments provided and the withheld information the Commissioner has concluded that the council has not demonstrated that the identified harm would be a consequence of the infringement of IP rights. As he has concluded that the exception is not engaged he has not gone on to consider the public interest arguments.

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

149. Regulation 12(5)(f) states that a public authority may refuse to disclose information if its disclosure would adversely affect the interests of the person who provided the information where that person:

- was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
- did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
- has not consented to its disclosure.

150. The Commissioner has considered whether the withheld information satisfies the criteria above.

151. The council has argued that all the withheld information was shared with the council by Lend Lease, that it was not a planning document required to be submitted as part of its application by law. Its provision was, therefore, voluntary and was not provided to the council pursuant to any legal obligation.

152. In relation to the second criterion, the council has referred to the fact, already acknowledged in this decision notice, that the information was shared with the council on a confidential basis. As such, the reasonable expectation of Lend Lease was that the withheld information would not

be shared for purposes other than those for which it was shared. The council has, therefore, argued that it is not entitled to disclose the information, other than under the EIR.

153. With regard to the third criterion, the council has confirmed that Lend Lease has not given its consent for the information to be disclosed.
154. In relation to the adverse effect of disclosure on Lend Lease's interests, the council has argued that, as the information was provided in confidence, disclosure would result in an erosion of trust between Lend Lease and the council. Such a breakdown in trust, the council argues, would adversely affect the interests of both parties. It confirmed that Lend Lease has consistently objected to disclosure of the information and when it was alerted to this request, it sought legal advice which confirmed its view that the information was provided to the council in confidence.

The Commissioner's conclusions

155. In this case, the Commissioner accepts that the information in question was provided to the council by a third party, specifically Lend Lease. As to whether this information was provided voluntarily, the view of the Commissioner is that the nature of this information and the circumstances in which it was provided are such that it is clear that it was supplied voluntarily. On the issue of whether there is, or could be, any other legal requirement to disclose this information, the Commissioner is aware of no evidence that suggests that any such requirement does exist and the council has explicitly confirmed to him that there was no legal requirement on Lend Lease to submit the Viability Assessment. The Commissioner also notes that Lend Lease has explicitly refused consent to the disclosure of the information.
156. The Commissioner recognises that if information is provided by a third party, with a clear expectation of confidentiality given by the body which received it, for the information to subsequently be made public will likely result in an erosion of trust between the two parties. It does not matter greatly whether there are consequences to the supplying group of the publication of the information; it is likely, in the circumstances, to be sufficient that a breach of trust has occurred. The erosion of that breach of trust would result in adverse effect for both sides.
157. The Commissioner notes that his analysis of the council's application of regulation 12(5)(e) above, concludes that disclosure of the information, which is subject to confidentiality provided by law, would also adversely affect the economic interests of Lend Lease. Having considered this alongside the other criteria, the Commissioner is, therefore, satisfied that the exception provided by regulation 12(5)(f) is engaged. Whether the information should be disclosed will depend on the balance of the

public interest factors for maintaining the exception, compared to those for disclosing the information.

Public interest test

Public interest in disclosure

158. As an argument in favour of disclosure, the council has identified the general public interest in transparency and accountability, particularly in relation to planning.
159. The council has also identified a specific argument, namely, the fact that the council is still (technically) the owner of the land as well as being the relevant planning authority adjudicating on the planning application and the potential for a conflict of interests which this brings.
160. The Commissioner considers that the public interest arguments in favour of disclosure which are set out in his consideration of the council's application of regulation 12(5)(e), above, are also directly relevant here and he has transposed these to his evaluation of the balance of the public interest below.

Public interest in maintaining the exception

161. In relation to the public interest in maintaining the exception, the council referred the Commissioner to the submissions it made in relation to its application of regulation 12(5)(e), which the Commissioner has considered above. The council stated that it considered these factors were relevant to the interests of the volunteers of information and that these arguments could also be applied in the context of this exception.
162. The council specifically highlighted the adverse affects of disclosure on the economic interests of Lend Lease (and its advisors), the impact on the council's working relationship with Lend Lease and the risk that disclosure would bring to the future of the scheme. It identified the size of the development, the scheme's potential contribution to a run down area and the fact that the development was in its early stages as other factors in favour of maintaining the exception.
163. The council also stated that the public interest in seeing that there has been no conflict of interest in the council's role in the scheme has been addressed by the independent evaluation of the viability assessment conducted by the District Valuer.
164. The council has further argued that the most likely impact of disclosure would be to discourage third parties from sharing information, at least to the extent supplied with the viability assessment. The council considers that the level of detail shared by Lend Lease has been of considerable

benefit and it would not be in the public interest for it to be deprived of such valuable information.

Balance of the public interest

165. In considering the balance of the public interest, the Commissioner considers that due regard should be had to the purpose of the exception, which is to encourage the voluntary flow of information from private persons to public authorities.

166. As a starting point, the Commissioner acknowledges that there is an inherent public interest in the prevention of adverse effects on the interests of the third party provider of information, and the principle of confidentiality. In this instance, the Commissioner has, therefore, given due weight to the potential impact of disclosure on the interests of Lend Lease and the damage that the disclosure of confidential information would cause to its working relationship with the council. Whilst there is a public interest in promoting public participation in the planning process, the Commissioner notes that this must be offset against the public interest in allowing the council to carry out this function effectively.

167. In relation to the general public interest in transparency and accountability, the Commissioner's general view is that, where this relates to planning matters, there is a strong weighting in favour of encouraging public participation and disclosure is a means of promoting this.

168. Additional factors which might, in a given case, increase the weighting towards disclosure include accountability for spending public money, the number of people affected by a proposal and any perception that an authority might not be acting in accordance with its own policies.

169. The Commissioner considers that the weighting of this argument is enhanced in the current case by a number of significant factors, namely:

- the scale of the scheme (£1.5 billion over 15 years)³²;
- the number of former residents of the Heygate estate affected by the scheme (3,000) and subject to rehousing or compulsory purchase orders;

³² http://www.southwark.gov.uk/info/200183/elephant_and_castle

- the loss of council owned property through sale of public land to a private enterprise
- the costs incurred by the council in taking the scheme forward (see paragraph 70, above);
- public concern about the levels of affordable housing provided by the scheme³³ and how this sits with the council's Core Strategy³⁴.

170. In relation to the council's submission that disclosure of the information would result in third parties being less likely to volunteer information in future, the Commissioner is not persuaded by this argument. Developments of this nature and scale can be highly lucrative and it is unlikely that a developer would wish to exclude itself from such a scheme.

171. Furthermore, the Commissioner considers that it is unlikely that an equivalent opportunity would present itself in the private sector. With the increasing outsourcing of public services and disposal of public assets to private partners or third parties, the Commissioner considers that there is a growing need for transparency and accountability in authorities' decision-making and expenditure, not least because many parties which authorities conduct business with will not themselves be subject to the EIR or FOIA. The Commissioner considers that there is a general public interest in addressing this potential shortfall in access to information. In this specific case, he considers that the reasons set out above combine to produce a very significant weighting in favour of disclosing the information.

172. The Commissioner has concluded that, in this case, the public interest in disclosing the information outweighs the public interest in maintaining the exception.

Aggregated public interest test

173. Further to the ruling from the European Court of Justice, in the case of Office of Communications (Ofcom) v the Information Commissioner (C-71/10)³⁵, for the information which engages both 12(5)(e) and 12(5)(b) the Commissioner has gone on to consider whether the aggregated

³³ See, for example: <http://www.bbc.co.uk/news/uk-england-london-19371334>

³⁴ http://www.southwark.gov.uk/download/5823/adopted_core_strategy

³⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0071:EN:HTML>

public interest in maintaining both these exceptions outweighs the public interest in disclosure.

174. Whilst the Commissioner does not repeat all the public interest arguments here, he has concluded that, for the information which engages both exceptions, whilst the aggregated public interest in maintaining regulations 12(5)(e) and 12(5)(f) is considerable it does not outweigh the public interest in disclosure in this case.

Right of appeal

175. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

176. 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.

177. 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
Principal Adviser Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF