

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 18 November 2013

Public Authority: The Royal Borough of Kensington and Chelsea
Address: The Town Hall
Hornton Street
London
W8 7NX

Decision (including any steps ordered)

1. The complainant requested information about the Earls Court regeneration project.
2. The Royal Borough of Kensington and Chelsea (the Council) stated that it did not hold some of the information. In respect of the information that it confirmed it holds, it refused the request, withholding the information under the Regulation 12(5)(e) of the EIR – the exception for the confidentiality of commercial or industrial information. The withheld information comprises two reports.
3. The Commissioner's decision is that the Council incorrectly withheld the information.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - disclose to the complainant the two reports, as provided to the Commissioner during the course of his investigation.
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 request in this case relates to information about a proposed regeneration site. The Commissioner understands that the site is located in both the Royal Borough of Kensington and Chelsea and the London Borough of Hammersmith and Fulham.

7. The request was made to the Royal Borough of Kensington and Chelsea. According to the part of the Council's website that contains information about the proposed development¹:

"EC Properties Ltd has submitted planning applications for the redevelopment of the main Earl's Court site, one to the Royal Borough of Kensington and Chelsea (RBKC) and one to London Borough of Hammersmith and Fulham (LBHF). Together, these applications are seeking outline planning permission for the redevelopment of the site which includes the Earl's Court Exhibition Centres, Lillie Bridge Road Rail Depot and the West Kensington and Gibbs Green Housing Estates".

8. One element of the withheld information in this case is a report by EC Harris. The Commissioner understands that EC Harris is a firm of quantity surveyors. EC Harris's website states:

"EC Harris is the leading global Built Asset Consultancy, helping clients make the most from their investment and expenditure in built assets."

9. The second element of the withheld information is a report by DVS (District Valuer Services). DVS is the property arm of the Valuation Office Agency (VOA). DVS provides professional property advice across the public sector. DVS was commissioned to advise on the viability of the proposed development particularly with regard to affordable housing.

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<http://www.rbkc.gov.uk/planningandconservation/planningapplications/earls-courtapplication.aspx>

10. The Commissioner understands that there are two DVS reports concerning the regeneration project – a report dated November 2011 and the report at issue in this case.

Request and response

11. On 11 January 2013 the complainant made the following request for information:

"I have seen documents that are in the public domain, many of which were contained within the Officers Report for the RBKC Planning Committee of 20 November 2012

However three documents relevant to the viability of the scheme are not in the public domain and these are the focus of my request. They are:

1. Development Infrastructure Study by DVS for H&F, RBKC and GLA (Full Report). Summary published November 2011 and contained within the RBKC Officers Report mentioned above. In the summary the 'existing use values' were blanked out. I do not mind if the same figures are also blanked out of the full report. It is the full report that I am seeking through this request.

2. EC Harris Built Asset Consultancy: Cost Analysis for the Earls Court and West Kensington Opportunity Area redevelopment proposals, Publication date: probably 2011

3. CBRE model for Capco referred to as 'the 2012 model' in a letter from PWC to [name redacted] of H&F dated 16th August 2012. The letter details tests on the '2012 model' version of this CBRE analysis which is described in the letter as 'DFBC4 for JLL (13.12.11) (inc Variable Profit.xlsx)."

12. The Council responded on 8 February 2013. In its response the Council referred to the request as comprising four parts, as follows:

"1. Development Infrastructure Study by DVS for H&F, RBKC and GLA (Full Report). Summary published November 2011 and contained within the RBKC Officers Report mentioned above. In the summary the 'existing use values' were blanked out. I do not mind if the same figures are also blanked out of the full report. It is the full report that I am seeking through this request.

2. *EC Harris Built Asset Consultancy: Cost Analysis for the Earls Court and West Kensington Opportunity Area redevelopment proposals, Publication date: probably 2011*
 3. *CBRE model for Capco referred to as 'the 2012 model' in a letter from PWC to [name redacted] of H&F dated 16th August 2012. The letter details tests on the '2012 model' version of this CBRE analysis which is described in the letter as 'DFBC4 for JLL (13.12.11) (inc Variable Profit.xlsx'.*
 4. *DVS Viability study for 'site wide development option' (Applications 1 and 2) and referred to in the Officers report to Major Planning Development Committee 20 November 2012."*
13. During the course of the Commissioner's investigation, the complainant confirmed that the four items mentioned in that response comprise the information he requested.
 14. The Council denied holding some of the requested information - namely parts (1) and (3) of the request. However, it confirmed that it holds the information requested in parts (2) and (4) of the request. It refused to provide that information, however, citing the exception at Regulation 12(5)(e) (the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest).
 15. Following an internal review, the Council wrote to the complainant on 13 March 2013 maintaining its original position.

Scope of the case

16. The complainant contacted the Commissioner on 27 March 2013 to complain about the way his request for information had been handled. He told the Commissioner his complaint was:

"regarding the failure of RBKC to provide two documents whose contents are important to the public understanding of the reasons for certain key decisions taken by RBKC in relation to the Earls Court Regeneration project".
17. Those two documents relate to parts (2) and (4) of the request. For the purposes of this decision notice, the Commissioner will refer to them as 'the EC Harris report' and 'the DVS report' (or collectively 'the reports').
18. The Commissioner considers the scope of his investigation to be the Council's application of regulation 12(5)(e) to those reports.

19. During the course of the Commissioner's investigation, the Council indicated that it may wish to submit further representations about its application of exceptions. However, it subsequently confirmed that it would not be doing so. At a late stage of his investigation, the Commissioner received a cover note from the third party involved, enclosing a copy of a letter it had sent to the Council: no correspondence about that submission was received from the Council.
20. In the Commissioner's view, in cases such as this, although public authorities should consider the views of interested parties, it is the public authority's responsibility to decide whether or not the exception applies. Accordingly, the Commissioner has focussed on the arguments put forward by the Council in this case.
21. The Commissioner has previously considered complaints involving similar requests for information. For example he has recently issued a decision notice² in a case where the complainant had requested - from London Borough of Southwark - a copy of a financial viability assessment relating to a large housing development at the Elephant and Castle in London.
22. Whilst acknowledging the existence of other similar cases having been, or being, investigated, the Commissioner's duty is to decide, on a case-by-case basis, whether a request for information has been dealt with in accordance with the EIR.

Reasons for decision

23. In correspondence with the complainant, the Council stated:

"There were a number of reports commissioned by and prepared on behalf of the applicants for planning permission by EC Harris and provided to the DVS by the Council for the purposes of the viability study".

24. The Commissioner understands that the EC Harris report was produced as part of the assessment of the viability of the applications for planning
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http://www.ico.org.uk/~media/documents/decisionnotices/2013/fer_0461281.ashx

permission and was submitted to the Council in its capacity as local planning authority.

25. The EC Harris report was one of the reports sent to DVS for the purpose of advising on the viability of the proposed development.
26. The exceptions listed under regulation 12(5) are based on harmful consequences of disclosure. A public authority may refuse to disclose information if disclosing it would 'adversely affect' (harm) one of the interests listed in regulations 12(5)(a) to 12(5)(g). In this case the Council has applied one exception, namely Regulation 12(5)(e) of the EIR, to the entirety of the two reports.

Regulation 12(5)(e) Confidentiality of commercial or industrial information

27. Regulation 12(5)(e) of EIR states that:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest".

28. The purpose of the exception is to protect any legitimate economic interests underlying commercial confidentiality. The Commissioner considers that in order for this exception to apply, there are a number of conditions that need to be met. He will consider 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?
29. In the Commissioner's view, the Council's initial response failed to address these points. Instead it appears to rely on the exception being self-evidently engaged and concentrates on the public interest arguments. He considers that it was not until the internal review that the Council explained to the complainant why it considers the exception applies in this case. Even then, he considers that its explanation lacked substance and detail.

30. The Council expanded on its arguments during the Commissioner's investigation.

Is the information commercial or industrial in nature?

31. The Commissioner considers that, for information to be commercial 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, usually for profit.

32. Without distinguishing between the two reports, the Council told the Commissioner:

"The information is commercial in nature as it relates to the development plans for land. The reports were produced in a commercial context to assist the business operations of the developer".

33. From the arguments it has put forward, the Commissioner considers that the Council failed to confirm whether it is claiming that the information relates to a commercial activity of the public authority itself, a third party, or both.
34. Nevertheless, taking into account the context in which the reports were produced, and their purpose, he accepts that the information is commercial in nature. For example, he notes that the reports contain financial information such as cost models, financial modelling information and information about land values in connection with the regeneration project. He has therefore concluded that this element of the exception is satisfied.

Is the information subject to confidentiality provided by law?

35. With respect to the common law of confidence, the Council told the Commissioner that the reports have the necessary quality of confidence:

"as they are not already in the public domain and are not trivial, as they relate to development which will have a major impact on the local area".

36. Having considered its arguments, and viewed the withheld information, the Commissioner is satisfied that it is not trivial in that it relates to a proposal for a comprehensive redevelopment which will have an effect on the local area.
37. As he is satisfied that the information has the necessary quality of confidence the Commissioner has gone on to consider whether the

information was shared in circumstances importing an obligation of confidence.

38. In that respect, the Council told the complainant:

"The reports prepared by EC Harris were provided to the Council on a confidential basis. The DVS was commissioned to advise the Council(s) on the viability of the proposed development ... The financial information contained within these reports is commercially sensitive and, therefore, it was for this reason provided on a confidential basis".

39. Similarly, it told the Commissioner:

"We believe that the reports were shared in circumstances creating an obligation of confidence".

40. The Council provided the Commissioner with further evidence in support of its argument that the information was provided in confidence. For example the Commissioner understands that the developer would not have presented the information contained within the reports in the way they did if they thought that the information could be released into the public domain.

41. Having considered the matter, the Commissioner is satisfied both that the information is not trivial and that it was shared in circumstances importing an obligation of confidence. Accordingly, he finds this element of the exception is satisfied.

Is the confidentiality protecting a legitimate economic interest?

42. In the Commissioner's view, in order to satisfy this element of the test disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.

43. The Commissioner has issued guidance on what he considers constitutes legitimate economic interests. That guidance 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. However, they will not include personal privacy concerns".

44. It is not enough that disclosure might cause some harm to an economic interest. The public authority needs to establish that disclosure **would** cause some harm.

Whose interests?

45. In correspondence with the complainant, the Council did not put forward any submissions to say that its own legitimate economic interests would be adversely affected by disclosure.

46. With respect to third party interests, the Council variously told the complainant:

"We have decided to withhold this information as we believe that disclosure at this stage will prejudice the commercial interests of EC Properties as the information is commercially confidential"

and

"Release of this information at this stage of the development would prejudice EC Properties commercial interests".

47. It told him that it was:

"... persuaded that the disclosure of the confidential information would adversely affect a legitimate economic interest of the person the confidentiality is designed to protect which in this case is the applicant for planning permission".

48. Confirming whose legitimate economic interests it considers are relevant in this case, the Council told the Commissioner:

"The confidentiality is required to protect the economic interest of the developer".

49. In the Commissioner's view, the Council's arguments lack sufficient detail with respect to the harm that would arise from disclosure.

50. Where, as in this case, it is a third party's interests that are at stake, the Commissioner considers that the public authority should consult with the third party unless it has prior knowledge of their views. It will not be sufficient for a public authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party.

51. From the evidence he has seen, it is not clear whether the Council had knowledge of the third party's views at the time of the request. The Commissioner notes, however, that the Council did consult the third party during the course of his investigation.

52. The Council provided the Commissioner with a submission from Capital and Counties Properties plc (Capco) - the parent company of the owners of the site and of the applicants for planning permission. That submission sets out Capco's objections to the release of documents (2) and (4) – the reports. The Commissioner has therefore had the opportunity to consider Capco's submissions about the harm that disclosure of the information at issue would cause to its legitimate economic interests.
53. For example, Capco states that the reports contain aspects unique to its business, such as pricing structure and development delivery models. It considers that:
- "Disclosing cost information at this stage would significantly weaken our negotiating position and adversely affect our competitive position in the marketplace.... There is significant commercial risk in making publically available the extent of the cost risks facing the scheme and how these have been adjusted for".*
54. It also explained that the information at issue identifies the allowances made for "very sensitive cost items" which will be the subject of negotiation. It said that disclosure of such information would present a significant commercial risk by prejudicing its ability to negotiate.
55. In Capco's view, disclosure would also be likely to prejudice the interests of other third parties. However, the Commissioner has not been provided with any evidence to support that statement. Therefore, he has only considered whether disclosure in this case would adversely affect the legitimate economic interests of Capco.
56. During the Commissioner's investigation, in support of its claim that disclosure would be detrimental to Capco, the Council simply summarised the arguments that Capco put forward. For example it told the Commissioner:
- ".. the reports identify the assumed cost allowances for sensitive cost items which will be the subject of negotiation with individual householders or third parties. The release of this information at this stage would prejudice their ability to negotiate with these third parties".*
57. Similarly, it told him that it would prejudice the ability of the third party to negotiate effectively with future investors if the parameters of their pricing model were made public.

The complainant's view

58. In bringing his complaint to the Commissioner's attention, the complainant put forward contrasting views to those of the Council.
59. He told the Commissioner that he considered that the Council's view that the report was commercially confidential:

"is not convincing in itself, or in the context that it provides an important element [of the DVS report]."

60. He further explained:

"The point is that the quantity surveyors report is specific to the scheme. The cost rates are often generally known within the development world but the actual quantities and measurements are highly specific. This is especially true of the present development as it involves a massive amount of demolition, undergrounding and then decking over the railway lines that occupy a substantial fraction of the site. The resultant report has little wider value: it is very specific to this site. Hence the importance of commercial confidentiality is low".

61. The complainant also stated that, even if the report had at one time commercial confidentiality:

"it certainly does not have it now.... The costs position will have changed significantly since then".

62. Acknowledging that, as in the case of the other DVS report about this regeneration project, it may be possible to provide information in a redacted form, the complainant told the Commissioner:

"There has been no attempt by RBKC to explain why a few deletions would not permit [the DVS report] to be published in the same way that the first one was".

63. He also argued that, in allowing that first DVS report to be published:

"Capco has already allowed a good deal of the commercial information to be made public. This reduces even further the validity of the commercial confidentiality argument".

Would disclosure cause harm?

64. The exceptions under Regulation 12(5) provide protection when disclosing information would 'adversely affect' (harm) particular interests. The adverse effect test under the Regulations is similar to the prejudice test under the FOIA.

65. In the context of Regulation 12(5)(e), the exception cited in this case, it is not enough that disclosure might cause some harm to an economic interest. The Commissioner must consider whether the Council has established that disclosure **would** cause some harm. He has also taken into account that regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure. Therefore there may be occasions when information should be disclosed even though it is confidential and disclosure would harm someone's legitimate economic interests.
66. In considering this matter, the Commissioner has focussed on the arguments put forward by the Council. In doing so, the Commissioner accepts that the submissions made by the Council identify relevant economic interests. He also accepts that they reflect the arguments expressed by the third party.
67. He accepts that, in suggesting that disclosure would result in Capco being put in a disadvantageous position compared with competitors, the Council identifies the nature of the disadvantage. However he does not consider that it provides any tangible evidence that disclosure would produce such an effect.
68. He also acknowledges that the Council considers that disclosure of the reports would have an adverse impact on its own ability as local planning authority:

"to require the applicant to provide such similar information in future should it become necessary in connection with future planning applications for this site".
69. However, again, there is no evidence to support that claim.
70. In the Commissioner's view, in cases such as this, although public authorities should consider the views of the third party, it is the public authority's responsibility to decide whether or not the exception applies..
71. The Commissioner notes that the Council's substantive submissions – which reflect the arguments expressed by the third party - were not made until during the course of his investigation. Notwithstanding that, the Commissioner accepts that the Council has addressed the sensitivity of the information at the time of the request and the nature of any harm that would be caused by disclosure.
72. In this case, although the Commissioner is satisfied that the Council has provided evidence in support of its arguments in relation to the effect of disclosure, he is not satisfied that the Council has demonstrated sufficiently that disclosure 'would' adversely affect legitimate economic

interest of the person the confidentiality it designed to protect, namely Capco.

Would the confidentiality be adversely affected by disclosure?

73. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it inevitable that this element will be satisfied. In his view, disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would harm the legitimate economic interests that have been identified.
74. However, in this case, the Commissioner is not satisfied that one of the first three elements is satisfied. Therefore he is unable to conclude that the confidentiality would be adversely affected by disclosure.

Is the exception engaged

75. Regulation 12(2) specifically states that a public authority shall apply a presumption in favour of disclosure. Therefore, there may be occasions when information should be disclosed even though it is confidential and disclosure would harm someone's legitimate economic interests.
76. In this case, having considered the criteria he considers relevant, the Commissioner has not found that all of those criteria are satisfied. It follows that he does not find the exception engaged.
77. As the Commissioner has not found the exception engaged, he has not gone on to consider the public interest.

Other matters

78. With respect to there being two reports produced by DVS about the regeneration project the complainant told the Commissioner:

"There is no explanation of the fact that there are two DVS reports, showing quite different affordable housing percentages to be bearable by the scheme. Moreover DVS1 was included as an appendix to the Officer's Report, which is what the public saw. This amounts to deception".

79. Notwithstanding the complainant's wider concerns about there being two DVS reports, the Commissioner understands that those of his concerns that fall within the Commissioner's remit are in relation to the Council's citing of regulation 12(5)(e) of the EIR which he has addressed above.

80. The Commissioner notes that the Council advised the complainant that if he did not accept its explanation and apology *"for any lack of clarity in the way in which the DVS report was described"*, his recourse was via the Council's complaints procedure. The Commissioner is therefore satisfied that there is a route available to the complainant to pursue his concerns should he wish to do so.

Right of appeal

81. 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

82. 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.
83. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Gerrard Tracey
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