

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

**Decision notice**

**Date:** 23 April 2014

**Public Authority:** Royal Borough of Greenwich  
**Address:** The Woolwich Centre  
Wellington Street  
Woolwich  
SE18 6HQ

**Decision (including any steps ordered)**

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1. The complainant requested a copy of a financial viability assessment relating to the Greenwich Peninsula.
2. Royal Borough of Greenwich (the Council) provided some of the requested information but refused to provide a small amount, citing the EIR exception for adverse affect to commercial confidentiality (regulation 12(5)(e)) as its basis for doing so.
3. The Commissioner's decision is that the Council failed to demonstrate that regulation 12(5)(e) is engaged.
4. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
  - disclose the withheld information.
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.

## Request and response

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6. On 12 June 2013 the complainant wrote to Royal Borough of Greenwich and requested information in the following terms:

*"Dear Sir/Madam, I would like to make a request under the Freedom of Information Act to obtain a copy of financial viability report that was commissioned and undertaken to inform the variation to the section 106 agreement over the 11 plots in question across Greenwich Peninsula that was agreed at the council's Planning Board of the 28th February 2013".*

7. Following the Commissioner's intervention, the Council responded on 20 August 2013, advising that the request had been considered under the EIR. It disclosed *"the majority of the information contained in the report"*, refusing to provide the remainder, namely information set out in section 6.0 on page 6 of the report. It cited the exception at regulation 12(5)(e) of EIR (confidentiality of commercial or industrial information) as its basis for doing so.
8. The Council sent the complainant the outcome of its internal review on 9 October 2013, maintaining its decision to rely on regulation 12(5)(e) in withholding that information.

## Scope of the case

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9. Further to earlier correspondence, the complainant provided the Commissioner with the relevant documentation to complain about the way his request for information had been handled - and confirmation of the nature of his complaint - on 13 December 2013.
10. The complainant told the Commissioner:
- "...we would like to see the full disclosure of claimed paragraph 6.0 within the financial viability report".*
11. The withheld information relates to the expected unit prices in £psf (per square foot) on the plots where there is no affordable housing.
12. The Commissioner considers the scope of his investigation to be the Council's application of regulation 12(5)(e) to that small amount of withheld information.

## Reasons for decision

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13. In responding to his request for information, the Council told the complainant it had been considered under the EIR:

*"This is in accordance with Regulation 2(c), it is information that relates to:-*

*'measures, (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors such as land, landscape.....'".*

### *Regulation 12(5)(e) confidentiality of commercial or industrial information*

14. 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 a small amount of information within paragraph 6.0 of the financial viability report.
15. 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".*
16. 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?

*Is the information commercial or industrial in nature?*

17. 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.

18. The Council told the complainant:

*"The information that has been redacted relates to the expected unit prices in £psf on the plots where there is to be no affordable housing and those with affordable housing and the %age difference between the figures".*

19. 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 concerning the public authority itself, a third party, or both.

20. Nevertheless, taking into account the context in which the viability report was produced, and its purpose, he accepts that the information is commercial in nature. He has therefore concluded that this element of the exception is satisfied.

*Is the information subject to confidentiality provided by law?*

21. The Commissioner considers that 'provided by law' will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.

22. The Commissioner is not aware of any statutory duty of confidence, and the report does not contain any provision or obligation relating to confidentiality. Therefore the Commissioner has considered the common law of confidence, which has two key tests:

- does the information have the necessary quality of confidence?
- was the information imparted in circumstances creating an obligation of confidence?

23. For the common law duty of confidence to apply the information must have the necessary quality of confidence, meaning the information should not be trivial in nature and should not already be in the public domain.

24. The Council told the complainant that the withheld information had been given to it by the developer:

*"as part of the viability assessment and this is subject to a duty of confidence provided by law".*

25. It also told him that it considered:

*"that this information was given to us by the developer on the strict understanding that this information would remain confidential".*

26. Similarly it told the Commissioner:

*"It is usual practice that figures relating to affordable housing in relation to such developments is provided to councils on a confidential basis".*

27. The Commissioner is satisfied that the withheld information was not in the public domain at the time of the complainant's request. The Commissioner does not consider the information to be trivial, therefore it is capable of having the necessary quality of confidence.

28. The Commissioner also accepts that information relating to expected unit prices would be reasonably understood as having been shared in circumstances importing an obligation of confidence. On this basis the Commissioner accepts that the information within the report which has not already been disclosed into the public domain will be subject to the common law duty of confidence.

*Is the confidentiality protecting a legitimate economic interest?*

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

30. In his view, it is not enough that some harm **might** be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm **would** be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets 'would' to mean 'more probable than not'.

31. The Council told the complainant:

*"Advice that is provided in relation to key variables in financial viability appraisals must remain confidential as the information changes on a site by site basis".*

32. In correspondence with the Commissioner, the Council explained the adverse effect both for the Council and for the developer if the information at issue was disclosed.

33. The Council told the Commissioner the adverse effect for the Council would be:

*"that developers would be reluctant to provide this information is they knew that it would be placed in the public domain".*

34. With respect to the developer, it said:

*"The adverse effect for the developer would be that publishing of these figures could influence the price future prospective purchasers may be willing to pay for the completed units".*

35. It also argued that disclosure of the disputed information would provide third parties with knowledge *"which would not otherwise be available in a competitive market"*.

36. In other words, to satisfy this element of the exception in this case, the Commissioner must determine whether disclosure would harm the legitimate economic interests of the developer and the public authority.

37. Where, as in this case, a third party's interests 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.

38. The Commissioner accepts that, in suggesting that disclosure would result in the developer 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. He therefore does not accept that disclosure would harm the legitimate economic interests of the developer.

39. Nor was he presented with any evidence to suggest that developers would lose confidence in the Council to the extent that they would decline to do business with it. In the absence of such evidence, the Commissioner does not accept that disclosure in this case would prejudice the Council's own commercial interests.

40. Although the Commissioner is satisfied that the Council has explained its view 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 – the Council itself or the developer.

*The confidentiality would be adversely affected by disclosure*

41. 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.
42. 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*

43. 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.
44. In this case, having considered the criteria he considers relevant, the Commissioner is not satisfied that the Council provided sufficient evidence and argument to demonstrate that regulation 12(5)(e) was engaged.
45. As the Commissioner has not found the exception engaged, he has not gone on to consider the public interest.

## Right of appeal

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46. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**