

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

Decision notice

Date: 22 October 2015

Public Authority: London Borough of Hounslow
Address: Civic Centre
Lampton Road
Hounslow
TW3 4DN

Decision (including any steps ordered)

1. The complainant has requested a copy of the viability assessment prepared in support of Brentford Football Club's planning application for a new stadium. The London Borough of Hounslow (the Council) has provided a copy of the viability assessment subject to redactions made in accordance with the 'commercial or industrial confidentiality' exception (regulation 12(5)(e)) in the EIR. The complainant has challenged these redactions and asked the Commissioner to consider whether the Council was entitled to withhold the various items of information contained within the assessment. The Commissioner has found that parts of the withheld information engage the exception (pages 27 (JLL value assumptions) and 32 (Table 10.2.5) and the Appraisal Summaries (Appendix 7)) and the public interest favours withholding this information. For the remainder, the Commissioner has decided that the exception does not apply and the information should therefore be disclosed.
2. 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

3. On 30 September 2014 the complainant wrote to the Council and, in respect of Brentford Football Club's proposal for the development of a new stadium at Lionel Road South, asked for information in the following terms:

I am seeking the viability assessment prepared in support of the Planning Application ref. P/2013/1811 or 00703/A/P11.

4. The Council responded on 24 October 2014. It informed the complainant that the request had been dealt with under the EIR and the Council had determined the viability assessment was excepted from disclosure under regulation 12(5)(e) (confidentiality of commercial or industrial information) of the EIR. Regulation 12(5)(e) of the EIR is qualified by the public interest test and the Council found that on balance the public interest favoured maintaining the exception. The Council noted, however, that the overall conclusion of the viability appraisal was incorporated within the officer's report to the Council's Planning Committee.
5. The complainant wrote to the Council on 5 November 2014 and asked for the decision to withhold the requested viability assessment to be reviewed. In particular, the complainant believed that two issues relevant to the request warranted further attention. Firstly, the complainant raised the possibility that FOIA rather than the EIR applied. Secondly, the complainant emphasised the importance of transparency for the purposes of facilitating local engagement with the planning process and considered this importance should be reflected in the consideration of the public interest test.
6. The Council carried out an internal review in light of the complainant's dissatisfaction, the outcome of which was provided on 12 December 2014. This upheld the decision to consider the request under the EIR and the reviewer further found that regulation 12(5)(e) of the EIR had been correctly applied. With regard to the public interest test, the reviewer considered that the potential harmful effect of disclosure on the delivery of the project, combined with the fact that no significant expenditure of public funds had been committed to the project, meant the public interest favoured withholding the requested information.

Scope of the case

7. The complainant contacted the Commissioner on 14 January 2015 to complain about the way her request for information had been handled. In particular, the complainant disputed the Council's decision to withhold the viability assessment produced for the Brentford Football Club stadium proposal.
8. During the course of the Commissioner's investigation, the Council disclosed a version of the viability assessment that had elements redacted under regulation 12(5)(e) of the EIR. The complainant has contested the extent and scope of these redactions and therefore it is this information which forms the focus of the decision notice.

Reasons for decision

Background

9. The request relates to Brentford Football Club's proposal to move from its existing home ground at Griffin Park to a new stadium at Lionel Road South. The planning application for the stadium development was received by the Council on 3 June 2013. To support the planning process, a viability report was prepared on behalf of Brentford Football Club in September 2013. This had the remit of analysing whether the project was deliverable, the findings of which were assessed by an independent consultant for the Council.
11. The planning application was considered by the Council's Planning Committee on 5 December 2013 and extracts of the summary of the officer's report¹ prepared to assist with the decision-making are quoted below.

1.1 The application proposes a new stadium for Brentford Football Club (BFC), moving its new home to Lionel Road South. The proposal also includes housing on surrounding land, with this helping to fund the stadium. Other associated transport, public realm improvements, car parking and commercial development, including a hotel are proposed.

1.2 The two main elements of the application are:

¹ <http://democraticservices.hounslow.gov.uk/mgConvert2PDF.aspx?ID=85368>

(i) A 20,000 seat football stadium with ancillary and community uses.

(ii) Housing development on adjoining and surrounding land to provide funding for the stadium comprising up to 910 dwellings, commercial uses and a 160 room hotel.

[...]

1.5 The application has been submitted with an Environmental Statement, and it has been advertised as a departure from the Council's Development Plan.

1.6 The development would be phased over ten years, with obligations requiring the stadium to be completed prior to the housing. The club would retain ownership of the stadium but sell the housing sites to fund the stadium's construction.

1.7 Owing to the current viability of the development, no affordable housing is proposed, and the ability to fund other planning obligations is reduced. As a phased scheme, an obligation is proposed requiring viability to be retested over different stages of its delivery, to ensure that if viability improves to a level that would enable affordable housing and other community contributions to be provided, that these can be secured.

12. Planning for the stadium was granted in December 2013 and later in the same month it was announced² on the website of Brentford Football Club that it had signed a Development Agreement with residential developer Willmott Dixon to deliver the new stadium at Lionel Road South, together with other community facilities, new homes and shops. Willmott Dixon would also take forward plans for Brentford's existing stadium at Griffin Park. In February 2014 it was reported that the Mayor of London had confirmed the decision of the Council to grant planning permission for the stadium and associated development.
13. Although post-dating the request, it is noted that September 2015 saw the opening of a public inquiry following an objection to a compulsory purchase order from the Council to acquire land needed for the development.

² <http://www.brentfordfc.co.uk/news/article/brentford-fc-lionelk-road-development-agreement-2161784.aspx>

FOIA or the EIR?

14. The EIR and FOIA give rights of public access to information held by public authorities. The regimes are, however, distinct from each other and a public authority must decide under which legislation a request should properly be considered. The EIR derived from EU law and exclusively covers environmental information. FOIA, on the other hand, represents an access regime to most other types of official records held by public authorities.
15. The Council considers that the requested viability assessment is environmental information and should therefore be considered under the EIR. The complainant, however, has raised the possibility that this interpretation is incorrect.
16. 'Environmental information' is defined at regulation 2(1) of the EIR. In accordance with the European Council Directive 2003/4/EC from which the EIR derives, it is the Commissioner's view that the definition should be interpreted widely. This is based on the construction of regulation 2(1), which states that environmental information is "any information...on" the factors described at paragraphs (a) – (f). Importantly, it is not necessary for the information itself to record or reflect a direct effect on the environment in order for it to be environmental.
17. Differently constituted Information Tribunals have decided that viability assessments relating to planned developments would constitute environmental information and should therefore be considered under the EIR. However, while adopting this position, the Tribunal in *The London Borough of Southwark v The Information Commissioner* (EA/2013/0162, 9 May 2014)³ also cautioned that there may be a tendency to overuse the EIR (paragraph 29).
18. The Council has acknowledged the guidance given by the Tribunal on the *Southwark* case but has maintained that the EIR is the correct access regime because of the significant environmental impact of the proposed development. It considers, and the Commissioner accepts, the viability information falls within the definition of environmental information set out at regulation 2(1)(e). This refers to the cost-benefit and other economic analyses and assumptions used within the framework of

³[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1279/London%20Borough%20of%20Southwark%20EA.2013.0162%20\(09.05.14\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1279/London%20Borough%20of%20Southwark%20EA.2013.0162%20(09.05.14).pdf)

environmental measures and activities (referred to at regulation 2(1)(c)).

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

19. The Council has applied regulation 12(5)(e) of the EIR to various elements of the viability assessment. The purpose of the exception is to protect any legitimate economic interests underlying commercial confidentiality.
20. The Commissioner's guidance⁴ states that 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 disclosure which would otherwise result in a loss of revenue or income.
21. The construction of the exception effectively imposes a four-stage test, each condition of which must be satisfied for the exception to be engaged:
 - (i) The information is commercial or industrial in nature.
 - (ii) Confidentiality is provided by law. This will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute.
 - (iii) The confidentiality is protecting a legitimate economic interest. If the arguments refer to the economic interests of a third party we will require evidence that the third party has expressed concerns about disclosure.
 - (iv) The confidentiality would be adversely affected by disclosure. Although this is a necessary element of the exception, the Commissioner considers that this test will inevitably be satisfied if the first three conditions are established.

⁴ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

22. If all of the tests are met, a public authority must go on to consider the balance of the public interest.

23. Taking into account the purpose of the exception, the Council has responded to (i) – (iv) in turn. The Commissioner has tested the submissions against the legislation and his analysis follows.

(i) Is the information commercial or industrial in nature?

24. The Council has asserted that the viability assessment contains commercial information relating to Brentford Football Club and its development partner, Lionel Road Developments Ltd (LRDL) in connection with the proposed development. In particular, the redacted information concerns the trading activity of the Club and LRDL, including information in relation to the purchase and sale of land, goods and services.

25. The Commissioner is satisfied that the withheld information is commercial in nature.

(ii) Confidentiality is provided by law.

26. Confidentiality in this context will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute. The exception can cover information obtained from a third party.

27. The Council considers that the information provided in the viability assessment is subject to the common law of confidence. The common law of confidence will apply where information has the necessary quality of confidence and is shared in circumstances creating an obligation of confidence.

28. For information to have the necessary quality of confidence, information must not be trivial nor can it already be in the public domain. The Council confirms that both of these factors are met in this case. It further highlights that the viability assessment contains the disclaimer "strictly confidential and commercially sensitive". The Council acknowledges that the presence of the disclaimer alone is not conclusive but argues that this, coupled with the reinforcement of the confidentiality of the information at various meetings with LRDL, indicate that there was a genuine expectation on the part of LRDL that the information would be kept confidential. Based on the explanations provided, the Commissioner accepts that the common law of confidence does apply.

(iii) The confidentiality is protecting a legitimate economic interest

29. The Commissioner's guidance provides the following clarification with regard to this test:

33. Public authorities will therefore need to consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure. The timing of the request and whether the commercial information is still current are likely to be key factors. Broader arguments that the confidentiality provision was originally intended to protect legitimate economic interest at the time it was imposed will not be sufficient if disclosure would not actually impact on those interests at the time of the request.

*34. It is not enough that disclosure might cause some harm to an economic interest. A public authority needs to establish (on the balance of probabilities – ie more probable than not) that disclosure **would** cause some harm.*

30. The Council considers that the confidentiality of the information protects the legitimate economic interests of Brentford Football Club/LRDL, its development partner (Willmott Dixon) and the Council. The reasons given for each of the parties cited are summarised below.

- Brentford Football Club and LRDL – it is claimed disclosure presents a real risk to the LRDL (and therefore the Club) that the project will not be delivered in accordance with the viability assessment and thus risks the deliverability of the scheme as a whole. The Commissioner has been provided with evidence that demonstrates LRDL's objections to disclosure that corresponds with this position, breaking down the nature of the prejudice as follows:
 - The risk to the viability of the project is particularly acute at the time of the request as there is on-going negotiation with regard to the acquisition of land by LRDL. Disclosure of information relating to acquisition costs and rental value of the land would be likely to prejudice those on-going negotiations.
 - Disclosure of the financial information would harm the Club and LRDL's ability to obtain similar services and goods at a competitive price in the future. Potential suppliers and contractors for goods and services would have an insight into the costs that the Club/LRDL would be willing to incur in respect of similar goods and services and would in turn be able to drive up their charges.

- The Council – it is explained that the Council is in the process of negotiating the acquisition of land that forms part of the planning application site that is not presently in the ownership of the applicant. This land may be the subject of a Compulsory Purchase Order if on-going negotiations are not successfully concluded. Disclosure of the estimated land acquisition costs and residual value information would prejudice the negotiating position of the Council.
 - Willmott Dixon – the release of the estimated building costs would allow competitors and suppliers of goods and services to price their services with knowledge of Willmott Dixon's budgeted costs. This would have the effect of disadvantaging Willmott Dixon in the negotiation for those goods and services.
31. The Commissioner accepts that each of the arguments may in principle hold some weight in terms of the application of the exception. However, he must decide whether the arguments correspond with the withheld information itself and, if so, that the nature and severity of the prejudice means there would be an impact on the parties concerned.
32. The First-tier Tribunal (Information Rights) has previously been required to consider the effects of the disclosure of viability information, most notably on *Royal Borough of Greenwich v IC & Brownie* (EA/2014/0122, 30 January 2015)⁵ and the *Southwark* case. Both of the Tribunals emphasised the importance of local people having access to information so that they were better able to participate in the planning process. It is noted that the specific circumstances of the cases differed from each other and also plainly from this case. Nevertheless, the Commissioner has found helpful the approaches adopted by the Tribunals to viability information.
33. In the *Southwark* case, the Tribunal expressed some reservations about the argument which said that rivals might be able to undercut a developer if more information were freely available. The Tribunal said:

19. [...] The market price for an asset at a later point is more likely to be determined by a purchaser's estimate of the value of the asset, and the number and purchasing power of potential powers, than any information on the price paid or the

⁵[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1478/Royal%20Borough%20of%20Greenwich%20EA.2014.0122%20\(30.01.15\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1478/Royal%20Borough%20of%20Greenwich%20EA.2014.0122%20(30.01.15).pdf)

expectations as to price or ambitions for profit levels of the vendor."

34. The possibility that market forces may change and prices fluctuate was itself observed in the report prepared for the Council's Planning Committee. As quoted above, the report acknowledged at paragraph 1.7 that the proposed development was a phased scheme and therefore it recommended that the viability calculations should be re-tested at various stages of the delivery. This was on the basis that the viability could improve to an extent that affordable housing could be incorporated into the plans. In other words, it was accepted that not only could the market conditions change but also that the changes that could take place during the phases of the project could be significant.
35. The withheld information includes information such as projected land acquisition costs and anticipated construction costs, among other pieces of financial and explanatory information. The Commissioner recognises that these categories of information are important in providing a framework in which to carry the project forward. However, he also considers that the financial assumptions are just that, assumptions, and may be liable to change. He also considers that a link has not been made between the explanations and descriptions set out in the viability assessment and the prejudice cited.
36. This is not to say that a competitor or third party will not attempt to use the information to gain an advantage. However, the Commissioner considers that the viability information is only a snapshot in time and would not commit a party to the figures specified. Instead, these figures would be open to negotiation. Furthermore, in many instances it can be seen that the figures only provide global assumption figures and not a breakdown of how these figures are calculated. With regard to the explanations and descriptions, the Commissioner also disagrees that the information could be used by competitors in a way that would damage any of the parties specified.
37. The Commissioner has therefore concluded that regulation 12(5)(e) is not engaged in relation to most, but not all, of the withheld information. The exception to this determination is the more specific appraisal information detailed on pages 27 (JLL value assumptions) and 32 (Table 10.2.5) and in the Appraisal Summaries (Appendix 7). The Commissioner considers that unlike the aforementioned classes of information, the data drills down to the position of a developer that would be used to guide the subsequent negotiation exercise. For this reason, the Commissioner would accept that disclosure of this, and only this, information would have an adverse effect.

38. As stated, the Commissioner considers that the fourth stage of the test relating to the engagement of the exception will necessarily be satisfied if the three preceding stages are met. With regard to the specific information that engages the exception, the Commissioner has therefore gone on to consider the public interest test.

The balance of the public interest

39. In the *Southwark* case, the Tribunal found that the following three issues were dominant in the exercise of the public interest test and were of such importance as to dwarf other considerations:
- The project must not be allowed to fail or be put in jeopardy.
 - The importance of public participation in decision making.
 - The avoidance of harm to a party's commercial interests.
40. The Commissioner likewise considers these factors provide a helpful framework in which to consider the competing public interest arguments.
41. In the *Southwark* case it had been necessary for the Tribunal to consider the viability assessment linked to a regeneration project for the Elephant and Castle. The Tribunal considered that Southwark was right to see a successful regeneration scheme as essential and emphasised the strong and natural concerns of local residents about what would happen to the area. The importance of the project translated into a significant public interest in ensuring that commercial information which was vital for the delivery of the project should remain confidential. The inherent value of the stadium proposal is perhaps less pronounced but nevertheless is designed to improve an asset in which a section of the public has a significant investment.
42. As with most large development projects, the reception to the plans was not universally positive. The officer's report to the Planning Committee detailed views that expressed the community benefits of the development, the heritage of Brentford Football Club and the importance of preserving its ongoing sustainability, and the potential improvement the development would make on the local area. It also noted that the Club had already agreed to reduce the size of the enabling development in accordance with the views of the community. Further on in the report are summaries of responses from a number of statutory bodies. A number of these supported the development or did not register any objections. However, a significant share did express objections. Many of these related to the scale of the residential towers and the wider impact on the Kew World Heritage site. Flowering from these concerns, the

complainant has argued that full transparency is required if the public was going to engage properly with the planning process.

43. The Commissioner acknowledges that the argument expressed by the complainant is one that corresponds squarely with the intention behind the implementation of the EIR. The preamble to directive 2003/4, from which the EIR derives, states:

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 environment decision making and, eventually, to a better environment.

44. The importance that is placed on environmental information is demonstrated by the EIR's express presumption in favour of disclosure.
45. The Commissioner has no doubt that the public interest arguments for disclosure are weighty, which arise from the profound effect that the development will have on the local area. This weight is further augmented by the fact that, based on the viability information, the planning application did not propose including any affordable housing and stated a reduction in the funding of other planning obligations. The Commissioner accepts that both of these issues hold considerable importance.
46. Against this is the acceptance that disclosure would harm the legitimate economic interests of the parties involved in the development of the project. In the Commissioner's view, it follows that there is a real risk that the release of the information could damage the efficient delivery of the stadium and the associated plans. This, in his view, is a critical consideration and one that ultimately sways the public interest in favour of withholding the information.
47. Where a proposed development will considerably alter the character of an area, the Commissioner considers that a balance must be struck between promoting public involvement in the planning process and protecting commercially sensitive information which is critical to the delivery of the project. Following the *Greenwich* decision, the Commissioner accepts that the pricing and assumptions embedded in a viability appraisal are entirely the public's business. However, he has found that the disclosure of the discrete items of information under consideration would tip the public interest too far one way.
48. For this reason, the Commissioner has decided that in all the circumstances the public interest in disclosure is outweighed by the public interest in favour of maintaining the exception.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.
51. 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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF