

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

Decision notice

Date: 17 December 2015

Public Authority: London Borough of Lambeth
Address: Town Hall
Brixton Hall
Lambeth
SW2 1RW

Decision (including any steps ordered)

1. The complainant has requested from the London Borough of Lambeth (the Council) viability information produced for the proposed development of the Megabowl site in Streatham. The Council provided the complainant with two documents – the developer’s viability study and a review of that study carried out by a consultant on behalf of the Council. The Council considered, however, that some items within the scope of the complainant’s request were excepted from disclosure in accordance with regulations 12(5)(e) (confidentiality of commercial or industrial information), 12(5)(f) (interests of the person who supplied information) of the EIR and 13 (third party personal data) in relation to other items. The Commissioner has decided that regulation 12(5)(e) is engaged and that in all the circumstances the public interest in disclosure is outweighed by the public interest in maintaining the exception. With regard to regulation 13, the Commissioner has decided that the personal data cited does not engage the exception apart from two items of information (a signature and email address). He therefore requires the Council to disclose the remainder of the personal data.
2. The public authority must take this step 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 18 February 2015, the complainant wrote to the Council and requested information in the following terms:

"[...] London Square, developers of the Megabowl site in Streatham, have written to me that the Council has produced a viability study (prepared by its consultants BNP [Paribas]) for their scheme [...].

Please would you send me a copy of this study.

In making this request I am mindful of the recent Tribunal Decision (Royal Borough of Greenwich v IC Additional Party Shane Brownie obo Greenwich Peninsula Residents EA/2014/0122) and the conclusions of Judge NJ Warren including the statement: "The objective of the EIR is to allow the public and in this case the affected community to have relevant factual information in time for them to participate effectively in environmental decision making.

In the alternative that the developers have themselves prepared a viability study and supplied that to the council, please would you send that to me."

4. The Council's substantive response was provided on 29 June 2015 following earlier correspondence which advised that it would be necessary to extend the statutory time limit of 20 working days for issuing a reply to a request.
5. The Council dealt with the request under the EIR and provided the complainant with two documents – the developer's financial viability assessment (FVA) and a review of that study carried out by BNP Paribas for the Council. Some of the information contained within the documents was redacted, however, on the basis that it was excepted from disclosure under the EIR. The Council applied regulation 12(5)(e) (confidentiality of commercial or industrial information) and regulation 12(5)(f) (interests of the person who supplied information) to aspects of the viability information and regulation 13 (third party personal data) to references made to individuals. Regulations 12(5)(e) and 12(5)(f) are qualified by the public interest test and the Council found that on balance the public interest favoured maintaining the exception in respect of each application.
6. Following receipt of this response, the complainant wrote to the Council on 30 June 2015 to express his dissatisfaction with the extent of the withheld information and to repeat a request for the deferral of the

Planning Committee's decision on the Megabowl scheme. Regulation 11 of the EIR makes provision for an applicant to make representations to a public authority, within 40 days of receiving a valid refusal notice from that authority, if he or she considers that the authority has failed to comply with any of the requirements of the EIR in dealing with his or her request for information. The accompanying EIR Code of Practice states that any expression of dissatisfaction relating to a handling of a request should be dealt with under the public authority's review procedure pursuant to the above regulation. Although the Council informed the complainant that it was not prepared to accept his deferral request, the complainant's correspondence did not trigger an internal review with respect to his information request.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he asked the Commissioner to consider whether the Council had properly decided to withhold parts of the requested information.
8. As stated above, regulation 11 of the EIR requires a public authority on receipt of representations provided by an applicant to review the evidence and reconsider whether it has properly dealt with a request. When the complaint was made to the Commissioner, a review had not been carried out. Accordingly, in order to discharge the obligation set out by regulation 11, the Commissioner instructed the Council to undertake a complete review as part of its response to his investigation.
9. The Council has confirmed that it has reconsidered its handling of the complainant's request and the relevant public interest factors and is satisfied that it has properly applied the relevant exceptions to the withheld information. The Commissioner's analysis of the decision to withhold aspects of the requested information is set out in the body of this notice.

Reasons for decision

Background

10. In 2010 the Council granted a planning consent for the redevelopment of the site known as the Streatham 'Megabowl' site, after the bowling alley that had previously operated on the site alongside other commercial properties, including a nightclub and offices. These buildings had fallen into disuse.

11. The website¹ of the current developers, London Square Ltd, explains that the consented plans involved the demolition of the existing buildings, retaining the historic façade, and the building of a mixed use development including:
 - 243 new homes
 - Children's play space
 - Retail space on ground level
 - A community and theatre space
12. The scheme proposed in 2010 was not progressed and London Square acquired the site in 2014. London Square explains that its intention is to develop the site based on the consented scheme with some minor amendments. The Commissioner understands these alterations included, among other things, an increase in the number of residential units, a modification of the amount of affordable housing that would be offered, and changes to the design of the theatre.
13. London Square submitted a FVA for the 2014 scheme in December of that year. A review by the Council's independent external viability assessors, BNP Paribas, was completed in early February 2015. The Council has explained that, at the date of the request, other planning aspects of the 2014 scheme were continuing to be assessed.
14. In its submissions, the Council has set out how viability information is used in the planning process. It explains that under the Council's planning policies as they were at the time of the submission of the 2014 scheme, there is a target requirement for larger schemes to provide 40% affordable housing or a greater percentage if there is some form of subsidy available, eg grant funding. Any shortfall against the target level of affordable housing provision can only be justified where there is independently validated evidence of viability; that is, where the applicant is able to demonstrate to the satisfaction of the Council that the proposals are unable to deliver a greater amount of affordable housing because of the cost to the developer of delivering affordable housing as opposed to market housing. The Council states that, in simplified terms, this means the provision of affordable housing is less profitable for a developer than the provision of open market housing.

¹ <http://www.londonsquarestreatham.co.uk/LSSEB.pdf>

15. A developer will say that a scheme is no longer financially viable to pursue if too high a proportion of residential units have to be given over to affordable housing, because of the effect on the developer's profit from – and therefore on their incentive to build – the scheme as a whole. Examining and testing viability information enables the planning authority to decide whether, in cases where a proposed development cannot deliver the required proportion of affordable housing, a lower level of provision is justified on financial viability grounds.

Exceptions to disclosure

16. The Council has applied regulations 12(5)(e) and 12(5)(f) of the EIR to the same items of analytic information contained within the viability documents. The Commissioner has begun by considering the application of regulation 12(5)(e).

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

17. 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. It will not, however, cover information that is on emissions.
18. The construction of the exception means that a public authority considering applying the exception must be able to satisfy a four-stage test. This was adopted by the Information Tribunal in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association (EA/2010/0012, 24 May 2010)*² and is set out below:

- (i) The information is commercial or industrial in nature
- (ii) Confidentiality is provided by law. This will include confidentiality imposed on any person by virtue of the common law of confidence, contractual obligation, or statute.
- (iii) The confidentiality is protecting a legitimate economic interest.

²[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)

(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 met.

19. If the exception is found to be engaged following an assessment of these tests, a public authority must then go on to determine whether the public interest in disclosure outweighs the public interest in maintaining the exception.
20. The purpose of the exception is to protect any legitimate economic interests underlying commercial confidentiality. The Commissioner's guidance³ says 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 Council's submissions begin by stating that the withheld information does not relate to emissions before addressing in turn each of the tests imposed by the exception. The Commissioner accepts that the requested information is not on emissions and has therefore gone on to consider the Council's application arguments.
 - *(i) The information is commercial or industrial in nature*
22. The Council has stated that the information requested is commercial in nature. It has explained that the viability information contains details about the projected costs and revenues associated with the disposal of commercial and residential units, and the resulting financial surplus. These categories of information are similarly replicated in BNP Paribas' review of the viability information. The Commissioner is satisfied that the information in both reports is commercial in nature as it relates to a commercial activity, i.e. the sale and purchase of commercial and residential units, as per the Commissioner's guidance.
 - *(ii) Confidentiality is provided by law*

³ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

23. Confidentiality in this context will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute. The Council has asserted that the disputed information in this case is protected by the common law of confidence. The Commissioner's guidance explains that in order to test whether the common law of confidence applies, it is necessary to consider the answers to two principal questions.
24. Firstly, does the information have the necessary quality of confidence? This will involve confirming that the information is not trivial and is not in the public domain. The Council has explained that the FVA is not trivial but goes directly to the core of the developer's business strategy.
25. Secondly, was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied, and may depend on the nature of the information itself and the relationship between the parties. The Council has clarified that the FVA was submitted to the Council on the basis that it was a confidential document and the Council agreed to accept it on that understanding. The expectation of confidentiality was expressed in the cover letter from the developer to the Council and was reiterated on the front page of the FVA. A confidentiality clause cannot be used by an organisation to contract out of their obligations under the EIR. Nevertheless, it may demonstrate a general expectation of confidentiality.
26. For these reasons, the Commissioner accepts the Council's position that a duty of confidence attaches to the information contained in the FVA. Furthermore, he agrees that this duty extends to the BNP Paribas review. This is because, as the Council puts it, the information in the BNP Paribas review is 'parasitic' on the information in the FVA. The Council advises that when the FVA was provided to BNP Paribas, it was done on the agreement that the FVA had been supplied in confidence to the Council. Under the terms on which the Council engages BNP Paribas, they are required to keep confidential the viability material supplied to them and they report to the Council on a confidential basis.
 - *(iii) and (iv) Confidentiality is protecting a legitimate economic interest and the adverse effect of disclosure*
27. To satisfy this stage of the test, disclosure of the disputed information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. It is not enough that disclosure *might* cause some harm. Rather, a public authority is required to demonstrate that the risk of some harm occurring is *more probable than not*.

28. It is argued that the economic interests of the developer, London Square, are at risk of being adversely affected through disclosure. Where a public authority considers that a third party's interests are at stake, it should consult with the third party about the possible disclosure of information unless the authority has prior knowledge of the third party's views. It will not be sufficient where the exception is being claimed for a public authority to speculate about the potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of the third party.
29. The Council has contacted London Square about the request and has provided the Commissioner with evidence of the developer's response. This drills down to the link between the release of a number of different categories of information and the adverse effect on the economic interests of London Square. Some of the information referred to by London Square was disclosed following the exercising of the public interest test by the Council. The remaining redactions included, among other items, the average sales value per square foot of affordable housing, the total assumed Gross Development Value, individual selling prices of particular units by unit size and a breakdown of sale prices estimated total construction costs, and letting legal fees.
30. A theme running through London Square's submissions pertains to the risk that disclosure would enable competitors or other interested parties to exploit the information to the disadvantage of London Square. At the time of the request, negotiations with valuers were ongoing and it was vital, in London Square's view, that its bargaining position was not undermined if the development was to be successfully delivered.
31. When analysing the nature and severity of the harm that could be created through the disclosure of viability information, the Commissioner has found it helpful to refer to the judgments of the First-tier Tribunal on *Royal Borough of Greenwich v IC & Brownie* (EA/2014/0122, 30 January 2015)⁴ and *The London Borough of Southwark v The Information Commissioner* (EA/2013/0162, 9 May 2014)⁵. Each of these decisions considered the application of regulation 12(5)(e) to viability information.

⁴[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)

⁵[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)

32. The Tribunals emphasised on *Greenwich* and on *Southwark* the importance of local people having access to information so that they were better able to participate in the planning process. They also generally shared the view that the relevance of sale prices were far more likely to be dictated by market forces at the time of disposal than assumptions built into a viability report, although both accepted the potential sensitivity of information that would form the basis of negotiations.
33. The Commissioner is satisfied in this case that the withheld information is relevant to London Square's future negotiations with regard to the disposal of the Megabowl site. In the Commissioner's view, it therefore follows that the release of the various items of viability information would therefore leave London Square at a disadvantage. In other words, disclosure would have an adverse effect.
34. As stated above, the Commissioner's approach is that the fourth stage of the test incorporated into the exception will automatically be met where the three previous stages are satisfied. Regulation 12(5)(e) has therefore been found to be engaged and the Commissioner has gone on to consider the public interest test.

Public interest arguments in favour of disclosure

35. The Commissioner has repeatedly acknowledged the importance of transparency where a public authority's decisions relate to a development that will have a significant impact on the local environment and community. Viability information will have a particular significance because it will allow the public to interrogate the reasons a developer considers it is unable to fulfil the requirements of a public authority's core planning strategy.
36. The complainant has sought to reinforce the value of viability information by referring to the *Greenwich* decision and the Information Tribunal's confirmation that "The objective of the EIR is to allow the public and in this case the affected community to have relevant factual information in time for them to participate effectively in environmental decision making" (paragraph 37). It is also apparent from reports that the proposed development, in its current form, is not universally welcomed.

Public interest arguments in favour of maintaining the exception

37. The Council has set out in detail the factors it considered to be instrumental when deciding that the public interest favoured withholding the disputed information.

38. The Council began by explaining its position with regard to the timing of the request and the fact that the assessment of the information was still ongoing at the time of the request. It took the view that, overall, this was a neutral factor. It considered that factors against disclosure were that BNP Paribas' review had only been received a few days before the request and further discussions regarding the viability proposals would likely be required. However, the Council also noted the importance of public participation in the planning process.
39. The Council went on to identify what it considered are the key factual issues, and how these differ from the circumstances considered in the *Greenwich* and *Southwark* cases. These are summarised below.
- The 2014 scheme represents a purely private sector project. The application site does not involve publicly-owned land and the proposals were not a public-private partnership or any other type of joint venture with the Council or other public body.
 - The site is prominent in the local area but the scale of the development is relatively modest when compared with other schemes in the borough and the proposals considered in *Greenwich* and *Southwark*.
 - Although the overall number of affordable units proposed in the 2014 scheme as at the date of the request were less than originally proposed, the Council considers there were other improved aspects of the affordable housing offer. Furthermore, the Council considered that the nature and scale of the changes were not in any way comparable to the proposed changes in the other examples cited.
 - The Council is of the view that the particular circumstances of the case and the importance of securing affordable housing in the form of social rented units meant a different decision to the *Greenwich* and *Southwark* appeals should be reached on the disclosure of affordable housing selling prices.
 - Unlike other examples, particularly the one presented in *Greenwich*, this is not a case of a developer acquiring an interest in a site and immediately looking to renegotiate existing planning obligations.
 - The 'Megabowl' site had continued to lie undeveloped with buildings in a state of disuse and there was a general consensus that the area needed to be put to use as soon as possible. The Council considered that the value of the development was further

augmented due to a number of wider improvements made in the 2014 scheme compared to the original proposals.

- The eventual decision on whether to grant or refuse planning permission would be considered by Members and not determined by officers under delegated authority.
- The Council considers significant the potential for distortion of the tender process, which has considerable commercial importance for the developer.

Balance of the public interest

40. The Commissioner has been guided by the three factors identified by the Tribunal in *Southwark* as being of such importance that they dwarfed other considerations. These were:
- (a) the project must not be allowed to fail or be put in jeopardy;
 - (b) the importance of public participation in decision making;
 - (c) the avoidance of harm to the developer's commercial interests.
41. It was also observed that the Tribunal had decided that Southwark Council was right to see a successful regeneration scheme as essential and stressed the strong and natural concerns of local residents about what would happen to the area. The importance of the project, in the Tribunal's view, translated into a significant public interest in ensuring that commercial information which was vital for the delivery of the project should remain confidential.
42. The Commissioner considers that the three factors specified by the Tribunal in *Southwark* similarly have an important application in the circumstances of this case. There are, however, differences between the developments. As the Council has highlighted, the scale of the 'Megabowl' development is not as great as the Heygate estate. It could be argued that the effects of the 'Megabowl' site development are not as pronounced and therefore the public interest in protecting the confidentiality of commercial information is weaker. However, the Commissioner does not consider this argument would carry much weight. This is because he considers that the effect of the development on the local area would not be insignificant.
43. More pertinently, in his view, is the importance that should be attached to the principle of increasing access to environmental information so that the public are better able to contribute to decisions affecting the environment. This importance is reflected in the EIR, which under regulation 12(2) places an express presumption in favour of disclosure.

44. There is no doubt that the requested planning information is important, with the proposals intending to develop the site in a way that would have a tremendous impact on the character of the local area. The Commissioner would also accept, following both his own decisions and previous decisions of the Tribunal, that the public has a legitimate interest in knowing how the developer established it could not satisfy the Council's core strategy requirements and, equally, the independent review carried out on the developer's analysis. In the circumstances, the fact that the development does not involve publicly-owned land would not offset the real concerns a local resident may have about the future of the site.
45. In accepting that the exception is engaged, however, the Commissioner has also found that there is a real risk that disclosure would prejudice the economic interests of the developer. He further considers that the nature and severity of the prejudice cited means the release of the information is likely to affect the ability of the developer to deliver the development proposals successfully. This would not be in the public interest. In his view, this is a critical and weighty consideration and one that ultimately sways the balance of the public interest away from disclosure. As the Council has applied the exceptions under regulations 12(5)(e) and 12(5)(f) to the same items of withheld information, and the Commissioner considers that the exception under regulation 12(5)(e) applies to the entirety of these items, he has not considered the Council's application of regulation 12(5)(f) to the relevant information.

Regulation 13 – third party personal data

46. The Council has argued that the personal data referred to in the documents – including names of individuals, signatures, personal emails and telephone numbers – are excepted from disclosure under regulation 13 of the EIR. Regulation 12(3) of the EIR provides that third party personal data can only be disclosed in accordance with regulation 13. The structure and wording of the EIR provisions on personal data mirror the 'third party personal data' (section 40(2)) exemption in FOIA and can be used in the same way.
47. There are effectively two parts to the application of regulation 13 of the EIR. Firstly, the requested information must constitute the personal data of a third party. Secondly, disclosure of the personal data would contravene a data protection principle in the Data Protection Act 1998 (DPA).
48. Personal data is defined by section 1 of the DPA as data which relates to a living individual who can be identified from that data, or from that data and other information. In short, information will only be classified

as personal data where it 'relates to' an 'identifiable' individual. A name will typically represent the clearest example of personal data. However, even in the absence of a name, it may be possible to directly link, say, a telephone number to an individual using other pieces of contextual information accessible to a member of the public. In that instance, the telephone number would 'relate' to the individual and therefore would be his or her personal data.

49. The Commissioner is satisfied from a review of the documents that the categories of withheld information do constitute personal data. He has therefore gone on to consider the second part of the application of regulation 13, namely whether disclosure would breach a data protection principle.
50. For the purposes of a potential disclosure under FOIA or the EIR, it is the first data protection principle which is likely to be relevant. In accordance with this principle, personal data can only be disclosed if it would be fair, lawful and meet one of the Schedule 2 conditions (and Schedule 3 conditions if the information represents sensitive personal data). If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
51. The starting point for the Commissioner is to consider whether disclosure would be fair to a data subject. This will involve balancing the consequences of any disclosure and the reasonable expectations of a data subject with general principles of accountability and transparency. In order to strike the correct balance, it is important to consider the circumstances of the case in the round.
52. Various factors will potentially affect whether an individual should have a reasonable expectation that their personal data would be disclosed upon request. These will typically include whether the information relates to an individual's public or private life and the seniority of the individual. The data subjects are referred to in the documents in their professional capacities, which means it is more likely that disclosure would be fair than if the information related to a data subject's private life. The Council nevertheless maintains that the release of the information would not lie within the reasonable expectations of the data subjects.
53. The Council states that the information in the FVA and the BNP Paribas review were prepared in each case in the name of a corporate entity. The individuals employed or engaged by those entities in connection with the preparation of documents would reasonably have understood those documents to have been submitted to the Council on a confidential basis. The individuals, according to the Council, would likewise have a reasonable expectation that their personal information

would not be made available to the world in general, because it was included in documents to the Council on a confidential basis.

54. The Council goes on to state that information such as names, emails and telephone numbers could result in unsolicited contact and/or misuse of that information. Signatures, in the Council's view, are particularly vulnerable to misuse. The Council has found it was not practical or proportionate to attempt to contact all the data subjects for their views on disclosure and, in such circumstances, considers it appropriate to take reasonable steps to protect those individuals from the potential misuse of personal data.
55. The Commissioner recognises that great care must be taken with respect to the disclosure of personal data. He is of the view, however, that the Council's approach is overly cautious in this case. A data subject's expectations in respect of the disclosure of their personal data will only carry weight if those expectations are reasonable in the circumstances. The Commissioner considers that each of the individuals concerned would have known, or at least should have known, that the documents in question would ultimately be passed to the Council and therefore would be subject to the EIR. Insofar as this is the case, the Commissioner would not accept as reasonable the assumption that all of the information contained in the documents would remain confidential.
56. Significantly, only one of the individuals could be deemed a junior partner within an organisation, with the remainder holding senior positions and having significant decision-making roles. They would therefore have greater accountability for the information produced or any decisions made using that information. Furthermore, with the one exception cited, the Commissioner does not share the Council's concerns about unsolicited contact. The Commissioner notes that each of the individuals in question already has a significant public presence, with the external advisors in many instances having electronic profile pages that supply telephone numbers and email addresses. Without evidence to support the position, the Commissioner considers it speculative to assume that connecting these individuals with the work carried out in respect of the 'Megabowl' site would result in unwanted contact.
57. For this reason, the Commissioner considers that it would be fair to disclose the majority of the personal data. This finding does not extend, however, to two pieces of information. Firstly, the email address containing the name of the junior employee referred to in the preceding paragraph (for reference, this information is included in the confidential annex attached to this notice). Secondly, the signature of a partner included in the documents. The Commissioner observes that a

personal signature will be included on most correspondence and therefore a relatively wide pool of people will be familiar with a signature of an individual who is likely to generate a significant number of letters. Notwithstanding this, the Commissioner is aware that a disclosure under the EIR is to the world at large and not simply an intended recipient. Insofar as a signature may be referred to for identification purposes, the Commissioner considers that a wider release would increase the risk of misuse and therefore disclosure would be unfair.

58. With these two items of personal data apart, the Commissioner has gone on to consider whether the release of the remaining personal data would satisfy a Schedule 2 condition. There are six conditions in Schedule 2 but only condition 1 (consent) or condition 6 (legitimate interests) will normally be relevant to a release of information under FOIA. As already mentioned, the Council has confirmed that the data subjects have not expressly registered their consent for disclosure and therefore condition 1 does not apply. Accordingly, the Commissioner has gone on to consider condition 6.
59. Condition 6 effectively imposes a three-part test: (1) there must be a legitimate interest in disclosure to the public; (2) the disclosure must be necessary to meet that legitimate interest; and (3) the disclosure must not cause unwarranted harm to the interests of the individual. The Commissioner's approach is that parts (1) and (3) will already have been dealt with where a finding is made that a disclosure would be fair. This leaves part (2) of the test.
60. Following previous decisions of the Tribunal and the High Court, the Commissioner considers that the reference to 'necessary' in the condition means that there must be a pressing social need for any interference with privacy rights and the interference must be proportionate. The Commissioner considers that it is in the interests of the public that a senior employee can be held accountable for their professional activities. He would also take the view that the interference with the privacy rights of the data subjects is on the lower end of the scale. On balance, therefore, the Commissioner has found that condition 6 is satisfied. This leaves the Commissioner to consider whether the disclosure would be lawful.
61. The Commissioner's guidance⁶ explains at paragraph 114 that 'lawful' refers to statute law, whether criminal or civil. Furthermore, a

⁶ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

disclosure that would breach an implied or explicit duty of confidence or an enforceable contractual agreement would also be unlawful. The Commissioner has not been provided with any evidence that indicates this factor is one that needs to be considered in this situation and, as a result, he has concluded that the release of the information would be lawful. He therefore considers that, with the exceptions cited, the disclosure of the personal data would satisfy a data protection principle and therefore regulation 13 is not engaged.

Right of appeal

62. 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

49. 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.
50. 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

Alun Johnson
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