

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

Decision notice

Date: 15 August 2017

Public Authority: London Borough of Lambeth
Address: Olive Morris House
Brixton Hill
London
SW2 1RL

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Lambeth (the Council) for copies of financial viability reports in relation to the redevelopment of the Central Hill estate. The Council provided some of the information but sought to hold the remainder on the basis of regulation 12(5)(e) (commercial confidentiality). The Commissioner has concluded that some of the redacted information is exempt from disclosure on the basis of regulation 12(5)(e) and that the public interest favours maintaining this exception. However, the Commissioner has also concluded that some of the redacted information is not exempt from disclosure on the basis of regulation 12(5)(e).
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the document 'Estate Regeneration Programme – Draft Financial Viability Appraisal Central Hill – Option A – Version 05' without redactions to the information concerning residential build costs and rents and operational allowances.
3. 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

4. This request which is the focus of this decision notice concerns the Council's plans to redevelop Central Hill Estate (the estate).¹
5. The Council has explained that the purpose of its estate regeneration programme is to deliver additional new homes to deal with the housing crisis and to replace homes that are poor quality; it involves building new and additional homes on Council-owned land, including land acquired by the Council. Where tenants have exercised the right to buy, they will be leaseholders of their properties. Individual buildings on the Council's estates therefore typically comprise a mix of leaseholders and tenants.
6. The Council is in the process of establishing a new wholly owned company to progress estate regeneration and housing delivery within Lambeth. The provisional name for this company is 'Homes for Lambeth' or 'HFL'. This company will be a commercial enterprise and whilst the Council will hold all the shares in the company it will be required to operate as an independent entity and to function on a commercial basis. The Council has explained to the Commissioner that in order to progress estate regeneration and housing delivery, this new company will need to enter into commercial deals with other land owners and development partners, to enter into commercial deals with energy suppliers, negotiate planning agreements with the planning authority (on a commercial basis), raise funding from the City and enter into investment agreements with financial organisations.

¹ http://estateregeneration.lambeth.gov.uk/central_hill

Request and response

7. The complainant submitted the following request to the Council on 5 September 2016:

'Please provide the financial viability reports for Central Hill Estate se19.

Please Provide the unredacted draft feasibility report for the project at Central Hill Estate reference: 14/124 Central Hill Version 5 dated 6thjuly2016'

8. The Council responded on 3 October 2016 and provided her with two documents in response to her request. The documents were entitled:

- 'Estate Regeneration Programme – Draft Financial Viability Appraisal Central Hill – Option A – Version 05'
- 'Draft Feasibility Report for the project at Central Hill Estate'. This document was dated 6 July 2016 with the reference 14/124 Central Hill Version 5

9. The Council explained that the first document had been redacted because it considered certain information to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA. The second document was disclosed unredacted.

10. The complainant contacted the Council on 11 October 2016 and asked it to conduct an internal review of this response.

11. The Council informed her of the outcome of the review on 31 January 2017 and explained that it had revised its position. The Council explained that it had decided to refuse to comply with the request on the basis of regulation 12(4)(b) (manifestly unreasonable) of EIR given the burden that would be placed on the Council in complying with the request.

Scope of the case

12. The complainant contacted the Commissioner on 23 December 2016 to complain about the way her request for information had been handled.

13. During the course of the Commissioner's investigation the Council amended its position and explained that it was no longer seeking to refuse the request on the basis of regulation 12(4)(b) of the EIR. Rather it was seeking to refuse to provide the information redacted from the

document 'Estate Regeneration Programme – Draft Financial Viability Appraisal Central Hill – Option A – Version 05' because it considered this information to be exempt from disclosure on the basis of regulation 12(5)(e) of the EIR.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

14. 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'.
15. In order for regulation 12(5)(e) to be engaged, the following four conditions must be met:
 - (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. Where the arguments refer to the economic interests of a third party, it will not be sufficient for a public authority to speculate on the potential harm attached to disclosure. Instead, it is imperative that a public authority has evidence that demonstrates the arguments genuinely reflect the concerns of the third party.
 - (iv) The confidentiality would be adversely affected by disclosure. Although this is a necessary condition, the Information Tribunal² has indicated that the disclosure of truly confidential information into the public domain would invariably harm the confidential nature of that information. In other words, if the first three criteria are met then the exception will be engaged.

² [EA/2010/0012](#)

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

16. The Council argued that the redacted information is commercial as it relates to the formulation of proposals for the redevelopment and/or refurbishment of Council owned or acquired land on the estate and buildings and (if the project is seen through to completion) would ultimately result in the sale and/or rental of newly constructed/refurbished residential property. Furthermore it explained that the subject matter of the project is commercial in nature as regards the activity of the Council itself, those whom it retains to work with it in connection with the planning stage of the project and its future development partners at the stage of implementation.
17. Having considered the Council's submissions and examined the withheld information, the Commissioner is satisfied that the information is clearly commercial in nature and satisfies this element of the exception.

(ii) Is the information subject to confidentiality provided by law?

18. In considering this point the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.
19. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
20. The Commissioner considers that confidence can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information.
21. The Council explained that the provenance of the information was as follows: In April 2015 the Council commissioned a consultancy, AMP, to work with it in relation to the project. AMP is a consultancy that provides services on a commercial basis to clients (including local authorities) in relation to building and quantity surveying disciplines, programme and quality management, as well as project and construction management including development viability and financial modelling.
22. In terms of the common law of confidence, the Council argued that the withheld information has the requisite quality of confidence given that it is not trivial and is not in the public domain. The financial projections for each option were developed by AMP as part of the wider project through

exchange of information between Council officers and AMP staff. The Council noted that the exception can apply to information obtained from a third party, information created jointly with a third party or information created by the public authority itself.

23. The Council emphasised that there was a common understanding between both parties that the withheld information would not be shared with third parties or if it was only in very tightly managed circumstances in view of the nature of the material and the purpose for which it came into being.
24. Based upon the Council's submissions the Commissioner accepts that the withheld information has the quality of confidence and moreover that given how the information was created a duty of confidence is owed both to the Council and AMP in relation to this information.

(iii) Is the confidentiality provided to protect a legitimate economic interest?

25. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. If the information that is being withheld was jointly agreed – as in this case – either party's interests could be relevant. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure.

The complainant's position

26. The complainant argued that the decision of the First-Tier Tribunal in *Clyne v London Borough of Lambeth*, in which the requester had also requested viability assessments of a particular development, set a precedent for the disclosure of the information which she had requested.³
27. She also referred to an article in the Council's monthly newsletter which suggested the Council would insist on developers publishing their viability assessments where affordability quotas are not met.⁴

3

<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1808/Clyne,Jermey%20EA-2016-0012%20AMENDED%2023-06-16.pdf>

⁴ <https://www.lambeth.gov.uk/sites/default/files/ec-Lambeth-Talk-Winter-2017.pdf> - page 6

The Council's position

28. The Council explained that the financial assumptions which it is using will be adopted by HFL as it progresses the projects. These financial assumptions, ie the redacted information, are therefore commercially sensitive data and if disclosed would seriously prejudice the future operation of HFL and its ability to negotiate appropriate deals.

29. With regard to the specific information that had been redacted from the document in question the Council provided the Commissioner with the following submissions to support its reliance on regulation 12(5)(e):

- Redactions under rents & operational allowances

The Council argued that it needed to redact these figures because HFL will be procuring housing management services for the estate when it has been built. This procurement exercise will need to be a competitive procurement exercise carried out under Official Journal of the European Union (OJEU) rules. Releasing this information, being the Council's current running assumptions around such costs, would prejudice that future procurement exercise.

- Redactions under decanting / disturbance costs, and buy-outs

The Council explained that it is in the process of seeking to purchase by negotiation freehold and leasehold properties on this estate, under the shadow of a compulsory purchase order. Under compulsory purchase rules, the Council explained that it was obligated to pay disturbance payments to those moving as a consequence of regeneration. These disturbance costs are specific to each individual household that is moving, where it is the responsibility of the homeowner being purchased to provide evidence of disturbance costs. The Council argued that it would raise unreasonable expectations amongst those with whom it was negotiating purchases if the financial assumptions around disturbance costs were made public. This could unreasonably raise costs.

- Redaction under energy

The Council explained that HFL will need to deliver energy to the newly built homes and it will potentially be looking for a commercial partner to deliver energy to the estate once built. The Council argued that releasing these financial assumptions would prejudice any future negotiations with any such partner.

- Redactions under residential build costs

The Council explained that HFL will need to procure construction works to build the estate and such procurement exercises will need to be undertaken under OJEU rules. The Council argued that release of build cost information would prejudice the ability of the new company to competitively procure construction contracts.

- Redactions under development finance and investment finance

The Council explained that HFL will need to raise money for construction and release of its assumptions relating to financing would prejudice its ability to negotiate good funding terms.

30. Furthermore, the Council explained that the interests of future development partner(s) of the Council/HFL (that have yet to be identified and so their views cannot be ascertained) in the carrying out of the redevelopment/refurbishment of the estate on detailed terms to be agreed with the Council in due course. For these purposes, those interests are also those of the Council itself, since the works would be undertaken for the benefit of the Council/its wholly owned venture HFL.
31. The Council also argued that disclosure of the withheld information would harm the interests of AMP in being engaged to work with the Council on the HFL project as a whole. This is because the withheld information contains financial data derived from the exercise of professional judgment by AMP for which it would be entitled to charge its clients. Disclosure of this information would therefore affect AMP's ability to charge its clients for similar information.
32. In relation to the article referred to by the complainant the Council explained that this concerned planning applications submitted to it where developers are negotiating affordable housing provision. However, the Council explained that the withheld information concerned the process of regenerating housing estates which it considered was very different from a planning application.

The Commissioner's position

33. The Commissioner acknowledges that the complainant has made a reference to an earlier First Tier Tribunal decision to support her position that the redacted information should be disclosed. The Commissioner has given careful consideration to this previous decision. However, she wishes to emphasise that whilst there are similarities between the two cases, eg both seek a copy of a financial viability assessment, there are some notable differences. For example, the request in *Clyne* concerned a private developer redeveloping a site as opposed to one involving the redevelopment of an existing housing estate by a local authority.

Furthermore, there is little cross-over between the categories of information redacted in the *Clyne* case and the categories of information redacted in this case. In any event, as with all cases the Commissioner must decide whether information is exempt from disclosure on the specific facts of a particular case. The Commissioner would also note that only decisions of the Upper Tribunal (and higher courts) are binding and therefore previous decisions of the First Tier Tribunal, whilst often providing useful guidance, do not set a precedent which has to be followed.

34. Given the range of information that has been redacted from the requested information, and given that the Council's submissions address each of the redactions individually, the Commissioner has also considered whether each of the redactions would be likely to result in harm to either parties' economic interests.
35. With regard to the redactions made to decanting/disturbance costs and buy-outs, given the relatively detailed nature of the redacted information and that fact that the Council is in the process of actively negotiating with freehold and leaseholders the Commissioner accepts that disclosure of this information would harm the Council's negotiating position in respect of such discussions. Such information is therefore exempt from disclosure on the basis of regulation 12(5)(e).
36. In relation to the redactions under residential build costs, in the Commissioner's view the redacted information would appear to be very limited when compared to the complex procurement process which would presumably have to take place in respect of securing a contractor(s) to build the new development. Given this the Commissioner is not persuaded that disclosure of this information would harm the interests of the new company in the manner envisaged by the Council and therefore this information is not exempt from disclosure on the basis of regulation 12(5)(e). For similar reasons the Commissioner is not persuaded that the redactions under rent and operational allowances would prejudice the company's position in any future procurement exercise.
37. In respect of the redaction under the heading 'energy' the Commissioner notes that the Council has suggested that the new company would only *potentially* be looking for an energy partner once the estate is built. However, whilst this is only a potential scenario, the Commissioner is nevertheless satisfied that disclosure of the information redacted under this heading would harm the company's interests given that it would provide any energy company with a direct insight in HFL's position by indicating the timeframe of a contract that it wished to agree and along

with its anticipated annual cost of such a contract. This information is therefore exempt from disclosure on the basis of regulation 12(5)(e).

38. Finally, the Commissioner is persuaded that information redacted concerning development and investment finance would undermine the ability of HFL to secure funding for the project on the best terms available given the insight disclosure of this redacted information would provide potential funding partners into the company's negotiating position.
39. In summary then the Commissioner accepts that the redactions concerning the following information categories of information are exempt from disclosure on the basis of regulation 12(5)(e): energy; development finance and investment finance; and decanting/disturbance costs and buy-outs. However, she has also concluded that the information redacted in relation to residential build costs and rents and operational allowances is not exempt from disclosure on the basis of regulation 12(5)(e).
40. In reaching this latter finding the Commissioner also notes that she does not accept the Council's argument that disclosure of these two categories of withheld information would harm the interests of AMP for the reasons suggested. Whilst the Commissioner accepts that the redacted information derives from the professional judgment of AMP, it is presumably too simplistic to suggest that another local authority would use the redacted information in lieu of commissioning their own financial assessment be it from AMP or indeed another similar company.

Public interest test

41. Regulation 12(5)(e) is a qualified exception and therefore the Commissioner must consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the requested information. In doing so, the Commissioner recognises that regulation 12(2) of the EIR specifically provides that public authorities should apply a presumption in favour of disclosure.

Public interest in disclosure of the withheld information

42. As indicated above the complainant argued that there was a compelling public interest in the disclosure of the withheld information to provide residents with an understanding of the Council's plans for the estate, particularly given that affordability quotas in relation to the development had not been met.

43. The Council acknowledged that the proposed regeneration of the Central Hill estate is of concern to residents and that it should be as transparent as possible in relation to its plans.

Public interest in maintaining the exception

44. The Council argued that it was overwhelmingly in the public interest to ensure the most effective use of public resources and in order to do this HFL needs to be able to compete effectively in any future competitive tendering exercise.
45. The Council must be able to maximise the ability of HFL to secure the financing of the project in due course and this may involve raising finance in a number of ways, including via the involvement of one or more private sector development partners. The Council argued that two points arise from this: Firstly, the Council had been advised, by AMP, that prospective private sector development partners are likely to be deterred from involvement with HFL if the Council has disclosed commercially sensitive information. Disclosure of the withheld information would therefore undermine the ability of the Council (and HFL) to enter into funding arrangements. Secondly the Council (and HFL) will require the freedom to be able to negotiate the best terms for the financing of the business as a whole and specific projects within it (including the estate) without those negotiations being undermined by information that tends to reveal the projected sources of financing for the particular project.
46. Finally, the Council emphasised that it had disclosed a considerable amount of information relating to the estate and had consulted with residents throughout the process. It noted that the withholding of the redacted information had not precluded that process from taking place. Furthermore, the Council argued that there were grounds other than financial viability on which residents could argue whether or not an estate regeneration project should proceed; that is to say, the financial viability information is not the sole determinant of the decision that the Council has to make.
47. The Commissioner recognises that a number of recent decision notices and Tribunal decisions have considered requests concerning information about local authorities' regeneration of housing estates. Whilst the circumstances of these cases differ in many respects from this case, the Commissioner believes that the factors identified by the Tribunal in the case *London Borough of Southwark and The Information Commissioner and others* serve to form a useful framework for testing the public interest in this complaint. The Tribunal identified in *Southwark* three factors which were of such importance that they dwarfed other considerations (paragraph 39). These were:

- (a) The project must not be followed to fail or be put in jeopardy;
- (b) The importance of public participation in decision making;
- (c) The avoidance of harm to a party's commercial interests.⁵

48. In respect of point (a), the Commissioner notes that the Council has suggested that if commercially sensitive information, such as the redacted information was disclosed then private sector development partners may be reluctant to be involved with HFL. In the Commissioner's view this would appear to be somewhat of a speculative argument with little or no discernible evidence to back up this assertion. In the Commissioner's opinion such a line of argument also underestimates the commercial value to such private sector organisations by providing HFL with investment. The Commissioner considers this would provide such organisations with a significant incentive to be involved in the project regardless as to the potential risks of their own commercially sensitive information being disclosed.
49. In respect of (b) the Commissioner acknowledges that the Council has only redacted parts of the draft financial viability report and has disclosed in full the accompanying draft feasibility report. More broadly, the Commissioner recognises that the Council has published a range of other information regarding the proposed redevelopment and indeed been engaged in consultations with residents. However, the Commissioner is not entirely persuaded by the Council's line of argument that its decision to withhold the redacted information has in no way undermined the nature of these consultations. Rather, the Commissioner takes the view that there is always a value in allowing the public to fully understand the reasons behind public authorities' decisions, to remove any suspicion of manipulating the facts, or 'spin', and presenting the full picture and allowing people to reach their own view. Disclosure of the withheld information would allow the public to more fully understand the Council's assumptions, as at June 2016, in respect of the financial viability of this project. In the Commissioner's view the value in this public interest should not be underestimated given the impact on residents of the estate of the proposed regeneration. Furthermore, the Commissioner acknowledges the complainant's concerns that the proposed regeneration will not meet affordability quotas. On this point the Commissioner accepts the Council's point that there is a distinction between a situation where a planning application is submitted to it by a developer negotiating affordable housing provision

⁵ London Borough of Southwark and The Information Commissioner and others
([EA/2013/0162](#))

and the process of the Council itself regenerating housing estates. However, in her view there remains a level of public interest in the disclosure of information where such quotas are not met regardless as to the nature of the development given the housing pressures in the capital, particularly in respect of sufficient numbers of affordable homes.

50. In relation to (c), the Commissioner accepts that there is an inherent public interest in ensuring fairness of competition and that organisations are able to protect and sustain their negotiating positions. The Commissioner therefore accepts that it would be counter to the public interest to disclose information which she accepts is exempt from disclosure on the basis of regulation 12(5)(e). Furthermore, she believes that this public interest in withholding this particular information attracts additional and significant weight given that the commercial interests of a Council owned company are at risk.
51. In conclusion the Commissioner considers the balance of the public interest in relation to this case finely balanced. However, by a narrow margin she has concluded that the public interest favours maintaining the exception in relation to the information which she accepts is exempt from disclosure on the basis of regulation 12(5)(e). In reaching this conclusion she has been persuaded by the significant, and in her view ultimately compelling public interest, in protecting the commercial interests of HFL to deliver the regeneration of the Central Hill estate. Although the public interest in redacting the withheld information is undoubtedly strong, the Commissioner accepts that the decision not to disclose such information should be seen in the context of the amount of information that has been disclosed by the Council.

Right of appeal

52. 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

53. 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.
54. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF