

**Freedom of Information Act 2000 (the Act)**  
**Environmental Information Regulations 2004 (EIR)**  
**Decision notice**

**Date:** 17 August 2018

**Public Authority:** City of Westminster Council  
**Address:** Information Services  
10<sup>th</sup> Floor East  
City Hall  
64 Victoria Street  
London  
SW1E 6QP

**Decision (including any steps ordered)**

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1. The complainant has requested information on the rental fee received for Leicester Square (the Square) during a specified time period.
2. City of Westminster Council (the Council) handled the request under the Freedom of Information Act (the Act) and withheld the requested information under section 43 of the Act (prejudice to commercial interests).
3. During the course of the investigation, the Council disclosed part of the requested information.
4. The Commissioner's decision is that the requested information is environmental and the request should, therefore, have been handled under the EIR. The Commissioner considers that the Council has failed to demonstrate that regulation 12(5)(e) is engaged in with regard to the remaining withheld information.
5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the remaining withheld information.
6. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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7. On 23 March 2017, the complainant wrote to the Council and requested information in the following terms:

*"Please provide details of income received by WCC from the temporary event at Leicester Square during November/December 2016/Jan 2017 (The Christmas Period) by the operator Underbelly.*

*Please state if the income received by WCC was greater or less than the income received from the temporary event for "The Christmas Period" (similar period) 2015/2016"*

8. The Council responded on 25 April 2017 and confirmed that it was handling the request under the Act and withheld the information citing section 43. It confirmed that it considered that, in the circumstances of the request, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
9. The complainant contacted the Council on 26 April 2017 and explained that he was dissatisfied with its response.
10. On 27 April 2017, the complainant contacted the Commissioner to complain about the response and to request an investigation without an internal review.
11. The Commissioner corresponded with both the complainant and the Council and confirmed that she was unable to proceed to an investigation where it was apparent that the internal complaints procedure of the public authority had not been exhausted as per section 50(2)(a) of the Act. The Commissioner confirmed that the email dated 26 April 2017 constituted a valid request for internal review and confirmed that the Council should provide the complainant with the outcome of the review.
12. The Council provided the outcome of its internal review on 7 August 2017. It apologised for its breach of the statutory time frame when providing its refusal notice. It maintained its position that section 43(2) was engaged and the public interest favoured maintaining the exemption.

## Scope of the case

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13. The complainant contacted the Commissioner on 16 August 2017 to complain about the handling of his request for information.
14. The Commissioner confirmed to the Council that she considered the request should have been handled under the EIR.
15. The Council confirmed that it wished to maintain its position that the correct legislation is the Act and that the information was exempt under section 43. The Council provided a submission on regulation 12(5)(e) in the event that the Commissioner's decision was that the correct legislation is the EIR.
16. During the course of the investigation, the Commissioner invited the Council to reconsider whether any of the requested information could be disclosed to the complainant. The Council disclosed the information falling within the scope of the second element of the request.
17. The Commissioner considers the scope of this investigation is;
  - to determine the appropriate legislation;
  - determine if the remaining withheld information is exempt under either section 43 or regulation 12(5)(e);
  - determine whether the response was provided outside of the statutory timeframe; and
  - if the EIR is the correct legislation, determine whether the internal review was completed within the statutory timeframe.

## Reasons for decision

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### Appropriate legislation

18. Regulation 2(1) of the EIR defines environmental information as:

*"...any information in written, visual, aural, electronic or any other material form on—*

*(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its*

*components, including genetically modified organisms, and the interaction among these elements;*

*(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*

*(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;*

*(d) reports on the implementation of environmental legislation;*

*(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*

*(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);..."*

19. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to comply with a request or, as in this case, withholding information in response to a request.
20. The Commissioner recognises that it can sometimes be difficult to identify environmental information, and has provided guidance<sup>1</sup> to assist public authorities and requesters. The Commissioner's well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC<sup>2</sup> which the EIR enact.

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1146/eir\\_what\\_is\\_environmental\\_information.pdf](https://ico.org.uk/media/for-organisations/documents/1146/eir_what_is_environmental_information.pdf)

<sup>2</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0004>

21. This Directive, in turn, gives effect to the international obligations under the 1998 UN/ECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environment matters (the Aarhus Convention).

22. Recitals to the Aarhus Convention include:

*"citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters..."*

*"improved access to information and public participation in decision-making enhance the quality and implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns."*

23. The recitals to the Directive explain its purpose, including in the first recital:

*"increased public access to environmental information and the dissemination of such matters, a free exchange of views, more effective participation by the public in environmental decision making and, eventually, to a better environment."*

24. In *Department for Business, Energy and Industrial Strategy v Information Commissioner and Henney [2017] EWCA Civ 844* ("*Henney*")<sup>3</sup>, the Court of Appeal set out two principles to be considered when interpreting the definition of environmental information in article 2(1) of the directive and regulation 2(1) of the EIR.

25. The Court of Appeal set out that the EIR must be interpreted as far as possible in accordance with the original Directive and the Aarhus Convention and drew attention to the recitals at paragraph 22 of this notice.

26. The Court of Appeal also confirmed that although the term "*environmental information*" must be construed broadly, there are limits to this broad approach. Essentially information which has only a minimal connection with the environment is not environmental information.

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<sup>3</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2017/844.html>

27. The Court of Appeal set out the differences between the definition of information under the Act and the definition of environmental information under the EIR. Under the Act, the definition of information is focussed on the information itself, however, in regulation 2(1)(c) of the EIR, the relevant measure can also be the focus. The Court of Appeal states at paragraph 37:

*"It is therefore first necessary to identify the relevant measure. Information is "on" a measure if it is about, relates to or concerns the measure in question."*

28. The Court of Appeal also stated at paragraph 43:

*"It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context, and is not strictly limited to the precise issues with which the information is concerned. It may be relevant to consider the purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself. It was not in dispute that when identifying the measure, a tribunal should apply the definition of the EIR purposively, bearing in mind the modern approach to the interpretation of legislation, and particularly to international and European measures such as the Aarhus Convention and the Directive. It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1)."*

29. The Court of Appeal agreed with the prior Upper Tribunal decision that concluded that a project having some form of environmental impact does not automatically make all information concerned with the project environmental. However, the Court of Appeal went on to confirm that it was not necessary that *"the information itself be intrinsically environmental"*.
30. It is generally necessary to inspect the requested information in order to ascertain whether or not it is environmental information. The Council has provided the Commissioner with the withheld information and a detailed submission regarding why it considers it was correct to handle the request under the Act.
31. The Council explained that it accepted that the requested information is information on an activity, however, it considers that the activity itself does not affect the land, landscape or any other elements or factors referred to in regulation 2(1)(a) or regulation 2(1)(b).

32. The Council cited *Henney* in support of its consideration that the requested information is too remotely connected to any likely impact on the environment to be considered environmental information.
33. The Council explained that in this case, the impact on the 'land' of the event is negligible as the event involves a temporary installation of a number of chalet style units which house market stalls and a handful of larger structures which serve as refreshment and entertainment venues. The Council explained that the temporary installation does not affect any permanent change to the appearance of Leicester Square (the Square).
34. The Council confirmed that the Square is largely paved but the event does take place on some grass areas of the square. The Council explained that the paved areas are not 'land' in the environmental sense as they are inorganic and do not support any biodiversity. The Council considers that these areas were unaffected by the event.
35. The Council explained that whilst the grassed areas required turfing after the event, it considered that this action returned the area to its former state and therefore the Square was not affected by the event.
36. The Council also explained that the event does not affect the landscape. The Council accepted that the meaning of landscape can include urban landscapes but it considers that the phrase implies a broad view of the layout of an urban area or dominant appearance of a significant section of it. The Council set out that projects that have been held by the First Tier Tribunal to affect the urban landscape are typically very large projects that will, for instance, appreciably alter the skyline, for example by demolition (*Southwark v ICO and Lend Lease EA/2013/0162*) or convert a large plot of land to a different use (*Royal Borough of Greenwich v Information Commissioner and Brownie EA/2014/0122*).
37. The Council explained that the effect on the 'landscape' of the Square was not of the same order as the Tribunal decision cited or of any sufficient order to make the information environmental. The Council again emphasised that the event is temporary and does not create permanent change to the Square and that even during the course of the event, the overall character of the Square is not materially altered. The Council confirmed that it considered the impact of the event on the land and landscape is modest or even negligible.
38. The Council cited '*Henney*' and the need to take a purposive approach when considering whether information is environmental. The Council considers that it is "*perfectly clear*" that the information is not environmental as its disclosure would not further any of the purposes of the Aarhus Convention. The Council explained that it considered the requested information had nothing to do with improving public



participation in environmental decision-making and it considered the information was regarding whether the Council has achieved value for money for a commercial use of the Square. The Council considers that the fee paid for the event *"has no sensible connection with any impact on the environment"*.

### The Commissioner's considerations

39. The Commissioner has considered the Council's arguments and has had sight of the withheld information. She notes that the withheld information comprises a single financial figure, however, she considers that the information does fall within the definition of environmental information at regulation 2(1)(c).

40. In her consideration of this case, the Commissioner is assisted by the Court of Appeal's findings in the *Henney* case.

41. The Court of Appeal commented that the EIR must be construed purposively, in accordance with the Directive and the Aarhus Convention, stating at paragraph 47:

*"In my judgement, the way the line will be drawn is by reference to the general principle that the regulations, the Directive, and the Aarhus Convention are to be construed purposively. Determining on which side of the line information falls will be fact and context-specific. But it is possible to provide some general guidance as to the circumstances in which information relating to a project will not be information "on" the project for the purposes of section 2(1)(c) because it is not consistent with or does not advance the purpose of those instruments."*

42. The disputed information in *Henney* related to a Project Assessment Review (PAR) which concerned the communication and data component (CDC) of the Smart Meter Programme (SMP). The key issue for the Court of Appeal was whether information on a measure which did not in itself affect the state of the elements of the environment, or the refactors referred to in regulation 2(1), could be information "on" another measure which did. The Court of Appeal found that information on the PAR was environmental information on this basis, even though it was not in itself a measure likely to affect the elements or factors. Rather, information on the PAR was information on the SMP, which was such a measure.

43. The Commissioner understands that interpretation of the phrase *"any information...on"* will usually include information concerning, about, or relating to the measure, activity, factor etc., in questions. With specific regard to regulation 2(1)(c), the Court of Appeal in *Henney* commented that:



*"48. My starting point is the recitals to the Aarhus Convention and the Directive, in particular those set out at [22] above. They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed and provide a framework for determining the question of whether in a particular case information can properly be described as "on" a given measure."*

44. The Council has accepted that the requested information is "on" an activity but disputes that the activity itself has an effect on the environment.
45. The Commissioner does not accept that a temporary event does not affect the environment. The definition of environmental does not include permanency of any effects or impacts and a temporary activity can have a significant positive or negative effect on the environment dependant on what the activity is. The Commissioner also considers that it is not unreasonable to consider that the construction and dismantling of the temporary structures in a short period of time may also have an effect.
46. The Commissioner also considers that the Council's argument that as the turf has been replaced, no lasting effect is made to the Square, is a contradictory argument. The fact of the grass areas requiring replacement is a strong argument that the event did have an impact on the immediate environment to the extent that the grass areas were irreparable and required reurfing.
47. The Commissioner also considers that the event's refreshment and entertainment venues will likely introduce additional emissions and litter into the environment within and surrounding the event.
48. The Commissioner does not accept that disclosure of the requested information would not further any of the purposes of the Aarhus convention. As set out by the Council, the information provides insight into whether value for money has been achieved and the Commissioner considers that this can be in the context of whether the financial and community benefits achieved are worth the effect and/or damage to the local environment. Disclosure of the fee achieved will allow greater scrutiny of the Council's decisions when renting out land for commercial use.
49. The Commissioner accepts that when viewed in isolation, it is not immediately apparent that the information is environmental. However, she considers that the requested information is related to activities which are likely to affect the environment.

50. The Commissioner therefore finds that the requested information constitutes environmental information within the meaning of regulation 2(1)(c).

### **Regulation 12(5)(e) – Commercial Confidentiality**

51. Regulation 12(5)(e) of the EIR provides an exemption to the extent that disclosure of the information in question would adversely affect;

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

52. The wording of the exception sets out a number of tests or conditions that must be met before the exception can be engaged, namely:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is this confidentiality provided to protect a legitimate economic interest?
- Will the confidentiality be adversely affected by disclosure?

53. The Commissioner has considered each in turn below.

*Is the withheld information commercial or industrial in nature?*

54. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity of either the public authority concerned or a third party. The Commissioner is satisfied that the information in question is commercial information as it relates to the renting of land for commercial activities.

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

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

56. The Council originally sought to rely on the exemption from access under the paragraph 3, schedule 12A of the Local Government Act (LGA) which it considered exempted the following from disclosure:

*"Information relating to the financial or business affairs of any particular person (including the authority holding that information)".*

57. Regulation 5(6) disappplies any statutory bars on disclosure of environmental information. This means that a statutory bar in itself is not a justification for withholding information under the EIR.
58. However, a statutory bar will mean that confidentiality is provided by law for the purposes of the exception. A public authority may therefore be able to refuse to provide the information under regulation 12(5)(e), but only if it can satisfy the other elements of the four stage test, and the public interest test.
59. The Commissioner has previously considered whether schedule 12A of the LGA constitutes a statutory bar in decision notice FS50517099, paragraph 14 of which states:

*"...nothing in Part VA or Schedule 12A actually prohibits the disclosure of information. At no point is it provided that such information should not be disclosed, merely that it is not subject to the Part VA requirement to disclose."*
60. The Commissioner confirmed her position to the Council and set out that she considered that there was no reason to adopt a different approach in this case. The Commissioner invited the Council to provide arguments regarding the common law duty of confidentiality in the absence of a statutory duty of confidence.
61. The Council explained that it considered the requested information did have the necessary quality of confidence. The Council confirmed that it was not currently in the public domain.
62. The Council explained that the information is more than trivial as it is sensitive financial information which provides an insight into the financial boundaries that the third party company is operating within in relation to their activities the Square.
63. The Council explained that the circumstances in which the requested information was provided gave rise to an implied obligation of confidence. The Council explained that the release of the requested financial information would be commercially beneficial to the third party's competitors.
64. The Council explained that the discussions which had taken place between the Council and the third party had been undertaken in the expectation that they would not be made public. The Council provided a letter from the third party company, written during the Commissioner's investigation, which confirmed the third party company's expectation of confidentiality.

65. The Council also explained that there is a standard expectation of confidentiality in the events industry and this expectation was "*plainly a reasonable one in the circumstances*".
66. The Council cited the First Tier Tribunal decision in *Brighton and Hove City Council v Information Commissioner and Keenan (EA/2016/0119)* which states:
- "When communicated to a public authority, sensitive commercial information, [...] is generally communicated in the legitimate expectation that it will remain confidential."*
67. The Council also confirmed that the equivalent licence agreement between the Council and the third party for 2017/18 does include express confidentiality clauses and the new clauses simply set out in express terms what was a mutual understanding of the parties in previous years.
68. As set out above, the Commissioner does not accept that the information is subject to a statutory bar on disclosure under the LGA and she is not aware of any other legislation that may prohibit disclosure of information of this type. The Council has also confirmed that there was no contractual obligation of confidence regarding the requested information. The Commissioner will, therefore, consider whether the information is subject to the common law of confidence.
69. The common law of confidence has two key tests:
- Does the information have the necessary quality of confidence?
  - Was the information imparted or created in circumstances creating an obligation of confidence?
70. For the common law duty of confidence to apply, the information must have the necessary quality of confidence, meaning the information should not be trivial in nature and should not already be in the public domain.
71. The Commissioner considers that as it comprises the agreed fee for the rental of a well-known area of London, the requested information cannot be considered trivial.
72. The Commissioner is concerned that the Council considers the agreed rental amount has been provided to it by the third party company. Any agreed or negotiated position cannot be provided to one of the parties involved in the negotiations as it has been created by both parties.

73. However unlike section 41 of the Act, under the EIR, information does not have to have been provided to a public authority in order to be considered confidential. Therefore, information created or agreed by the Council can also be considered as confidential for the purposes of regulation 12(5)(e).
74. The Commissioner accepts that the expectations of both parties led to the requested information being created in circumstances obligating confidentiality.
75. The Commissioner is therefore satisfied that the requested information is subject to the common law duty of confidence.

*Is the confidentiality provided to protect a legitimate interest?*

76. The first tier tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* that, to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. It is not enough that disclosure *might* cause some harm to an economic interest. The public authority needs to establish that, on the balance of probabilities, i.e. more probable than not, disclosure *would* cause some harm.
77. The Council explained that it considered disclosure of the information would adversely affect the economic interests of both the Council and the third party company.
78. The Council explained that disclosure would compromise the Council's future negotiations with operators regarding the Square, and other locations. The Council explained that operators submit event applications or proposals, and enter into commercial discussions with the Council in the expectation that all discussions are confidential. The Council considers that disclosure would deter operators from entering into commercial discussions with the Council and they would consider the Council incapable of upholding commercial confidentiality. The Council argues that this would have an adverse impact on the Council's income and the event related benefits for the local area as it would like impact on its potential to generate income from events.
79. The Council provided a letter from the third party company which explained that disclosure of any financial information, including the requested information, would have the following negative and serious commercial impacts:
  - It would risk prejudicing the tender or negotiations for future use of the site; and,

- It would risk prejudicing its tender or negotiations for other similar sites in London as competitors will be able to make quantitative comparisons and gain an unfair understanding of its business model.
80. The third party company also confirmed that when it entered into negotiations and the arrangement for operating the event at the Square, it did so in the expectation that such arrangements would be kept confidential and not released to competitors. The third party company confirmed that this was standard practice in the events industry.
81. The Council explained to the Commissioner that whilst the third party company had stated that prejudice would arise from disclosure of *any* financial information, it considered that the relevant harm would arise only from disclosure of the precise amount and not from disclosure of the information requested in the second element of the request, namely, whether the amount paid was more or less than the previous year's corresponding event. As set out at paragraph 16 of this notice, the Council has disclosed the information requested in the second element of the request.
82. The Council confirmed that it agreed with the third party company that disclosure of the disputed information would cause the company commercial prejudice with regards to their competitors.
83. The Council also confirmed that the scope of what the licence agreement grants the third party company in return for the negotiated fee is in the public domain. The Council furnished the Commissioner with a copy of the licence agreement. The Council explained that disclosure of the requested information, with the already available information, would allow a competitor to make a precise evaluation of the third party company's business model.
84. The Council explained that the income generated is used to preserve frontline services and disclosure would, therefore, compromise the Council's financial position and impact on public services.
85. The Council explained that its ability to negotiate commercial agreements for future events on this site would be compromised as the current value of the site would be readily available to the event industry. The Council explained that this could result in collusion or bid-capping with event organisers unwilling to bid more than the named third party company had paid. The Council considers that disclosure would reduce its ability to maximise revenue and may prejudice the Council if it decided to put sites out to tender in the future.

86. The Council also considers that disclosure of the information would "*show the Council's hand*" as disclosure into the public domain would result in the industry being aware of the current market value of the Square, therefore compromising the Council's position when negotiating any future commercial agreements for this location.
87. The Council explained that the economic benefits associated with events are not measured solely on the amount of income the Council may generate from these events. The Council explained that events can bring significant economic benefits to the local area, and London, in the form of increased visitor spend at local retailers due to higher footfall and raising the profile of an area or location on a national or international scale, which has a positive impact on the tourism and hospitality sector.
88. The Council confirmed that when considering an event application, a number of additional criteria are taken into account, including:
- Relevance and appropriateness of an event in the context of each individual action;
  - Proposed hire period in terms of duration and seasonality;
  - Scale of use in context of location;
  - Scope for public participation;
  - Potential impact of the event on the area, environment, visitors and residents;
  - Any added value to residents, businesses and the local community, i.e. discounts, offers or promotions;
  - The views, aspirations and feedback of residents and local businesses;
  - The extent to which a proposal aligns with council policies, aims and objectives;
  - To what extent a proposal might add value to the local area outside of the financial agreement i.e. event will attract a bigger audience and generate media interest, adding value to the area;
  - Capacity and experience of the event organiser to deliver safe and successful events.
89. The Council explained that it had previously waived the rental fee in support of events that were able to demonstrate a tangible benefit to the city.



90. The Council set out the process operators have to follow to apply for commercial rental of land from the Council. It confirmed that for all events across Westminster, the operator may apply via the formal application portal.
91. The Council confirmed that prior to the current operator (the third party company), a historic event had previously taken place in the Square over the 'Christmas Period' and, following feedback, discussions and consultations with stakeholders, it was no longer deemed to be the right fit for the location.
92. The Council also confirmed that at the time of submitting its application, the third party company was the only applicant to consider for the space.
93. The Council explained that the application from the third party company, for the 2016/17 Christmas period, was aligned with the location and received positive initial feedback from the Business Improvement District and other key stakeholders.
94. The Council also explained that even if an application is deemed appropriate from an event perspective, if the proposed operation exceeds 28 days, then planning permission is required. The Council confirmed that the third party company applied for planning permission and a premises licence. The Council explained that this provided two additional layers of checks and balances by providing the public with two opportunities to comment on the proposals. The Council confirmed that both the planning and licencing applications were determined after statutory public consultation periods. The Council confirmed that this process was consistent across all event activity in Council owned parks and open spaces.
95. The Council confirmed that it does advertise the single day hire fee for the Square online<sup>4</sup>, however, hire periods of more than one day are negotiated, taking into account the factors in paragraph 88 of this notice. The Council confirmed that this approach is consistent across all parks and open spaces and has applied to all events that have taken place in the Square since 2012.
96. The Council confirmed that it considered the above prejudice would be more likely than not to occur. The Council quoted the *Brighton* Tribunal decision which states at paragraph 37:

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<sup>4</sup> <https://www.westminster.gov.uk/events-and-filming>

*"It is simply a matter of commercial reality that a company will exploit any valuable information as to a competitor's business plan that comes lawfully into its hands. It owes a duty to its stakeholders to do so. The inference that such exploitation will follow is readily drawn by the Tribunal or by anybody else with any experience of commercial life."*

97. The Commissioner has taken account of the Council's arguments and her own guidance when considering whether the established confidentiality is protecting a legitimate economic interest.
98. The Commissioner must consider the sensitivity of the information at the time of the request and the nature of the harm that would be caused by disclosure. The timing of the request and whether the information is still current are likely to be key factors. Broader arguments that the confidentiality provision was intended to protect legitimate economic interests at the time the confidentiality was imposed will not be relevant if disclosure would not actually impact on those interests at the time of the request.
99. As set out above, it is not sufficient that disclosure *might* cause some harm to a legitimate economic interest, the public authority must establish that, on the balance of probabilities, disclosure *would* cause harm.
100. The implementation guide for the Aarhus Convention gives the following guidance on legitimate economic interests:

*"Define harm. Legitimate economic interest implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors."*
101. The Commissioner's guidance explains that legitimate economic interests could relate to retaining or improving market position, ensuring competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, or avoiding disclosures which would otherwise result in a loss of revenue or income.
102. The Commissioner considers that some of the Council's arguments are not relevant to this criteria of the exception and are more relevant to the public interest test. The Commissioner will not, therefore, consider these arguments in this section. The Commissioner has also not included arguments regarding confidentiality in her considerations as she has already accepted that the information is subject to the common law of confidence.

103. In the specific circumstances of this case, the Commissioner is not persuaded that the threshold of *would* prejudice a legitimate economic interest of the Council has been reached. She has reached this conclusion for the following reasons:
104. With regard to the Council's economic interests, the Commissioner accepts that in a competitive market such as the events industry, operators will use as much information as possible to ensure that the lowest possible outgoings are incurred while running an event. However, as the Council has set out, the rental income achievable is not the sole or overriding factor when negotiating for use of the Square. The Council confirmed that it is just one of many factors in the Council's considerations and that, on this basis, it had previously provided the space free of charge when it was considered that the benefits to the community and local area were sufficiently high.
105. The Commissioner accepts that disclosure of the fee paid would give competing operators an indication of the amount the Council has previously accepted, however, the Council has not provided any evidence or explanation of how potential operators would be able to ascertain to what extent the Council's decision was weighted toward the rental income of the event or weighted toward the benefits to the local area. It is not evident from the withheld information whether the third party company paid the full market rate or whether it was able to demonstrate tangible benefits to the area and therefore achieve a lower negotiated rate.
106. The Council has also disclosed in response to the second element of this request that it accepted a lower fee from the third party company than the previous historic event operator. This suggests that the market rate was not achieved and potential operators would be aware that they may not need to pay the current negotiated rental fee (ie the withheld information) to secure use of the Square in the future.
107. The Commissioner considers that the Council has a duty to achieve best value, whether monetary or benefits to the local area, from its assets. For an asset as well known and valuable as Leicester Square, she would expect the Council to have a firm understanding of its market value and a robust position when negotiating for its use.
108. The Commissioner does not accept the Council's argument that disclosure of the negotiated fee would deter operators from applying in the future. The Commissioner considers that the Square is a valuable site to acquire and companies are likely to accept a degree of transparency in exchange for the use of a well-known landmark. She also considers that it is the Council's duty to ensure that operators are aware of the Council's obligations regarding the Act and the EIR, and

ensure that any assumption of confidence is in keeping with the legislation.

109. The Commissioner also considers that disclosure may benefit the Council by increasing the competition in the market. She notes the Council's assertion that there was only one application to consider for the event in question, the Commissioner considers that if the requested information was disclosed, this may encourage other operators to make applications who may previously have erroneously believed the Square to out of their price range.
110. The Commissioner considers that whilst there is a possibility that disclosure may prejudice the economic interest of the Council, the Council has not sufficiently demonstrated that the prejudice is more likely that not to occur and therefore the required threshold of *would prejudice* has not been reached.
111. The Commissioner has considered the possible prejudice to the third party company. The Commissioner understands the third party company's reticence to have any part of its financial transactions released into the public, however, the Commissioner must again decide whether disclosure of the requested information *would* prejudice a legitimate economic interest of the third party company.
112. The Council explained that it considered competing operators would use the withheld information to undercutting the third party company, make quantitative comparisons and gain an unfair understanding of the third party company's business model.
113. The Commissioner accepts that competing companies will use whatever information is available to them to gain an advantage over others in the industry.
114. With regards to the possibility of undercutting the third party company, the Commissioner is not persuaded that this is more likely than not to occur.
115. As set out above, competitors would need to emulate or exceed the non-financial criteria of the third party company's application in order to negotiate the same rental fee or lower. Neither the Council nor the third party company have provided evidence of whether the third party company's application, and the Council's consideration of it, are accessible to the competing operators in the events industry
116. The Commissioner also notes the Council confirmation that at the time of the decision to lease the Square, there was only one application to consider. The Commissioner therefore considers that this reduces the weight she can afford to this argument as the likelihood of prejudice

occurring in this manner must be proportionate to the likelihood of another competing application for the space and she has not been provided with evidence that there is likely to be one.

117. The Commissioner considers that without knowledge of the weight applied to the other factors in the third party company's application, disclosure of the fee would not give competing operators sufficient knowledge to engage the threshold of *would* prejudice the third party company.
118. The Commissioner has also considered whether disclosure of the fee would aid competitors in making quantitative comparisons and gain an unfair understanding of the third party company's business model.
119. The Commissioner again notes that the Council has not provided an explanation or evidence of how this harm would occur. The Commissioner has scrutinised the licence agreement, which is in the public domain, and it is not apparent to her how its contents and the fee paid would expose the third party company's business model. The licence agreement gives no details of the operator's costs, overheads, profit margins, etc. It sets out what the operator can expect in return for its fee and where various responsibilities lie.
120. The Commissioner considers that companies have a duty to their shareholders to undertake sustainable and profitable business ventures. This involves assessing projected outgoings and projected income and deciding whether a venture is viable. As part of this, companies will seek to reduce their outgoings to the minimal possible, therefore, it is unlikely that the negotiated fee is the maximum amount the company was willing to pay. The Commissioner also considers that the rental fee is not directly correlated to the projected income of the event, the third party company is unlikely to lower its food and drink prices because it obtained a satisfactory rental figure, it will maintain the market values of its goods and services and provide its shareholders with a larger profit.
121. The Commissioner is also mindful of the Council's assertion that the fee is, at least in part, based on the value to the local area and community of the proposed use of its open spaces. The Commissioner considers that it is not, therefore, plausible to argue that a business model can be extrapolated from a single figure and a licence agreement.
122. The Commissioner considers that, whilst competitors may seek to use the withheld information to gain a competitive advantage over the third party company, the threshold of *would* prejudice has not been reached as it is not apparent how disclosure of the requested information would

more likely than not prejudice the third party company's legitimate economic interests.

123. As the Council has failed to persuade the Commissioner that either party's economic interests *would* be prejudiced, she considers that the exemption at regulation 12(5)(e) is not engaged.

124. The Commissioner required the Council to disclose the remaining withheld information.

### **Regulation 5(2): Statutory time frame**

125. Regulation 5(2) of the EIR states:

*"Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request"*

126. The complainant made his request on 23 March 2017 and the Council issued a response on 25 April 2017, a period of 21 working days<sup>5</sup>.

127. The Commissioner therefore finds that the Council breached regulation 5(2) of the EIR. She notes that the Council acknowledged and apologised for the breach at internal review in line with paragraph 45 of the section 45 code of practice.

### **Regulation 11(4): Internal review timeframe**

128. Regulation 11(4) of the EIR states:

*"A public authority shall notify the applicant of its decision under paragraph (3) as soon as possible and no later than 40 working days after the date of receipt of the representations."*

129. The complainant wrote to the Council to express his dissatisfaction on 26 April 2017 and the Council provided its response on 7 August 2017, a period of 68 working days.

130. The Commissioner therefore finds that the Council breached regulation 11(4) of the EIR.

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<sup>5</sup> For the purposes of the Act and the EIR, a working day is defined as any weekday, not including any bank holiday observed in any part of the UK

## Other matters

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131. The Council confirmed to the Commissioner that it now included confidentiality clauses in its licence agreements. The Council should be mindful that it cannot 'contract out' of the EIR or the Act. The Council should ensure that operators are aware that information may require disclosure under the appropriate legislation even where a confidentiality clause is in place.
132. The Commissioner would like to take this opportunity to remind the Council that both the Act and the EIR are applicant and motive blind. The Council should consider a request for information as a request to disclosure to the general public and not to a specific individual.



## Right of appeal

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

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

134. 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.

135. 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**