

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

Decision notice

Date: 27 November 2019

Public Authority: London Borough of Hounslow
Address: Hounslow House
7 Bath Road
Hounslow
Middlesex
TW3 3EB

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Hounslow (the Council) seeking information about the disposal of a particular piece of land. The Council initially sought to withhold the information on the basis of section 43(2) (commercial interests) of FOIA before arguing that the information was exempt from disclosure on the basis of regulation 12(5)(e) (commercial confidentiality) and regulation 12(5)(f) (interests of the person who provided the information to the public authority) of the EIR.
2. The Commissioner has concluded that the information falling within the scope of the request is exempt from disclosure on the basis of regulation 12(5)(e) of the EIR and that in all the circumstances of the request the public interest favours maintaining the exception.

Request and response

3. The complainant submitted the following request to the Council on 30 December 2018:

'Please release the documentation relating to the lease of the Bridge Farm Nursery / Borough Cemetary [sic] Expansion Land to the Government / Ministry of Housing, Communities and Local Government for the building of Turing House Free School.'

'The transaction is now complete thus you ought to be able to release the information in its entirety, Including the reports for the cabinet member decision made on Friday 2nd December 2016.'

4. The Council responded on 11 January 2019 and explained that:

'We confirm that the Council has no direct interest in the construction of Turing House Free School and therefore we suggest that your enquiry is directed to DCLG. All relevant internal reports which are available for public scrutiny are available on the authorities web site.'

5. The complainant contacted the Council on 22 January 2019 and asked it to conduct an internal review of this response. He suggested that the Council had not disclosed any information about the transaction or the impact on burial land supply.

6. The Council contacted him on 31 January 2019 and explained that:

'We have reviewed the answer given and consider that it fully addresses the question based on the data available to the authority. As set out in the published data a 125 year lease was granted by the Council of land totalling in the order of 16.22 Acres situated on Hospital Bridge Road in the London Borough of Richmond. The Education Funding Agency has subsequently led in terms of securing planning permission for the construction of a 1,050 pupil secondary school and the authority has no further involvement. The terms of the transaction are considered commercially sensitive.'

7. The Council subsequently provided him with the outcome of the internal review on 18 April 2019. It explained that the property transactions had not yet been completed and were still in negotiation and therefore it did not hold information about the transaction. With regard to the part of

the request seeking information about the Cabinet member decision on 2 December 2016, the Council provided a link to information about the meeting.¹ The Council explained that the report relating to the meeting was exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 19 February 2019 in order to complain about the Council's handling of his request. Following the completion of the Council's internal review in April 2019 and the clarification that the transaction had not yet been completed, the Commissioner agreed that the focus of her investigation would be on the Council's decision to withhold the report relating to the meeting of 2 December 2016.
9. Although the Council initially handled this request under FOIA, given the subject of the request the Commissioner explained to the Council that in her view it should have considered this request under the EIR. The Council agreed with this assessment and during the course of her investigation it revised its position and explained that it now considered all of the report to be exempt from disclosure on the basis of regulation 12(5)(e) (confidentiality of commercial or industrial information) of the EIR. The Council also explained that it considered some parts of the report to be exempt from disclosure on the basis of regulation 12(5)(f) (interests of the person who provided the information to the public authority) of the EIR.

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<https://democraticservices.hounslow.gov.uk/ieListDocuments.aspx?CIId=578&MIId=9811&Ver=4>

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

10. 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'.
11. 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 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.
- (i) *the information commercial or industrial in nature?*
12. The Council explained that it considered the information to be commercial in nature, because it consists of or includes information about land values, the terms of proposed land transactions, and information about the Council's position in prospective negotiations about the terms of a proposed lease, and the terms that may be

² [EA/2010/0012](#)

proposed to a commercial tenant to secure the termination of his commercial lease.

13. 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?

14. The Council explained that the Cabinet resolved that the report should be exempt from publication. It did so in exercise of the statutory power contained in the Local Government Act 1972, Schedule 12, Part II, Paragraph 3. That provision permits the Council to exempt from publication reports which contain information which relate to the financial or business affairs of any particular person (including the authority holding that information) and to the extent that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it. In this case the Council considered, and continues to consider, that the public interest in the Council as a public body obtaining the best consideration reasonably obtainable on the disposal of the land significantly outweighs the general public interest in transparency, accountability, and the public accessibility of information.
15. The Commissioner's guidance on this exemption explains that in this context this will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute. In light of the Council's submissions the Commissioner accepts that the report is subject to confidentiality provided by law, namely the statutory confidentiality provided by the provisions of the Local Government Act 1972 set out above.

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

16. The Council argued that the confidentiality is required to (a) protect its economic interest in obtaining the best price on the disposal of land, and (b) to protect the Council and the Education Funding Agency's (EFA's) economic interests, in relation to the negotiations with the commercial tenant for ending the commercial lease.
17. With regard to (a), the Council argued that if the withheld information was disclosed:
 - the EFA would be aware of the advice given to and received by the Council in relation to the valuation of the land.
 - the EFA would be aware of the Council's negotiating position in relation to the disposal of the site. In both cases publication of the information

would thereby prejudice the Council's ability to obtain best consideration on disposal; and,

- The Council's economic interest would be further prejudiced because in the event the proposed lease to the EFA does not proceed and the Council decides to dispose of the site to a third party, public disclosure of the information would prejudice the Council's ability to obtain best consideration from the third party.
18. With regard to (b), the Council argued that the economic interests of both the Council and the EFA would be damaged by disclosure of the information relating to the position in relation to the existing commercial tenant of the site, and the terms on which that tenancy may be ended to secure vacant possession of the site, because those ongoing negotiations would be prejudiced if the commercial tenant was aware of the Council's or the EFA's negotiating position.
 19. The Council emphasised that the transaction, ie the grant of the lease, had not yet been completed because the EFA had not yet been able to obtain vacant possession and because planning permission had not yet been issued.
 20. The Commissioner notes that the complainant has argued that any commercial sensitivity would have fallen away as the transaction has been completed. However, the Commissioner's understanding is as per the preceding paragraph, ie that the granting of the lease between the Council and the EFA has still not be completed. This is because the granting of the lease is dependent on both vacant possession of the site being obtained and planning permission being granted, neither of which have yet to take place.
 21. Therefore, the Commissioner accepts that there is still a potential need to ensure the confidentiality to protect a legitimate economic interest.
 22. Turning to the Council's specific arguments, in relation to the first two bullet points, the Commissioner is not persuaded that disclosure of *some* parts of the information would result in the harm envisaged by the Council. This is because these two arguments rely on the EFA becoming aware of information in the Council's possession. However, it is the Commissioner's understanding that parts of the withheld information are already in the possession of the EFA. It is therefore difficult to see how disclosure of these parts of the withheld information would result in these particular harms occurring. However, the Commissioner does accept that if the proposed lease did not go ahead, then disclosure of all parts of the withheld information would provide another third party with a detailed insight into the Council's position in respect of the land and this would significantly undermine its negotiating position in respect of

future discussions with any such third parties. Furthermore, the Commissioner also accepts that disclosure of parts of the withheld information would harm both the Council's and the EFA's economic interests because it would provide the existing commercial tenant of the site with a clear insight of their negotiating position in securing vacant possession.

23. The Commissioner is therefore satisfied that the disclosure of the withheld information would harm the economic interests of the Council and the EFA.
24. The information is therefore exempt from disclosure on the basis of regulation 12(5)(e) of the EIR.

The public interest test

25. Regulation 12(1)(b) requires that, where the exception under regulation 12(5)(b) is engaged, a public interest test should be carried out to ascertain whether the public interest in maintaining the exception outweighs the public interest in disclosing the information. In carrying out her assessment of the public interest test, the Commissioner is mindful of the provisions of regulation 12(2) which states that a public authority shall apply a presumption in favour of disclosure.

Public interest in favour of disclosing the withheld information

26. The Council acknowledged that disclosure of the information would be consistent with policies for greater transparency about the uses of, and accountability for, public expenditure.
27. The complainant argued that the public interest outweighs any commercial sensitivity as the land is burial land and the Council appears not to have consulted the Mayor of London on its disposal - despite having London wide significance. The complainant suggested that the site represented around a third of the burial space supply for the Council and in his view the disposal is in conflict with policy 7.23 of the 'London Plan' that deals with burial spaces.³

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https://www.london.gov.uk/sites/default/files/gla_migrate_files_destination/Audit%20of%20London%20Burial%20Provision.pdf

Public interest in favour of maintaining the exception

28. The Council argued that as a public body there was a clear public interest in it obtaining the best possible value it could when disposing of the land and in order to do so it needed to withhold the information.

Balance of the public interest

29. The Commissioner agrees that there is a public interest in the disclosure of information which would add to the public's understanding of the Council's considerations in relation to the disposal of the site given the sums of money potentially involved. Furthermore, the Commissioner recognises that the complainant has raised particular concerns about the issue of burial land and that disclosure of the withheld information would reveal the extent and nature of the Council's considerations about this specific issue.
30. However, in the Commissioner's opinion there is a significant public interest in the Council being able to achieve best value for money when disposing of the land. Given that disclosure of the withheld information risks harming the Council's negotiating position in a number of ways, namely both with the existing commercial tenant and in respect of any other potential future third party who may be interested in the site, should the EFA transaction not proceed, in the Commissioner's view this adds to the public interest in maintaining the exception. Therefore, despite the public interest in disclosure of the information, the Commissioner has concluded that the public interest favours maintaining the exception.
31. In light of this decision the Commissioner has not considered the Council's position that some parts of the withheld information are also exempt from disclosure on the basis of regulation 12(5)(f) of the EIR.

Right of appeal

32. 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@justice.gov.uk

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

33. 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.
34. 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
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