

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 18 October 2022

Public Authority: Lambeth London Borough Council

Address: Lambeth Town Hall
Brixton Hill
London
SW2 1RW

Decision (including any steps ordered)

1. The complainant has requested information relating to payments made in connection with work on Cressingham Gardens. Lambeth London Borough Council ("LB Lambeth") refused to provide the information on the basis of regulation 12(5)(e) and regulation 13 of EIR.
2. The Commissioner's decision is that LB Lambeth have correctly applied regulation 12(5)(e) of EIR.
3. The Commissioner does not require LB Lambeth to take any further steps.

Request and response

4. On 2 February 2021, the complainant wrote to the public authority and requested information in the following terms:

"I understand that Lambeth council has made payments to Mott Macdonald totalling around £875k in connection with its work on Cressingham Gardens. Please provide a copy of all invoices and any other documentation that was collected to support the sign off of the payments (e.g. completion certificates)"

5. On 17 February 2021, the complainant made an additional request as follows:

"Please provide a copy of all documents (e.g. contracts, agreements, statements of work etc) and communications which relate to the

council's commissioning of Homes of Lambeth to act in connection with Cressingham Gardens estate, the scope of such work and any terms & conditions.”

6. Following the Commissioner’s decision in March 2022 (Decision Notice IC-102828-G5M1¹), LB Lambeth disclosed the second part of the complainant’s request, which comprised of March 2020 Cabinet Decision Homes For Lambeth (HFL) Delivery Plan and HFL Corporate Plan, which outlines the projects and project preparation activities to be undertaken as part of HFL Business Plan and also a progress update given through the March 2021 Cabinet report, the Joint Delivery Plan. However, LB Lambeth withheld other parts of the request under regulation 12(5)(e) of EIR.

Reasons for decision

7. The Commissioner has considered the response provided by LB Lambeth and is satisfied that the second part of the complainant’s request has been met.
8. The following analysis sets out why the Commissioner has concluded that LB Lambeth was entitled to rely on regulation 12(5)(e) of EIR.
9. Regulation 12(5)(e) 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”. The Commissioner’s guidance² sets out that the exception can be broken down into a four-stage test as follows.

Is the information commercial or industrial in nature?

10. For information to be commercial in nature it needs to relate to a commercial activity. The essence of commerce is trade. A commercial activity generally involves the sale or purchase of goods or services, usually for profit. The withheld information consists of contractor’s payment authorisation certificates, invoices showing references and VAT information, individual contact, project description, details of the

¹ [Decision Notice IC-102828-G5M1](#)

² [Commercial or industrial information \(regulation 12\(5\)\(e\)\)](#)

professional services provided, and a breakdown charge of the services provided.

11. Having considered the withheld information provided by LB Lambeth, the Commissioner is satisfied that the withheld information is commercial in nature as it relates to the commercial activity of the procurement of the services of Mott MacDonald Limited ("MML") for the purposes of work on Cressingham Gardens.

Is confidentiality provided by law?

12. In establishing if confidentiality is provided by law, LB Lambeth argue that the information satisfies the common law of confidentiality. This criterion covers information that has been obtained from a third party, jointly created or agreed with a third party. LB Lambeth stated in their submissions that the withheld information is not trivial or in the public domain. The withheld information was provided to LB Lambeth as part of the contractor's services provided for the development of Cressingham Gardens. The Commissioner notes that there is no obvious confidentiality clause, however he does not consider it necessary for there to be formal confidentiality clause for this element of the exception to be met.
13. The Commissioner considers that the withheld information has the necessary quality of confidence and therefore can be said that it is protected by common law duty of confidence. The Commissioner does not consider the withheld information is trivial in nature and is not aware that the withheld information is otherwise publicly available. For this reason, he is satisfied that the information was shared in circumstances creating an obligation of confidence and that any reasonable man standing in the shoes of the public authority would consider that the information provided to them has been provided in confidence.

Is confidentiality protecting a legitimate economic interest?

14. To satisfy this element of the test, the tribunal in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd* (EA/2010/0106, 4 January 2011) confirmed that disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect.
15. LB Lambeth consider that the duty of confidence identified, arises in order to protect the public authority and MML's economic interests. It explained that the disclosure of the information would be detrimental to both parties as financial information would be disclosed and used by MML's competitors to undermine future contractual bids in a busy

commercial market. It also contends that disclosure would damage the relationship that exists between the parties and would make it difficult for LB Lambeth to attract similar future contracts or achieve good value for money for its residents.

Is confidentiality adversely affected by disclosure?

16. The Commissioner has reviewed the withheld information and he is satisfied that disclosure would adversely affect MML's legitimate economic interests. The Commissioner considers that the information would be useful to MML's competitors for future contractual bids that would undermine MML's ability to compete fairly within a competitive market and would adversely affect MML's ability to secure the best possible contractual agreements it can. It will also allow its competitors to tailor their bids accordingly.
17. For these reasons, the Commissioner is satisfied that the third and fourth criteria of the test are met and therefore regulation 12(5)(e) of EIR is engaged.

Public Interest Test

18. LB Lambeth has taken into account the presumption in favour of disclosure of environmental information under EIR in accordance with regulation 12(2). It also recognises the importance of openness and transparency, as this allows the public to hold public authorities to account with regards to how decisions are made and how public funds are spent to assure the public that value for money is being achieved.
19. However, it considers there is also a public interest in protecting the commercial interest of private companies and that of public authorities when they are exercising commercial related functions. It argued that there is a substantial benefit to the wider public in preserving the principle of commercial confidentiality. LB Lambeth contend that public interest has already been met by the information which has already been released into the public domain. It considers the level of information already in the public domain to be sufficient to enable the public to understand the arrangements in place and to scrutinise its spending of public funds.
20. LB Lambeth argue that it is not in the public interest to provide commercially sensitive information if it would mean that the public authority cannot attract future suppliers or the best value for money for its residents. It will also discourage contractors and providers from operating with the local authority in future if they feel that their pricing information will be published. This could hamper LB Lambeth's ability to procure services in the future.

21. LB Lambeth have explained that disclosure of information would place contractors and providers at a commercial disadvantage when negotiating with other authorities who are aware of the rates received by the local authority.
22. The Commissioner has considered the withheld information together with the arguments presented and considers that the public interest arguments in maintaining the exception are stronger. He agrees that the withheld information would be useful to MML's competitors during similar future procurement exercises. It will enable them to tailor any future bids accordingly and to outbid MML. It would hinder LB Lambeth's ability to secure the same or more favourable terms for the tax payer. Such consequences of disclosure are not in the wider public interest. Instead, it is in the public interest to protect MML and LB Lambeth's ability to compete fairly to ensure that the best possible terms and price is secured. If LB Lambeth is hindered from negotiating for the best possible terms, it could potentially lead to it paying more for these services or similar and this would be detrimental to the public purse.
23. For the above reasons, the Commissioner is satisfied that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. On this basis, it has not been necessary for the Commissioner to go on to consider regulation 13 of EIR.

Right of appeal

24. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

25. 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.
26. 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

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