

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

**Date:** 8 July 2024

**Public Authority:** London Borough of Lambeth

**Address:** Lambeth Town Hall  
Brixton  
London  
SW21 RW10

**Decision**

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1. The complainant sought information from London Borough of Lambeth ("the Council") regarding a redevelopment project. The Council provided some redacted information to the complainant, however it refused to disclose the remainder ("the withheld information") citing regulation 12(5)(e) of the EIR as a basis for non-disclosure.
2. The Commissioner's decision is that at the time of the request the Council was entitled to withhold the withheld information, which concerns commercial interests. The Council correctly applied regulation 12(5)(e), however it breached regulation 14(3) of the EIR as it incorrectly issued its refusal notice under FOIA and not the EIR.

**Request and response**

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3. On 3 October 2023 the complainant requested the following information:-

"I wish to make a request for information under the Environmental Information Regulations 2004.

Can you please provide me with a copy of the Council's contract (including the pricing documents) with Galliford Try in the sum of £30,658,157 for the Brixton House project."

4. The Council responded to the request on 31 October 2023. It refused to disclose the requested information, citing section 43 of FOIA as a basis for non-disclosure and also referring to the EIR.
5. The complainant sought an internal review of the Council's handling of the request on 7 November 2023. A response to this was provided on 5 December 2023 attaching a redacted version of the contract. The complainant requested a further internal review, the response to which was provided on 30 January 2024. The reviewer responded under the EIR and stating that the requested information was exempt from disclosure under regulation 12(5)(e) of the EIR.

### Reasons for decision

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6. This reasoning covers first, whether the Council handled the request under the correct legislation and second, whether the information could be withheld because it was commercially sensitive.
7. When it acknowledged receiving the request, the Council advised it would handle the request under the EIR but went on to provide a response and internal review under FOIA.
8. The requested information concerns a redevelopment project. As such the Commissioner is satisfied that the information is environmental information under regulation 2(1)(c) of the EIR<sup>1</sup>, and also potentially regulation 2(1)(e). It is not clear to the Commissioner why the Council reverted to FOIA.
9. Because the Council issued its refusal under FOIA and not the EIR it breached regulation 14(3) of the EIR. This concerns the exception(s) a public authority is relying on to withhold information and why the exception(s) are engaged.

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<sup>1</sup> <https://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

10. Information can be withheld under regulation 12(5)(e) of the EIR if 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. At the time of the request in October 2023, the Council explained that it considered that identifying the commercially sensitive cost information of the contract could potentially harm the interests of Galliford Try ("GT") should they wish to tender for other schemes of similar standing, as competitors would be aware of their cost limits and levels of penalties that they agree to. The Council disclosed a version of the contract to the complainant with the pricing and cost information redacted.
12. The interests of the Council would be also be compromised as any future tenderers for future Council schemes would know levels of penalties that were accepted by the Council, therefore the Council may not gain the current market levels.
13. When considering whether the exemption has been appropriately applied, the Commissioner has considered four tests.

**Is the information commercial in nature?**

14. A commercial interest relates to a legal person's ability to participate competitively in a commercial activity e.g. procurement. The Commissioner is satisfied that the requested information is commercial in nature as it contains contractual information and concerns a redevelopment project,

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

15. It has been determined that this information is not trivial. In this case it includes information which could potentially be used by GT's competitors to their own advantage, and to the disadvantage of GT. Elements within the information would disclose a package of information brought together using the skills and experience of the contractor over time, which would be advantageous to other businesses in the area.
16. The information held encompasses aspects that are unique to GT and as such are not available by other means and have not been passed into the public domain. The Council considers this information to be legally confidential, protected by the common law duty of confidentiality because the information is non-trivial and has not been previously disclosed. It has been provided in a circumstance with an expectation of confidence from the provider of the information. This project was awarded to GT following a tender exercise in which all parties made confidential submissions. Following the award of the project, GT and the

Council entered into contractual documentation which includes obligations on both parties to always keep all information confidential.

**Is the confidentiality required to protect an economic interest?**

17. The requested information prescribes the confidential terms and conditions which govern the commercial relationship between GT and the Council including, most critically the commercial sensitive pricing information which makes up the project price. The construction industry is a competitive industry which relies heavily on commercially sensitive information remaining confidential between organisations and the supply chain. Disclosure could provide information on the contractor's methods of business which may be of advantage to direct competitors, thereby negating the ability to develop a commercial advantage when tendering for other contracts. The Council considers that the legitimate economic interests of the contractor could be adversely affected by the disclosure of this information.

**Would the confidentiality be adversely affected by disclosure?**

18. The economic interest, and thereby its confidentiality, has to be adversely affected by disclosure of information. If the requested information which includes commercially sensitive pricing information were disclosed, such information would be available to:
  - (i) competitors in the market and
  - (ii) parties including GT's clients.
19. The pricing tolerances and the contractual basis on which GT is prepared to proceed with such a project would be revealed to its competitors thus putting them at an advantage in terms of being able to use that information to incorporate within their own bids going forward and/or to compete against GT in future bids. Additionally, such information would be revealed to existing clients which is likely to lead to a comparison exercise and is likely to impact on future opportunities for the Council and GT or by giving a potential client/competitor the upper hand as they will be aware of the breakdown of the pricing strategy. The Council and GT would be unable to negotiate on an equal basis as a result.
20. GT's supply chain would also be affected as the terms on which they are willing to subcontract including their pricing tolerance will be revealed to competitors and clients which would put them at a disadvantage on existing and future projects.
21. The Commissioner is satisfied that the confidentiality would inevitably be adversely affected if the Council disclosed this information.

22. Since the four tests have been satisfied the Commissioner finds that regulation 12(5)(e) of the EIR is engaged as disclosing the requested information would adversely affect the Council's and the GT's commercial interests. He has gone on to consider the associated public interest test.

### **Public interest test**

23. The Council noted that there is a public interest in it being open and transparent in how it delivers public services. Disclosing the information would help assure the public that the Council undertakes commercial transactions on a competitive, commercial basis. Disclosure would enable the public to better scrutinise how the Council spends public money, such as when it purchases goods and services or awards contracts to private sector companies.
24. Regarding the public interest in maintaining the exemption, the Council considers that it would not be in the public interest for it to lose its ability to enter competitive dialogue within a varied and competitive market because of the disclosure. This would eventually result in a financial loss to the Council because it would mean that the Council could not attract future suppliers as it would not then be able to achieve the best value for money for its residents. Additionally, it is not in the public interest to provide detrimental information about a third party if to do so would weaken the third party's position in the market.
25. The complainant has brought to the Commissioner's attention the fact that the redevelopment project has increased substantially in cost since the beginning and therefore it is important for the public to understand this by viewing the withheld information.
26. The Commissioner finds that there is a significant public interest in disclosure of the withheld information as it is important for the Council to be transparent and accountable for public expenditure.
27. However, there is also significant public interest in the Council maintaining its position in a competitive commercial market. As disclosure would have a knock-on adverse effect on future redevelopment tenders, ultimately affecting the Council's residents, the Commissioner considers that this outweighs the public interest in disclosure. The Commissioner's decision is therefore that at the time of the request, the public interest favoured maintaining the regulation 12(5)(e) exception to protect the Council's commercial interests and those of its contractor GT.

**Procedural matters**

28. The Council took longer than 20 working days to refuse the request in reliance on regulation 12(5)(e). Consequently the Council breached regulation 14(3) of the EIR.

## **Right of appeal**

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

30. 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.
31. 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**

**Deirdre Collins**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**