First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0205

Heard in London on 26 February 2018

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS PIETER DE WAAL AND HENRY FITZHUGH

Between

NICOLA CURTIS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

NB Numbers in [square brackets] refer to the open bundle

1. The appeal is allowed in part.

2. Ms Nicola Curtis has appealed against the rejection by the Information Commissioner (the Commissioner) on 15 August 2017 of her complaint that the London Borough of Lambeth (the Council) had wrongly refused to disclose certain information to her under the Environmental Information Regulations 2004 (the EIR). [1]

[1] SI 2004 No 3391

3. Ms Curtis had formally opted for an oral hearing. However, she did not attend. When contacted by the clerk, she explained that there was family illness but said that she was content that the appeal be determined on the papers and had in fact thought it would be. The Commissioner had submitted a Response (drafted by Counsel) but had indicated that she did not propose attending. The Tribunal was satisfied that it could properly determine the issues in the absence of the parties within rule 36 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber**)** Rules 2009 (as amended). [2]

Factual background

4. Ms Curtis is chair of Central Hill Residents' Association in Lambeth. There have been plans to regenerate Central Hill (the estate), which houses 470 households, since 2012.

5. The purpose of the regeneration is to deliver additional new homes to address the housing crisis in Lambeth and replace homes of poor quality. New homes will be built on Council-owned land, including land it acquired. There are both leaseholders (who have exercised their right to buy their homes) and tenants on the estate. Compulsory acquisition of many of the leaseholders' homes will be necessary. Secure tenants are guaranteed a new home on the redeveloped estate and leaseholders will have the opportunity to acquire new homes there.

6. The Council has been in the process of establishing a company (also known as a special purpose vehicle) to progress the regeneration and provision of housing in the borough. Its provisional name is 'Homes for Lambeth' or 'HFL'. The Council would own all the shares but the company would be required to operate as an independent entity and to function on a commercial basis, at least breaking even. It could not simply deliver affordable housing. It would need to enter into commercial deals with other land owners, development partners and energy suppliers, negotiate planning agreements on a commercial basis with the Council as planning authority, raise funding from the City and enter into investment agreements.

The request

7. On 5 September 2016, Ms Curtis requested of the Council (i) the financial viability reports for the estate and (ii) the unredacted draft feasibility report for the project at the estate (version 5 dated 6 July 2016) **[49]**.

The initial response and review

8. The Council responded on 3 October 2016 **[50]**. It treated the request as made under the Freedom of Information Act 2000 (FOIA). It disclosed the financial viability reports unredacted. They are not in the bundle. It also disclosed a redacted version of the draft feasibility report which, it said, was provided to the Resident

[2] SI 2009 No 1976

Engagement Panel (REP) on 30 August 2016. Some of the description of documents in the papers is confusing but the Council described the redacted part as 'REP Appendix B2 Development Assumptions Redacted'; it appears to be an appendix to version 5 of the draft feasibility report by Airey Miller (AMP), the Council's consultants, on 6 July 2016 (reference 14/124). The open part of the draft feasibility report is at **[64]** and the redacted appendix begins at **[87]**. AMP provides consultancy services in relation to building and quantity surveying disciplines, project and construction management including development viability and financial modelling. The Council explained that it was relying on the exemption in section 43(2) FOIA (commercial interests) to withhold the redactions (the originally disputed information). Section 43(2) is a conditional exemption; the Council decided that the public interest favoured withholding the disputed information.

9. Ms Curtis requested an internal review on 11 October 2016 **[54]**. She referred to the Tribunal's decision in *Clyne v The Information Commissioner and London Borough of Lambeth* [3] and suggested that the originally disputed information should be released because it was not commercially sensitive 'and [the Council] are not going out to tender'.

10. In its review decision dated 31 January 2017 **[56]**, the Council changed its position. Although it did not spell this out, it must have decided that the disputed information constituted 'environmental information' within regulation 2 of the EIR. It said that the exception in regulation 12(4)(b) applied: '… a public authority may refuse to disclose information to the extent that … (b) the request for information is manifestly unreasonable'. It argued that it would take days, if not weeks, to review the information to determine whether other exceptions applied.

Proceedings before the Commissioner

11. Ms Curtis had in fact already lodged a complaint with the Commissioner on 23 December 2016 **[62]**, since she had not received a review decision. She again referred to *Clyne* and attached a copy from the Council's monthly newsletter, *Lambeth Talk*, for December 2016. An article quoted Councillor Jack Hopkins, Cabinet Member for Regeneration: 'There's been growing public concern that deals with developers are done behind closed doors and we need to make the process much more transparent, clear, and fair, to make sure the affordable housing Lambeth badly needs is built'. The article said that developers of all major sites in the borough who were not able to meet its 40% affordable housing target would be required to publish an unredacted viability assessment explaining why.

12. In his letter to the Council of 13 April 2017 **[98]**, the Information Commissioner Office case officer suggested that the exception in regulation 12(4)(b) did not apply, given that the disputed information extended to relatively few pages. However, he also suggested that the exceptions in regulation 12(5)(e) or (f) might apply. [4]

[3] EA/2016/0012 (14 June 2016)

[4] Regulation 12(5)(f), on which the Council has not sought to rely, reads:

13. In its reply of 24 May 2017 **[105]**, **t**he Council changed its position again, now relying on the exception in regulation 12(5)(e) instead of regulation 12(4)(b). It maintained that the public interest in withholding the disputed information outweighed that in disclosing it. It said that the *Lambeth Talk* article referred to planning applications by developers negotiating affordable housing provision, a very different scenario to regeneration of housing estates. It subsequently, by email sent on 5 July 2017 **[113]**, clarified why it believed that the exception applied to specified redactions: those under the headings Rents & Operational Allowances; Decanting/disturbance costs and buy-outs; Energy; Residential build costs; and Development Finance and Investment Finance.

The Commissioner's decision

14. The Commissioner issued her Decision Notice on 15 August 2017 **[1].**

15. The Commissioner set out the four tests which she considers must be met before regulation 12(5)(e) is engaged: (i) the information is commercial or industrial in nature; (ii) confidentiality is provided by law; (iii) the confidentiality is protecting a legitimate economic interest; and (iv) confidentiality would be adversely affected by disclosure (drawing on the Tribunal's decision in *Bristol City Council and Information Commissioner and Portland and Brunswick Squares Association*, [5] she said that, if the first three tests are met, so necessarily must the fourth). In relation to the third test, it is necessary to show on the balance of probabilities that harm would (not might) be caused by disclosure.

16. The Commissioner decided that the tests were met in relation to some, but not all, of the originally disputed information:

- **Decanting/disturbance costs**: the redactions were appropriate. The information in question was relatively detailed and the Council was in the process of actively negotiating with freeholders and leaseholders, such that disclosure would harm the Council's negotiating position

- **Residential build costs**: the redacted information appeared to be very limited when compared to the complex procurement process which would presumably

'*… a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –*

…

(f) the interests of the person who provided the information where that person –

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure'.

[5] EA/2010/0012 (24 May 2010)

have to take place to secure contractors to build the new development. As a result, disclosure would not harm the interests of HFL in the way claimed

- **Rents & operational allowances**: the redactions were not justified by parity of reasoning with the residential build costs redactions

- **Energy**: although the Council had suggested that HFL would only *potentially* be looking for an energy partner, the Commissioner accepted that disclosure of the redacted information would harm HFL's interests: it would provide an energy company with direct insight into HFL's position by indicating the timeframe of a contract along with its anticipated annual cost

- **Development and finance**: the redactions were appropriate: disclosure would undermine the HFL's ability to secure funding for the project on the best terms available given the insight disclosure would provide potential funding partners into the company's negotiating position

17. The Commissioner applied the public interest test to the information she agreed should be withheld. She referred to the Tribunal's decision in *London Borough of Southwark and The Information Commissioner* (*Lend Lease*). [6] The Tribunal had identified three factors which were of particular importance: (i) the project must not be allowed to fail or be put in jeopardy; (ii) the importance of public participation in decision-making; and (iii) the avoidance of harm to a party's commercial interests. It will be seen that factors (i) and (iii) point to withholding information and factor (ii) to disclosing it. In relation to (i), the Commissioner was not persuaded by the Council's argument that, if the disputed information was disclosed, private sector development partners might be reluctant to be involved with HFL. This underestimated the commercial value to private sector organisations of providing HFL with investment.

18. In relation to (ii), the Commissioner noted that the Council had disclosed much of the requested information along with a range of other information and had been engaged in consultations with the residents. Nevertheless, those consultations would be aided by further disclosure. The Commissioner acknowledged Ms Curtis' concerns that the proposed regeneration would not meet affordability quotas, even though there was, as the Council argued, a distinction between a situation where a planning application was submitted to it by a developer negotiating affordable housing provision and the Council itself regenerating housing estates.

19. In relation to (iii), there was an inherent public interest in ensuring fairness of competition; organisations should be able to protect and sustain their negotiating positions. That interest gained additional and significant weight given that the commercial interests of a Council-owned company were at risk.

[6] EA/2013/0162 (9 May 2014)

20. The public interest arguments were finely balanced but by a narrow margin the Commissioner concluded that they favoured withholding the remaining disputed information. She was persuaded 'by the significant, and … ultimately compelling public interest, in protecting the commercial interests of HFL to deliver the regeneration of the Central Hill estate'.

21. The Council has not challenged the Commissioner's decision in relation to the residential build costs and the rents & operational allowances sections and has presumably disclosed these to Ms Curtis.

The Grounds of Appeal and the Commissioner's Response

22. In her **Grounds of Appeal [21]**, Ms Curtis did not directly challenge the Commissioner's finding that regulation 12(5)(e) applied to the remaining disputed information. However, she made a number of points, principally relevant to public interest. She said that the Council had set up a group of companies under the name Lambeth Topco Ltd, which would work with other private companies to regenerate six housing estates in the borough. The new companies had been established with public money, specifically council tax revenue and the general rent fund. The public was already deeply concerned about the Council's finances and its vast debt and how the money would be repaid. It is not clear whether Lambeth Topco Ltd is in addition to or instead of HFL.

23. Ms Curtis was sceptical about the Council's claim that it was regenerating the estates to create more homes: according to information on its own website, the number of publicly owned homes would be vastly reduced and not meet its guidelines for affordability quotas which they imposed on private developers. The commercial interests of a publicly funded company were not more important than the public interest in transparency and accountability for the use of public funds, she suggested. To the extent that redactions were warranted, they should be as limited as possible.

24. Ms Curtis said that many of the redacted items of information were available with other Lambeth regeneration schemes (such as Cressingham Gardens) and some were available via the industry. She gave the following analysis (not all of which correspond to the categories of the remaining disputed information): home loss payments (these were statutory and should not be redacted); direct finance (taxpayers should see this information since this was a public subsidy); commercial uplift (the figures had been given for Cressingham Gardens); decant/assumed disturbance payments (these figures had been given for Cressingham Gardens and were therefore in the public domain); leaseholders buyouts (these were again available for Cressingham Gardens and valuations for all properties on each estate were available on a Council website); section 196 receipts (these could be found from other sources; the Council should be accountable to taxpayers for their use); and one-off payments or set payments for ground rents/per acre fees for land

should be treated as basic contract terms (disclosure would not cause significant harm as they are known in the industry).

25. Ms Curtis conceded that the principle that the venture should not be allowed to fail (as it was being funded by public money) could be compelling but, in light of the fact that past ventures by the Council had cost much more than originally anticipated, it was of deep concern to borough residents that more of their hard-earned money would be needed to complete the estate regeneration scheme. Accountability was difficult without information. She attached some figures from the Cressingham Gardens project **[23]-[35]**.

26. The Commissioner's **Response [38]** reduced Ms Curtis' Grounds to two propositions (not entirely fairly): (i) some of the information was in the public domain and was not therefore commercially sensitive; and (ii) there was considerable public interest in the Council's conduct of the development, in particular to ensure accountability on behalf of residents: that trumped the commercial interests of HFL. As to (i), the Council had assured the Commissioner that the remaining disputed information was not in the public domain and the Commissioner had no reason to doubt that. The fact that information was available in respect of other development schemes did not mean that similar information had been public in respect of the development in question. Similarly, the fact that such information had been disclosed in other cases did not necessarily indicate that disclosure of the remaining disputed information would not harm HFL's or the Council's commercial interests. Each case had to be considered on its own facts. The Commissioner was satisfied that, given the stage of development at the time of request, the remaining disputed information was commercially sensitive. The information could provide companies with whom HFL might seek to contract with insight into its position on a number of issues, which might then hinder HFL's ability competitively to negotiate and conduct tender exercises for the development as it progressed.

27. The Commissioner maintained her position on public interest.

The statutory framework

28. Under regulation 5 of the EIR, pubic authorities have a duty to make environmental information available on request.

29. Regulation 2(1) of the EIR provides:

> '*"environmental information" has the same meaning as in Article 2(1) of the Directive [Council Directive 2003/4/EC], namely 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;
…
(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c)
…'.

30. Regulation 12 contains exceptions to the duty to disclose. It provides:

(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if –

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure

…

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect –

…

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest

…'.

Discussion

Introductory remarks

31. The regeneration of the estate is a public: private partnership. Such partnerships are often controversial. They have become more common following the withdrawal of relevant central government funding for local authorities. Some people nevertheless think that the profit motive should have no role in areas of local government responsibility such as the provision of social housing. Others see the private sector as a vital tool in releasing funds which would otherwise not be available and in injecting efficiency into large projects.

32. These are philosophical and political questions and it is not for the Tribunal to resolve them. The fact is that it is government policy to encourage and facilitate

public: private partnerships. They are lawful and the EIR has to be applied on that basis. There is no suggestion that Directive 2003/4/EC (the directive) (which the EIR transpose into domestic law) or the Aarhus Convention [7] on which it is based contemplated that the private sector would not be involved in projects touching on the environment or therefore in generating environmental information. It is an inevitable consequence of that involvement that some information will have to be withheld from competitors and therefore the public: information is a key tool in private enterprise and there cannot be an information free-for-all if an enterprise is to flourish. As the Tribunal noted in *Lend Lease*:

> '*Once you use private sector profit making organisations to help fund regeneration and to deliver infrastructure, social housing and other public goods, then inevitably considerations of commercial confidentiality and the need to avoid harm to commercial interests must be given full weight when assessing the public interests for and against disclosure*'. [8]

33. The result, however, is that principles collide. On the one hand is this imperative for some confidentiality. On the other is the imperative for transparency and accountability in public affairs so that, in the present context, residents and council taxpayers can assess on an informed basis whether their political representatives are spending wisely the money given to them in trust and ensuring the best interests of residents. It need hardly be said that homes and communities are of the first importance to citizens; they should not be required to leave their homes, even on a temporary basis, without demonstrably good reason. More generally, the first preamble to the directive recognises the importance of access to environmental information:

> '*Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of view, most effective participation in environmental decision making and, eventually , to a better environment*'.

34. Finding accommodation for these conflicting principles is no easy task. There is no empirically correct answer and reasonable people may reasonably arrive at different conclusions. That is why Commissioner decisions, and Tribunal decisions, may sometimes appear to conflict. The Council has made its attempt at striking the right balance and has released a large amount of information, including from the draft feasibility study. The Tribunal's task is to assess whether it has struck the balance appropriately.

Error of law by the Commissioner

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[7] The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998): http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf

[8] Para 51

35. The Commissioner has made an error which appears at first sight to be significant. She has largely based her reasoning, both on engagement of regulation 12(5)(e) and on public interest, on the harm which disclosure would cause HFL and, in particular, on the importance of not stymying (through the general availability of relevant information) its ability to negotiate with potential partners. The problem with this analysis is that HFL did not exist at the time of the request or the initial response. It is trite law that it is the situation in existence at the time of a request, or the time of the initial response at the latest, which governs whether requested information has to be disclosed. (It makes no difference here whether the relevant date is that of the request or response). Evidence which comes into existence only later can be relevant but only insofar as it casts light at the circumstances at the time in question. HFL may now have been incorporated – the Tribunal has no information about this – but it did not exist at that time. It is impossible to see how an entity which does not exist, and might never exist, can have legitimate economic interests (or any interests).

36. However, the error is not material, for this reason. Until and unless HFL, or another company, came into being, any legitimate economic interests it would accrue are retained by the Council. Those interests are the same whether the Council carries out the regeneration itself or through a subsidiary company. They represent the ability to secure the best deal for council taxpayers and residents of the estate. The Tribunal will therefore consider whether disclosure of the remaining disputed information would have an adverse effect on the Council's legitimate economic interests and, if so, whether the public interest nevertheless requires disclosure of some or all of it (bearing in mind the presumption in favour of disclosure in regulation 12(2) of the EIR).

Is the remaining disputed information 'environmental information'?

37. This determines whether EIR, as opposed to FOIA, is the correct legislation under which to consider the request

38. The definition of 'environmental information' is extraordinarily wide. However, it is not limitless and the Tribunal shares the unease expressed by its counterpart in *Lend Lease* [9] that there is a tendency to assume, wrongly, that anything related to the planning process falls within the definition and therefore outside FOIA. [10] In *BEIS v Information Commissioner and Henney*, [11] where the precise issue was whether it could be said that a project assessment review of a particular subset of the Government's Smart Meter Programme (SMP) was information 'on' a measure affecting the environment (the SMP), the Court of Appeal looked for a sufficient connection between the information requested and the environment.

[9] Para 29
[10] See 39 section FOIA
[11] [2017] EWCA Civ 844

39. In *Lend Lease*, the Tribunal said [12] that the project was so large that it was likely to affect the state of the landscape as an element of the environment. The activity or programme was therefore a measure which fell within subparagraph (c) of the definition of 'environmental information'. The Central Hill project is smaller but the Tribunal nevertheless considers that the approach in *Lend Lease* equally applies. The draft feasibility assessment was an economic analysis used within the framework of that measure and activity. There is sufficient connection between the assessment, and therefore the remaining withheld information, and the environment.

40. In fact, Ms Curtis has not disputed that her request is properly dealt with under the EIR.

Tribunal decisions on which the parties rely

41. Ms Curtis relies on *Clyne* and the Commissioner on *Lend Lease*.

42. In *Clyne*, where the public authority was again the Council, developers made an application to vary an earlier planning permission so as (*inter alia*) to increase the number of residential units and parking but decrease the amount of affordable housing. The Council's planning policies contained a target of 40% affordable housing for larger development schemes not benefiting from public subsidy. Applicants proposing to develop below the 40% figures had to demonstrate that it was not economically viable to deliver more, and their assessment would be independently evaluated by external viability assessors. The Council appointed BNP Paribas (BNPP) for this purpose. The requester asked for BNPP's viability study or alternatively any viability study submitted by the developers. He referred to the Tribunal's decision in *Royal Borough of Greenwich v Information Commissioner and Shane Brownie on behalf of Greenwich Peninsula Residents*. [13]

43. The Council disclosed some material but withheld considerably more than in the present case. The Tribunal, applying the same four tests applied by the Commissioner in the present case, accepted that regulation 12(5)(e) was engaged but held that the public interest favoured disclosure. It was important that the public could interrogate why the 40% affordability housing threshold was not being met and that required full data, including intended disposal values from the remainder of the scheme. The fact that there was no suggestion that the Council had made a bad deal did not detract from the importance of transparency, and nor did the fact that there had been a thorough consultative process as part of the planning process or the fact that BNPP had conducted an extensive and expert independent review of viability. Those affected were less likely to respond to a planning application. The public interest in maintaining confidentiality was significant but the arguments for disclosure were vastly superior. The Tribunal did not accept the 'chilling effect' argument, that developers would in future give information on a more generic basis: the fact was that the Council had to satisfy itself that a greater

[12] Para 33
[13] EA/2014/0122

level of affordable housing would not be possible. Disclosure at the time of the request would not have imperilled the project or prejudiced the developer's bargaining position.

44. In *Lend Lease*, the requester was a former councillor of the London Borough of Southwark (Southwark). He asked for the financial viability assessment submitted with the planning application by the developer wishing to redevelop a large housing estate as part of a regeneration scheme. Faced with the disappearance of central government subsidy for affordable homes, Southwark required developers to make provision in their plans for homes to be sold onto 'social housing providers' at a price low enough for them to be let out at cheaper rents. The council had a target of 35% of new housing to be affordable (half at a social rent and the other half shared ownership). If the 35% target could not be met for a development, the developer had to submit an 'open book' financial viability assessment.

45. The Tribunal adopted the following definition of 'viability' from a Government-commissioned report by Sir John Harman: [14]

> *'An individual development can be said to be viable if, after taking account of all costs, including central and local government policy and regulatory costs and the cost and availability of development finance, the scheme provides a competitive return to the developer to ensure that development takes place and generates a land value sufficient to persuade the land owner to sell the land for the development proposed. If these conditions are not met, a scheme will not be delivered'.*

The present Tribunal gratefully adopts the same definition.

46. If the development proved more lucrative than expected, Lend Lease would share some of its profits with Southwark. The parties agreed to keep confidential discussions and negotiations, whilst recognising that confidentiality might have to give way to an obligation to disclose information under FOIA or the EIR. One of the appendices to the viability assessment was a financial model developed by Lend Lease for use as an analytical tool on large projects. The assessment would change over time.

47. The Tribunal noted that the anticipated compulsory purchase order inquiry and negotiations involving the requester's home would proceed according to well-known principles irrespective of disclosure under the EIR; Southwark's ownership of the land in question did not carry special weight; and any difficulty in interpreting the requested information had to be left out of account; in fact, residents had access to specialist advice.

48. The Tribunal accepted that regulation 12(5)(e) was engaged. Application of the public interest test led to different results for different categories of information. For example, the financial model in Appendix 22 was a trade secret (which would have

[14] *Viability Testing Local Plans* report for the Local Housing Delivery Group (2012)

been given special protection under section 43(1) FOIA) and should be protected. Information about projected sales to private purchasers, by contrast, should not be protected: purchasers would be much more likely to be influenced by the market rate at the time. Similarly with property destined for a social housing provider.

49. Having set out the principles, the Tribunal left it to the parties to discuss what information should be retained or disclosed, returning to the Tribunal only if necessary.

50. At least on superficial consideration, it is not easy to reconcile the two decisions. That may in part be because there were inevitably differences between the two projects, or in part because the (differently-constituted) Tribunals struck the balance between commercial confidentiality and the importance of transparency at junctures which were different (but nevertheless in each case reasonable). Consistency in public decision-making is important, particularly where the public authority is the same (as in the present case and *Clyne).* Ultimately, however, the task of the present Tribunal is to make its own assessment, based on all the circumstances.

Is regulation 12(5)(e) engaged with respect to the remaining disputed information?

51. The Tribunal has concluded that it is for some parts of the remaining disputed information but not for another part.

a) **Decanting/disturbance costs**

52. Decanting is the process under which residents are moved on a temporary or permanent basis while repairs or redevelopment take place. Disturbance costs are the reasonable expenses to which they are entitled as a result. There is some overlap with home loss payments.

53. Those payments are required by section 29 Land Compensation Act 1973 where (*inter alia*) an interest in land is compulsorily acquired by an authority or a resident is permanently excluded so that improvements or redevelopment can take place. Various conditions have to be fulfilled. The rules are complicated but, in essence, under a combination of section 30(1) and The Home Loss Payments (Prescribed Amounts) (England) Regulations 2016 (which were in force at the time of the request) [15] the amount of the home loss payment where someone is occupying the dwelling is 10% per cent of the market value of an interest in the dwelling, subject to a maximum of £58,000 and a minimum of £5,800. Dwellings include any garden, yard, outhouses and appurtenances belonging to or usually enjoyed with that dwelling.

54. The Council has disclosed much of this information in the draft feasibility study. It has redacted the figures under: (i) the subheadings *Assumed Home loss payment* and *Assumed Disturbance payment* under the heading *Existing Council Rent Decant*; (ii) the

[15] SI 2016 No 789 http://www.legislation.gov.uk/uksi/2016/789/regulation/2/made

Existing Leaseholder/Freeholder Decant Disturbance heading; and (iii) the *Total Cost* and *Avg [Average]/dwelling value* subheadings under the heading *Freeholder Buy Outs* (but not the equivalent information for *Leasehold Buy Outs*). It has revealed the headings and subheadings such that the reader can see the nature of the redacted information.

55. Because home loss payments are based on market value, which is more art than science to determine, their assessment cannot be reduced to arithmetical calculation. There is therefore some commercial value to the Council in keeping secret the assumptions it is using.

56. That said, as the Tribunal noted in *Lend Lease* there are well-developed principles for the assessment of compensation on compulsory purchase. That does not remove the uncertainty in assessment but it does significantly constrain the Council's negotiating hand (and that of residents). These days there is a wealth of information about the value of homes on the internet. In addition, the Council has disclosed the equivalent information for the Cressingham Gardens regeneration. The financial viability report for that project was prepared by AMP, the authors of the draft feasibility report for Central Hill. There is no obvious reason why decanting/disturbance information should be regarded as confidential for one ongoing project but not another in the same borough.

57. In the Tribunal's judgment, regulation 12(5)(e) is not engaged with respect to this information. There would be no, or no more than minimal, adverse effect from disclosure. If that is wrong, the adverse effect from disclosure on the Council is outweighed by the public interest in disclosure (the importance of maximum transparency and accountability for a controversial and expensive project directly affecting residents' lives).

b) Energy costs

58. The Council has redacted figures under the subheadings *Yield* and *Av.Rate (£/PA)* under the heading *Energy/FIT's [Feed-In Tariffs]/RHI [Renewable Heat Incentive]*, while again revealing the heading and subheadings. The figures are all said to be for 25 years.

59. The Tribunal accepts that, were this information to be disclosed, there would be a significant adverse effect on the Council's ability to negotiate with energy providers. It notes that it was withheld with Cressingham Gardens **[33]**. The public interest favours withholding it (see further below).

c) Development and finance

60. The Council has redacted the figures for sub debt and senior debt funding and finance costs for both development and investment finance, with commercial uplift in each case. It has also redacted the average property price under *Loan to value*;

section 106 [Town and Country Planning Act 1990] capital contribution; refurbishment leaseholder repayment; *RTB [Right to Buy] receipts deployed for build*; and *Land payments - Ground Rent Payment On Occupation £Per Plot/PA*. In each case, the headings and subheadings are again visible.

61. The Tribunal considers that disclosure of this information would seriously prejudice the Council's ability to secure investment on the most advantageous rates for its taxpayers (including Central Hill residents). Very similar information was withheld with Cressingham Gardens **[34]-[35]**. The public interest favours withholding the information (see further below).

Public interest

62. The Tribunal has carefully considered whether withheld information under *Energy* costs and *Development and finance* should be disclosed under the public interest test. One of the public interest criteria put forward by the Tribunal in *Lend Lease*, and adopted by the Commissioner in the present case, was that the project should not be allowed to fail. That is self-evidently correct: those opposed to a scheme as a matter of principle could otherwise achieve their ends simply by seeking disclosure. However, it does not follow that there would need to be such a dramatic result from disclosure before the public interest favoured withholding the information. It is enough, in the Tribunal's judgment, that significant adverse effect would be caused to legitimate economic interests – here, of the Council, but in other cases of a subsidiary company or negotiating partners - and that, as a result, the financial viability of a project would be rendered less likely. That would be the position were the development and finance information to be disclosed. As far as energy costs are concerned, there is an important, and decisive, public interest in the Council being able to negotiate the best deals for its taxpayers.

63. For the reasons already discussed, it is important that residents and Lambeth council taxpayers more generally should have as much information as possible about regeneration projects such as that of Central Hill. The withheld information should be the irreducible minimum. The Council has disclosed a considerable amount of information, including from the draft feasibility report. The Tribunal considers that, with the exception of the decant/disturbance costs, it is withholding no more than the irreducible minimum.

64. Understandably, Ms Curtis and her colleagues would like to see everything. They could then, if they so wished, instruct experts on a fully informed basis and interrogate the Council's plans for their homes and their community with maximum effectiveness. However, the Tribunal has to balance that desire with what it regards as the Council's legitimate economic interests and the imperative – for the benefit of taxpayers and the borough's residents more generally - that its negotiating hand is not unduly restricted. It is right to note that, as a result of the request, considerably more information has been disclosed and relatively little remains withheld.

65. In relation to the *Lambeth Talk* article, the Tribunal is not persuaded of the distinction the Council seeks to draw between planning applications by developers and regeneration schemes (which will, of course, also necessitate a planning application). However, this is not enough to tip the balance in favour of full disclosure. Affordability targets are important and the public is entitled to know why they are not met, but even so some information about a regeneration project has to be withheld if legitimate economic interests are not to be unreasonably adversely affected. A short quote from a councillor cannot alter that reality. Similarly, the fact that, as Ms Curtis contends, past projects by the Council may have overrun their budgets points to the need for as much information being available as possible for rigorous scrutiny, but not everything.

Conclusion

66. For these reasons, the appeal is allowed to the extent of the withheld decant/disturbance costs information but otherwise dismissed. The decision is unanimous.

67. The Council is to disclose the withheld decant/disturbance costs information to Ms Curtis within the later of 28 days and the determination of any application for permission to appeal by the Council (and the substantive appeal if permission is granted).

Signed

Judge of the First-tier Tribunal
Date: 16 May 2018