

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

**Decision notice**

**Date:** 26 November 2015

**Public Authority:** London Borough of Lambeth  
**Address:** Olive Morris House  
18 Brixton Hill  
Lambeth  
SW2 1RW

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to the application submitted by the London Borough of Lambeth (the Council) in 2014 for additional Decent Homes Backlog Funding. The Council provided a copy of the backlog bid document but redacted parts of the information under section 43(2) of FOIA or regulation 12(5)(e) of the EIR. The complainant has asked the Commissioner to consider whether the redactions were correctly applied. During the course of the Commissioner's investigation, the Council clarified that it was relying on regulation 12(5)(e) of the EIR to withhold the information in question. The Commissioner has found that regulation 12(5)(e) of the EIR is engaged and has decided that in all the circumstances the public interest in favour of withholding the information outweighs the public interest in disclosure.

**Request and response**

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2. On 25 February 2015 the complainant wrote to the Council and requested information in the following terms:

*I would like to request a copy of the application that was submitted in 2014 for further Decent Homes Backlog Funding and as a consequence of which Lambeth was successfully awarded a share of the £145m as announced on 20<sup>th</sup> January 2015.*

3. The Council responded on 2 April 2015 and confirmed that the request had been dealt with under the EIR. The Council explained that a partial allocation is being awarded to the Council for a total of £23,283,562 to upgrade homes by the end of March 2016. The response stated that a copy of the backlog bid was attached.
4. The complainant wrote to the Council on 9 April 2015 and advised that the document attached to the response appeared to be corrupted. She therefore asked the Council to revisit its handling of the request.
5. This was done and the outcome of the review was provided by the Council on 22 May 2015. The Council explained that its original response had been reconsidered and it had been found that some of the backlog bid information was found to be exempt information under section 43(2) (commercial interests) of FOIA. The exemption is qualified by the public interest test and the Council decided that on balance the public interest favoured withholding the information.
6. The Council also considered the possibility that some of the requested information constituted environmental information and should be dealt with under the EIR. Where this applied, the Council stated that the information would be subject to the exception to disclosure set out at regulation 12(5)(e) (confidentiality of commercial or industrial information) of the EIR. With regard to the public interest test, the Council again found that the public interest test favoured withholding the information.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 11 June 2015 to complain about the way her request for information had been handled. In particular, she has asked the Commissioner to determine whether the Council was entitled to redact the items of information contained in the backlog bid document provided.

### **Reasons for decision**

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### **Background**

8. The request refers to an announcement made on 20 January 2015 regarding the Decent Homes Backlog Funding programme. This was

published on the website of the Greater London Authority (GLA) and reported the following<sup>1</sup>:

*Thousands of aging council homes across the capital are set to be renovated and repaired, thanks to a £145 million funding boost from the Mayor of London, Boris Johnson.*

*From replacing dilapidated roofs, doors and windows, to rewiring, and updating outmoded bathrooms and kitchens, the funds will be used on internal and external repairs to help improve living conditions for thousands of local authority residents, across nine London Boroughs.*

[...]

*New government legislation for councils and housing associations will limit the amount leaseholders can be charged for future major repair, maintenance, or improvement works when they are wholly or partly funded by the government. The £145 million funding is in addition to the £821 million share of the Decent Homes programme, agreed with the government and committed to 14 boroughs during 2011-15 to help transform social housing in the worst conditions. As part of the bidding process each borough was required to review the potential for additional building of homes on their estates.*

9. The Decent Homes Standard sets out the following four criteria for a property to which the standard applies; it meets current minimum standard for housing, is in a reasonable state of repair, it has reasonably modern facilities and services, and it provides a reasonable degree of thermal comfort. As part of the Decent Homes Backlog Funding programme, stock owning Local Authority landlords were invited to bid for grant to carry out eligible works to bring stock up to the Decent Homes Standard.

### **FOIA or the EIR?**

10. In its response to the complainant, the Council stated that the requested information engaged section 43(2) of FOIA, although it indicated that regulation 12(5)(e) of the EIR may also apply. To investigate the complaint, the Commissioner has instructed the Council to confirm

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<sup>1</sup> <https://www.london.gov.uk/media/mayor-press-releases/2015/01/mayor-s-145-million-boost-to-repair-thousands-of-london-s-low>

whether it considers FOIA or the EIR would be the applicable access-regime with regard to the items of withheld information.

11. The EIR covers any environmental information held by a public authority, with FOIA providing a qualified right of access to most other types of records held by public authorities. The EIR was derived from European Law and was designed to encourage greater public awareness of issues that affect the environment.
12. 'Environmental information' is defined at regulation 2(1) of the EIR. In accordance with the Council Directive 2003/4/EC from which the EIR derives, it is the Commissioner's view that the definition should be interpreted widely. This is based on the construction of regulation 2(1), which states that environmental information is "any information...on" the factors described at paragraphs (a) – (f). Importantly, it is not necessary for the information itself to record or reflect a direct effect on the environment in order for it to be environmental.
13. The Council has explained that the request had been considered under both regimes as some of the works relate to internal works (such as new kitchens and bathrooms) which are more about providing modern services and facilities rather than bringing about an environmental improvement. However, the Council considered that on balance the main focus of the plans and programmes of the Decent Homes work was environmental in nature and so should be considered under the EIR.
14. Using the wide application of environmental information set out in the EIR, the Commissioner is content that the Council's position is correct. He considers that the withheld information relates to a *measure* within the meaning of regulation 2(1)(c) of the EIR. The Commissioner has therefore gone on to consider the Council's assertion that the withheld information is excepted from disclosure under regulation 12(5)(e) of the EIR.

***Regulation 12(5)(e) – confidentiality of commercial or industrial information***

15. Regulation 12(5)(e) of the EIR states 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.
16. The construction of the exception effectively imposes a four-stage test, each of which must be satisfied for the exception to be engaged:
  - (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.
  - (iv) The confidentiality would be adversely affected by disclosure. Although this is a necessary element of the exception, the Commissioner considers that this test will inevitably be satisfied if the first three conditions are met.
17. If all of the tests are met, a public authority must go on to consider the public interest test.
18. The purpose of the exception is to protect any legitimate economic interests underlying commercial confidentiality. The Commissioner considers that legitimate economic interests could relate to retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosure which would otherwise result in a loss of revenue or income.
19. Taking into account the purpose of the exception, the Council has responded to (i) – (iv) in turn. The Commissioner has tested the submissions against the legislation and his analysis follows.
- (i) Is the information commercial or industrial in nature?*
20. The Council has explained that the requested information relates to the per-unit price of services and works that would be carried out by the suppliers / developers commissioned by the Council. Following the successful bid for the funding, the benchmarking information will be used by the Council to procure contractors. The Commissioner accepts the Council's view that the information would therefore constitute commercial information.
- (ii) Is the confidentiality of the information provided by law?*
21. Confidentiality in this context will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute. The exception can cover information obtained from a third party and, significantly in the circumstances, information created by a public authority itself.

22. The Council considers that the information has both the necessary quality and obligation of confidence. This is because the information is not trivial, nor is it in the public domain (aspects of this assertion are considered in more detail later in the notice). Furthermore, the Council states that the information was provided to the GLA on a confidential basis. This would appear to be corroborated by a separate request made to the GLA for the same information. The GLA also withheld the cost figures on the basis that they were commercially sensitive, albeit the GLA considered the information engaged section 43(2) of FOIA.
23. Taking into account the reason for which the information was produced and the way in which it was used, the Commissioner is satisfied that the information is protected by the common law of confidence.

*(iii) Is the confidentiality protecting a legitimate economic interest?*

24. The Commissioner's guidance on regulation 12(5)(e)<sup>2</sup> provides the following advice with regard to this part of the exception:

*33. Public authorities will therefore need to consider the sensitivity of the information at the date of the request and the nature of any harm that would be caused by disclosure. The timing of the request and whether the commercial information is still current are likely to be key factors. Broader arguments that the confidentiality provision was originally intended to protect legitimate economic interests at the time it was imposed will not be sufficient if disclosure would not actually impact on those interests at the time of the request.*

*34. It is not enough that disclosure might cause some harm to an economic interest. A public authority needs to establish (on the balance of probabilities – ie more probable than not) that disclosure **would** cause some harm.*

25. The Council considers that the decision to withhold information is required in order to protect its own commercial interests. It argues that disclosure would prejudice its ability to achieve best value for money with respect to the proposed works to be carried out using the funding.

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1624/eir\\_confidentiality\\_of\\_commercial\\_or\\_industrial\\_information.pdf](https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf)

26. The critical point for the Council is that the information could be used by parties bidding for work to identify how much the Council had budgeted for each category of work covered by the Decent Homes bid. A party may then seek to produce a bid that takes account of the funds that have been budgeted instead of providing an offer that is truly competitive in the circumstances. The complainant disputes this argument, however.
27. Firstly, with regard to the average unit costs forecast for each of the work components, she states that this information is generally made publicly available by the Department for Communities and Local Government (DCLG), which collects district-level data from local authorities under (local authority housing statistics (LAHS)) on an annual basis. Secondly, the complainant argues that the sensitivity of the information is less than it might otherwise have been because the Council has already disclosed the actual pricing schedules for the major contractors under the recently signed 5 year Long Term Qualifying Agreements (LTQAs) that resulted from a section 20 consultation process in 2014. For its part, the Council does not accept that either of these arguments affects its ability to use regulation 12(5)(e).
28. In respect of the LAHS information, the Council has explained that the published data relates to the returns of local authorities for 2013-14 and is based on works that have been carried out under previous funding programmes. The difference here, the Council has advised, is that the information relates to costs of works that are currently being negotiated. The Commissioner considers this is an important distinction.
29. With regard to the LTQAs, the Council has explained that they cover all external works and are not related to the Decent Homes programme. The complainant, however, considers that the information published in relation to the LTQAs is pertinent. This is illustrated by the following arguments provided by the complainant:

*In 2011/12, Lambeth embarked on the "Lambeth Housing Standard" (LHS) Programme plus extra works (e.g. external paving, etc). For a clear definition, please refer to page 14 in the attached public reports pack issued by the council earlier this year, which graphically shows that LHS incorporates DHS.[<sup>3</sup>]*

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<sup>3</sup><http://moderngov.lambeth.gov.uk/documents/g9072/Public%20reports%20pack%20Thursday%2016-Apr-2015%2019.00%20Leaseholders%20Council.pdf?T=10>



*As part of this programme, Lambeth went back to the market and entered into new LTQAs specifically for the LHS in 2014. During this process they had to undertake a s20 consultation with the leaseholders and as part of this consultation, they issued various documents including the TnCs of the proposed contract and the actual pricing schedules (see attached).*

*However, I would like to specifically direct your attention to [a document containing the statement]: "The proposed contract with Mears Limited is intended to be the primary means for the Council/Lambeth Living procuring the delivery of the Lambeth Housing Standard in the Central Area.*

30. The Council has been made aware of this argument and, in response, has stressed that the ability to cross reference costs within the 15/16 Backlog bid is not evidenced from the documents cited. It has explained that while there is a primary framework contractor for the different areas in the Borough (split into the North, Central and South), the Council is not obliged to give them the work relating to the Backlog bid and there are other reserve contractors available. On the basis that the primary framework contractor is not guaranteed the work, it cannot be assumed the published rates would be used for all Decent Homes works within a particular area.
31. The Council has gone to explain that the Backlog bid is not area specific and sets out average costs for components of works, whereas the pricing schedule referred to by the complainant sets out unit costs for individual items of works. The Council considers the critical point is that until specific surveys are carried out on the individual properties and blocks that will receive works, the specific items of works are not known and therefore its final position on costs are likewise not known. The Council argues the information should not be released while there is this uncertainty and negotiations have not been concluded.
32. Based on the explanation provided, and having considered all the submissions provided the complainant, the Commissioner has ultimately accepted that the Council was entitled to draw a distinction between the LTQA information and the Backlog bid information for the purposes of the request. Crucially, the Council has explained that the withheld information will be used as the basis for forthcoming tenders in relation specifically to the Backlog bid work. That said, in order for the exception to be engaged the Commissioner must be satisfied that disclosure would have a harmful effect on the legitimate economic interests of the Council.
33. When testing the potential harm of disclosure, the timing of a request will often be a key factor. As stated, the Council's arguments return to



the fact that a re-procurement process was already underway or, in other areas, a decision was pending as to whether to extend current contracts or re-procure. The Council explains that disclosure may prejudice its commercial interests insofar as it could harm the Council's ability to maximise value for money with respect to the proposed works to be carried out as a result of the funding. The Council asserts that information which gives an indication of the amount that has been budgeted for each aspect of work covered by the Decent Homes application could be exploited by parties bidding for the work, leading to the modification of their bids to the detriment of the Council. In short, it is claimed there is a real risk that disclosure would affect the Council's ability to operate an effective procurement process.

34. The Commissioner accepts that the decision to withhold the requested information was necessary to safeguard the Council's commercial bargaining position in the context of both existing and future negotiations. He therefore considers that the confidentiality was required to protect a legitimate economic interest, namely the Council's, which fulfils the third stage of the engagement test.
35. As referred to above, the Commissioner considers that the disclosure of truly confidential information will inevitably harm the confidential nature of that information and the economic interests that have been identified. The fourth stage of the test will therefore necessarily be satisfied where the preceding elements of the test are met. The Commissioner has found on this basis that regulation 12(5)(e) of the EIR is engaged and has gone on to consider the balance of the public interest in disclosure.

### **The public interest test**

#### *Public interest arguments in favour of disclosure*

36. The importance of transparency and accountability means that the public interest in disclosure will always attract some weight. The EIR further acknowledges the benefits of public participation in decisions relating to the environment and under regulation 12(2) places an express presumption in favour of disclosure of environmental information.
37. In carrying out a weighting exercise in the context of the public interest test, the Council has acknowledged the general proposition of maximising openness, which it has recognised is the aspiration of the EIR. It has additionally acknowledged that the strength of the public interest in disclosure will be enhanced where information discloses how a public authority receives and spends money.

38. The complainant has also powerfully argued for disclosure of the requested information. Her position has two prongs, both of which refer to the assertion that the regeneration programme in the borough has been mismanaged. Firstly, the complainant has stated that, in response to another freedom of information request, the Council has admitted that it is unable to provide a breakdown of expenditure at the estate level. Secondly, the complainant has highlighted previous reports that have indicated the inaccuracy of the Council's previous cost estimates relating to regeneration and refurbishment works. These weaknesses, in the complainant's view, make the case for disclosure even more compelling in this case as they demonstrate the potential benefits of accountability at an earlier stage of the decision-making process.

*Public interest arguments in favour of maintaining the exception*

39. The Council's public interest arguments for withholding the requested information essentially replicate the arguments for finding that the exception is engaged. In short, it considers that the public ultimately benefits from the Council being able to exercise its strongest negotiating position in order to maximise value for money.
40. The Council has also indicated that the release of commercially sensitive information risks undermining the confidence of third parties with respect to the Council's ability to keep confidential their own sensitive information.

*The balance of the public interest*

41. In order to determine where the balance of the public interest lies, the Commissioner has found it helpful initially to return to the European Directive (2003/4/EC) from which the EIR derives. Paragraph (1) of the Directive reinforces the benefits of transparency in respect of environmental information:

*(1) Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.*

42. A particularly important argument in the circumstances of this case, and one that has been strongly advanced by the complainant, is that disclosure will allow the Council to be held to account in its use of public money. Public scrutiny of a public authority's decision-making processes should have the effect of making any decisions more robust and justifiable.

43. The Commissioner also recognises, however, that there will be occasions when it is imperative that a public authority is able to carry out procurement exercises away from external interference. This space will increase the chance that a public authority is able to maximise the benefits it receives from the terms agreed with a third party, an outcome that is clearly in the public interest.
44. The Commissioner has found that the timing of the request is a critical consideration. At that time, the procurement exercise had not been completed, meaning the sensitivity of the information remained. The Commissioner understands that the cost figures may change depending on the results of surveys undertaken on the properties allocated for improvement. However, the Commissioner is satisfied from the explanations provided that the information could still be used in such a way so as to distort the procurement process.
45. Bearing in mind the date of the request and status of the tender process at that time, the Commissioner has ultimately decided that the value of transparency to the public was less than the value attached to ensuring that the tender could be completed unchecked. The Commissioner has therefore determined that in all the circumstances the public interest in disclosure is outweighed by the public interest in maintaining the exception.

## Right of appeal

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46. 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)

47. 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.
48. 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 .....**

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