

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

**Decision notice**

**Date:** 23 February 2018

**Public Authority:** London Borough of Sutton Council  
**Address:** Civic Offices  
St Nicholas Way  
Sutton  
SM1 1EA

**Decision (including any steps ordered)**

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1. The complainant has requested a copy of the Financial Model Review in relation to the Sutton Decentralised Energy Network. The London Borough of Sutton Council refused the request on the basis of the exception at regulation 12(5)(e) of the EIR.
2. The Commissioner's decision is that is that the Council has incorrectly applied regulation 12(5)(e) of the EIR in this case.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information to which regulation 12(5)(e) had been applied.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

**Request and response**

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5. On 27 April 2017, the complainant wrote to the Council and requested information in the following terms:

*"I would like to request information on Sutton Decentralised Energy Network (SDEN) Financial Model Review and on claims in the attached sustainability plan. I would like the information supplied about SDEN in quantitative terms. Can you tell me first the average price paid by SHP tenants for heating per kWh?"*

*The Council have been making various claims about the benefits of the Sutton Decentralised Energy Network (SDEN).*

*Can you explain in quantitative terms how anyone connecting to SDEN can be taken out of fuel poverty?"*

*Can you explain how claims by Sutton Council that by lowering a residents CO2 Emissions it will rescue them from fuel poverty?"*

*Councillor Jayne McCoy has said that SDEN is technology agnostic and claimed that SDEN is not dependent on landfill gas engines or an incinerator to provide heat, What evidence can you provide to indicate that she knows what she is talking about? Can you indicate the place where this new source of heat will be located and what form it might take?"*

*The Council have paid £30,000 of tax payers money to pay for a Financial Model Review. Can I see it?"*

*This was advertised via: <https://procontract.due-north.com/Advert?advertId=7502b4a4-6c60-e611-8114-000c29c9ba21>*

*Also see: <http://contracts.contractsadvance.co.uk/tender-opportunity/215736/UKCarshalton-Sutton-Decentralised-Energy-Network-SDEN-Financial-Model-Review>*

*I would like to put in a freedom of information request to receive a copy of this information so that I can if this project has any chance of providing value for money or rescuing people from fuel poverty?"*

*Can you tell me when the report was written and who has seen its contents?"*

6. The Council responded on 25 May 2017 and addressed each of the points in the request. For the request for the Financial Model Review (FMR) the Council refused to provide this on the basis that it was commercially confidential.

7. On 31 May 2017 the complainant requested an internal review, raising issues with the failure by the Council to issue a proper refusal notice, the decision to withhold the FMR as commercially confidential and whether the FOIA or EIR is the correct access regime to consider the request under.
8. Following an internal review the Council wrote to the complainant on 27 June 2017. It stated that it accepted the previous refusal had not been sufficiently detailed and explained it considered the request was for environmental information. It confirmed the FMR was being withheld under regulation 12(5)(e) of the EIR and explained its reasons for this and gave an outline of the public interest arguments it had considered.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 11 July 2017 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of her investigation to be to determine if the Council has correctly applied regulation 12(5)(e) to the Financial Model Review and where the balance of the public interest lies.

### **Reasons for decision**

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

11. The withheld information in this case is a report provided to the Council by consultants it commissioned to review the SDEN Financial Model. This has been referred to by the complainant and in this decision notice as the Financial Model Review (FMR). The SDEN<sup>1</sup> is a heat distribution aiming to utilise heat generated from existing landfill gas turbines and an energy recovery facility being constructed by Viridor to initially supply sustainable low temperature hot water to a nearby estate. The FMR was commissioned to review the financial model presented by the project team to the Council Committee to seek approval for the procurement of the project to proceed.
12. Regulation 12(5)(e) of the EIR states that a public authority can refuse to disclose information if to do so would adversely affect the

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<sup>1</sup> <http://sden.org.uk/about-us/>

confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.

13. When assessing whether this exception is engaged the Commissioner will consider the following points:

- Is the information commercial or industrial in nature?
- Is the information subject to confidentiality provided by law?
- Is the confidentiality required to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

14. The Commissioner considers that the withheld information is environmental information within the meaning of regulation 2(1)(c) of the EIR. She considers that the information is on measures, plans and activities likely to affect the state of the elements and factors mentioned in regulations 2(1)(a) and (b) EIR.

*Is the information commercial or industrial in nature?*

15. The Commissioner considers that for information to be commercial or industrial in nature it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for a profit.

16. The Council considers the information is of a commercial nature as it relates to a commercial activity. In this case the withheld information is the review of the financial model, presented to the Council to approve the SDEN.

17. The Commissioner accepts that the nature of the information in this report would be commercial as it relates to a clear business activity with a commercial gain.

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

18. With regard to this element of the exception the Commissioner will consider if the information is subject to confidentiality provided by law, which may include confidentiality imposed under a common law duty of confidence, contractual obligation or statute.

19. The Commissioner considers the Council is relying on the information being subject to a common law of confidence and accepts that disclosing details of financial assumptions would impact on the ability of the Council Committee to analyse the proposals. The Commissioner has

been guided in her thinking by the approach of the Information Tribunal in *London Borough of Southwark v Information Commissioner and Lend Lease and Glasspool*<sup>2</sup>. This case related to a viability report produced in relation to a proposed redevelopment of an estate. The Information Tribunal found that regulation 12(5)(e) was engaged and the operating model and commercial projections in particular should be withheld. In explaining its thinking, the Tribunal commented that financial models are used as analytical tools on large projects and allow for different scenarios to be run and tested.

20. In this case, whilst this is not a financial model it is the financial review of the model and there are clearly some similarities as the FMR contains details of the financial viability of the SDEN. The FMR is implicitly confidential as it was created solely for the viewing of the Council and the information is not otherwise accessible. It is therefore not trivial in nature and it relates to a significant project in its early stages. The Commissioner notes the information has not been made available elsewhere and has been provided with an implied duty of confidence due to the nature of the review.
21. The Council states that the information in the review is commercially sensitive to several parties, particularly those that SDEN are purchasing heat from and selling heat to. In addition to this, SDEN has confidentiality clauses in its contracts with these parties. The Commissioner accepts this adds to the argument that the information is not trivial as it is implicitly confidential and not otherwise accessible.
22. Taking this into account the Commissioner is satisfied there is a common law duty of confidence. As such she is satisfied that the withheld information was imparted in circumstances importing an obligation of confidence.

*Is the confidentiality required to protect a legitimate economic interest?*

23. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by the disclosure.

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<sup>2</sup> EA/2013/0162

24. The Commissioner has been assisted by the Tribunal in determining how “would” needs to be interpreted. She accepts that “would” means “more probably than not”. In support of this approach the Commissioner notes the interpretation guide for the Aarhus Convention, on which the European Directive on access to environmental information is based. This gives the following guidance on legitimate economic interests:

*“Determine harm. Legitimate economic interests also implies that the exception may be invoked only if disclosure would significantly damage the interest in question and assist its competitors.”*

25. The Council has argued that disclosure of the information would adversely affect the legitimate economic interests of SDEN and, by extension, the Council. As well as this, the Council has alluded to the confidentiality being designed to protect the interests of Viridor (whom heat will be purchased from), Barretts (whom heat will be sold to).

26. In relation to the nature of the adverse effects, the Council stated that:

*“The review contains commercially sensitive information regarding pricing and costs involving various parties and I am of the view that disclosure of this information would harm their economic interests, and those of SDEN. The Guidance<sup>3</sup> gives examples such as retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, avoiding disclosures which would otherwise result in loss of revenue or income etc. The Guidance states that economic interests are wider than commercial interest and can include financial interests.”*

27. In relation to the adverse effects to its own legitimate economic interests, the Council has essentially argued the outcome of disclosing the information would be that third parties would be discouraged from confiding in the Council because of the possibility that their commercial information might be disclosed. In effect the Commissioner understands this argument to be that the Council would experience difficulty in engaging third parties in future projects or partnership opportunities, harming its ability to effectively pursue its legitimate economic interests.

28. The Commissioner considers that, since the EIR came into force public authorities entering into contractual arrangements with third parties

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<sup>3</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)

should make it clear that any relevant information held can be subject to disclosure in response to a request for information. Third parties should, therefore, be aware of the possibility that "commercial" information might be disclosed.

29. However, the Commissioner is not persuaded by this argument as there are potentially lucrative economic benefits for third parties in engaging with public authorities in commercial partnerships. She therefore considers it unlikely that the disclosure of information would inhibit parties from entering into arrangements with the Council. It follows that it is unlikely that the Council would therefore suffer damage to its legitimate economic interests should the information be disclosed.
30. With regard to both the Council's arguments regarding its own legitimate interests and those of the third parties; the Commissioner notes that the Council has not identified any specific elements of the withheld information and causally linked disclosure to specific effects. Damaging future relationships and avoiding disclosures which would result in loss of revenue or income are general arguments and, in order to be convinced that such an effect would occur, the Commissioner considers that the commercial significance of information needs to be identified. Simply identifying information as commercial information does not explain why the information is particularly sensitive or why disclosing it would have an adverse effect. The Commissioner is of the view that the exception has been applied on a general basis.
31. In relation to the third parties; the Council has argued that disclosure would affect their ability to retain or improve market position and would result in a loss of revenue or income. The Commissioner accepts these are categories of negative outcomes listed in her guidance but the Council has provided no explanation as to how these effects would come about or what form they would take. As far as the Commissioner is aware, the Council have not consulted with these third parties to seek their views on disclosure but has instead used its discretion to formulate arguments on their behalf taking into account the obligation of confidence owed in this case.
32. The Commissioner has consistently maintained in her investigations that she will not generally accept speculation by public authorities as to the potential effects of disclosure on third parties. The absence of any evidence of input from the third parties leads the Commissioner to conclude the arguments are speculative.
33. The Commissioner considers that the threshold for the engagement of regulation 12(5)(e) is a high one and, in order for it to be applied, it must be shown that the disclosure of specific information will result in specific harm to the legitimate economic interests of one or more

parties. In demonstrating harm, an explicit link needs to be made between specific elements of withheld information and specific harm which disclosure of these elements would cause.

34. The Commissioner is of the view that the council has adopted a “blanket” approach to the application of the exception and has not had sufficient regard to the nature of the actual information. Furthermore, the rationale presented is particularly limited and contains a lack of detail and absence of any reference to the information in itself. The Commissioner does not consider it her role to demonstrate arguments on behalf of public authorities.
35. Having considered the available evidence the Commissioner does not find she can support the Council’s application of the exception. The arguments provided do not demonstrate that adverse effects to the Council’s or any of the third parties economic interests would be more probable than not.
36. For the reasons described above, the Commissioner has concluded that the Council has not demonstrated to her the required standard that it had correctly engaged the exception under regulation 12(5)(e). The Commissioner has, therefore, not considered the application of the public interest in this case.



## Right of appeal

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37. 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)

38. 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.
39. 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** .....

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