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

Decision notice

Date: **21 February 2019**

Public Authority: Brent London Borough Council
Address: Brent Civic Centre
Engineers way
Wembley
HA9 0FJ

Decision (including any steps ordered)

1. The complainant requested information in relation to a proposed regeneration project. The public authority disclosed some of the information held within the scope of the request. The public authority however considered the remaining information exempt from disclosure on the basis of the exception at regulation 12(5)(e) EIR.

2. The Commissioner's decision is that the public authority was entitled to rely on the exception at regulation 12(5)(e).

3. No steps are required.

Request

4. On 15 December 2017 the complainant submitted a request for information to the public authority in the following terms:

   "I refer to the One Public Estate programme at/near Northwick Park Hospital, and attach a Government Cabinet Office dated March 2017, showing - on page 11 - what appears to be some form of potential land swap of the Northwick Park pavilion footprint with an equal amount of land by Northwick Park Station. I wish to raise some queries under the FOIA, and look forward to hearing from you with a FOI reference number and the date for response, which I calculate as 19 January.

   1. The Council/consortium appointed GVA as consultants earlier this year. Please supply a copy of all of their reports. I am content if you excise any commercially confidential information which is properly and lawfully exempt-able under the FOIA, and providing reasoning for such excision (and balancing the public interest test), if applicable

   2. The Council/consortium indicated it would be appointing RRP architects and a highway consultant. Please supply a copy of all of their reports and plans drawn up (particularly in light of the plan on page 11 of the above report which indicates the position of a likely residential development on Northwick Park Metropolitan Open Land (" MOL")). I am content if you excise any commercially confidential information which is properly and lawfully exempt-able under the FOIA, and providing reasoning for such excision (and balancing the public interest test), if applicable

   3. please supply any correspondence with the Mayor's Office/ GLA or otherwise relating to the One Public Estate programme at/near Northwick Park Hospital and /or relating to the MOL at Northwick Park in connection with or leading to OPE at Northwick Park (including any correspondence relating to an actual or potential MOL land swap)

   4. I attach a paper from Brent CCG Primary Care Co-Commissioning Committee in August. If any part of OPE in Brent (now) involves Brent CCG, please supply any supplementary documentation whereby Brent CCG join in with the MoU, other areas which are now included in OPE bids in Brent, and/or detailing any land brought in via or by Brent CCG or NHS bodies owning/controlling land."

5. The public authority initially responded on 21 December 2017. It explained that it considered the information requested exempt on the basis of section 22(1) FOIA (information intended for future publication).

6. On 2 January 2018 the complainant requested an internal review of the public authority's response on the basis that the public authority was not entitled to rely on the exemption at section 22(1).

7. The public authority wrote to the complainant on 23 February 2018 with details of the outcome internal review. The public authority explained that it had incorrectly relied on section 22(1) FOIA because the information held within the scope of the request constitutes environmental information within the meaning of regulation 2(1) of the EIR. It also explained that it did not hold any information further to part 4 of the request.

8. The review further concluded that some of the information held within the scope of parts 1 and 2 of the request had been published on the public authority's website. However, the rest of the information held within the scope of parts 1 and 2 was considered exempt from disclosure on the basis of the exception at regulation 12(5)(e) EIR.

9. With respect to part 3 of the request, the public authority explained that at the very least it holds a considerable amount of emails which could total many thousands within the scope of that part of the request. It therefore invited the complainant to either refine the scope of part 3 of her request or "provide more particulars of your request" so that the information sought can be located, retrieved or extracted within reasonable limits subject to the application of exceptions.

10. The complainant wrote to the public authority on 6 March 2018. She requested an internal review of the application of regulation 12(5)(e) to parts 1 and 2 of her request. In addition, further to the advice by the public authority for her to refine part 3 of her request, she re-submitted the following request:

    "Any correspondence, emails, notes of telephone conversations or meetings or other items covered by the EIR duty to disclose between the Council (and any of its other partners in connection with One Public Estate at Northwick Park ("the Council's Partners") in the Council's possession) and the GLA/Mayor's Office relating to the Metropolitan Open Land (MOL) at Northwick Park, including in relation to any potential MOL swap and the areas suggested."

11. The public authority wrote to the complainant on 12 September 2018. During the course of the Commissioner's investigation the public authority explained that the correspondence of 12 September 2018 was issued in response to the refined request submitted by the complainant on 6 March 2018. It considered that it had issued its final response to

parts 1 and 2 of the request on 23 February 2018 and to part 3 of the request (as refined) on 12 September 2018.

12. It is regrettable that the public authority's response of 12 September 2018 was not explicitly clear that it was issued specifically in relation to part 3 of the request. Consequently, it was only following clarification by the public authority to the Commissioner during the course of her investigation that it became completely clear that the information disclosed to the complainant on 12 September 2018 was released further to part 3 of her request as refined on 6 March 2018.

13. The rest of the information held within the scope of part 3 of the request as refined was also withheld on the basis of regulation 12(5)(e) EIR.

Scope of the case

14. The complainant contacted the Commissioner on 25 June 2018 to originally complain about the delay in responding to her letter of 6 March 2018. Following the public authority's response of 12 September 2018 the complainant wrote to the Commissioner on 21 September 2018 and explained that she disagreed with the decision to withhold the rest of the information held within the scope of parts 1, 2 and 3 (as refined on 6 March 2018) of her request. The Commissioner has referred to the complainant's submissions further below in her analysis.

15. The complainant also claimed that the public authority had not responded to part 3 of her request as refined on 6 March 2018. However, as noted above, the public authority subsequently clarified to the Commissioner that its correspondence of 12 September 2018 was in response to part 3 of the complainant's request as refined on 6 March 2018.

16. Consequently, the scope of the Commissioner's investigation was to consider whether the public authority was entitled to rely on the exception at regulation 12(5)(e) EIR to withhold the remaining information held by the public authority within the scope of parts 1, 2 and 3 (as refined on 6 March 2018) of the complainant's request.

Reasons for decision

Background

17. The public authority provided a brief background to the request summarised below.

18. The public authority received funding from the One Public Estate (OPE) to lead a consortium of land owning public sector partners in examining the potential regeneration of adjacent landholdings at Northwick Park. The other partners are London Northwest NHS Health Authority (LNWNHS), The University of Westminster and Network Homes Ltd. Jointly, the parties engaged with development and planning consultants, GVA, to explore, articulate and evaluate options that could contribute to meaningful review by the parties. It was likely that many of the options would be discarded but it was important not to exclude any options no matter how extreme.

19. The complainant's request was received whilst options, feasibility and commercial aspects relating to the potential regeneration project were still being considered. Initially the request was refused on the grounds that the requested information was going to be published "once the work was concluded." Following the internal review of this decision, the requested information was withheld on the basis of the exception at regulation 12(5)(e) EIR.

Applicable access legislation

20. There is no dispute between the parties regarding the information access regime - ie the FOIA or the EIR – which applies to the request. However, for the avoidance of doubt, the Commissioner considers that the withheld information constitutes environmental information within the meaning of regulation 2(1)(c) because it is information on plans and activities affecting or likely to affect the elements and factors.[1]

Application of Regulation 12(5)(e)

21. Regulation 12(5)(e) states:

[1] The full text of regulation 2(1) EIR is available here:
http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made

"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."[2]

Public authority's submissions

22. The public authority's submissions are summarised below.

23. It acknowledged that in order to successfully engage the exception, it will need to establish that:

- The withheld information is commercial or industrial in nature,
- The withheld information is confidential under the common law of confidence , contract or a statutory bar,
- The confidentiality is protecting a legitimate economic interest, and
- The confidentiality would be adversely affected by disclosure

24. The public authority considers that the withheld information is commercial in nature because it relates to the potential development of land owned by the public authority and its partners.

25. It considers that the second criterion has been satisfied because the public authority and its partners have considered and agreed to keep the withheld information confidential. In addition, a mutual obligation of confidence has been assumed under the common law of confidence. The obligation arises from the commercial nature of the options appraisal the public authority and its partners are jointly engaged in and the financial interests at stake.

26. The public authority considers that the confidentiality is protecting the legitimate economic interests of the public authority and its partners. Without the mutual obligation in respect of confidentiality, the activities undertaken and the financial interests would be severely harmed. The commercial value in the confidential information would be lost if it was made public. Further, revealing potential plans, costings and land values at this stage would adversely affect the ability of the public authority and its partners to secure the most economically advantageous commercial agreements. Maintaining the confidentiality of the

[2] http://www.legislation.gov.uk/uksi/2004/3391/regulation/12/made

information is necessary to protect the commercial bargaining position of the public authority and its partners in respect of future negotiations.

27. With respect to the balance of the public interest, the public authority acknowledged that under the EIR there is a presumption in favour of disclosure in the interests of openness, transparency and accountability especially in respect of the expenditure of public money. Disclosure would also promote greater public awareness and understanding and provide a valuable insight into the potential development options being considered. It would also inform public opinion about the options for the site in question and the ideas that had been suggested.

28. The public authority however submitted that the public interest in maintaining the exception is inherent in the harm that disclosure would inflict on the legitimate economic interests of the public authority and its partners. There is a strong public interest in protecting the economic interests of public authorities who legitimately engage in redevelopment and commercial activities in order to provide high quality services, facilities and amenities to the public at the best possible price.

29. It explained that the information it has commissioned is at a very early and preliminary stage in the decision making process. It merely explores the options for creating a masterplan. The public authority and its partners are far from making any actual decisions at this stage and, in any event, due to the scale and nature of the options being explored, extensive public and stakeholder consultation will be undertaken. Maintaining the confidentiality of very early stage and preliminary options appraisal is critical to joint working and the integrity and viability of the further development of any preferred options. Therefore, the sensitivity of the information, the timing of the request and the unwarranted harm that disclosure would cause means that the public interest in maintaining the exception outweighs the public interest in disclosing the withheld information.

30. The need for and benefits of public awareness, understanding and participation will be secured at key stages of the development and decision making process. Not only has the public authority already committed to full public consultation on its development proposals, the various regulatory approvals which will need to be obtained will provide statutory opportunities for public participation and influence too.

Complainant's submissions

31. The complainant's pertinent submissions are reproduced below.

32. “The Council states:" the council and its partners have considered and agreed to keep the withheld information confidential"; this is irrelevant under the EIR. I do not accept that it is a legitimate reason for withholding information under the EIR to plead agreement of mutual confidentiality with partners, some of whom are also public authorities. In any case, the information I sought was not of a nature which would " adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest” (see r12(5)(e)).The information I asked for - road plans , transportation reports and discussions on swaps of Metropolitan Open Land (MOL) - would be common infrastructural considerations for any development; it seems they would be needed to support the development whoever carried it out.”

33. “I did not ask for details of land values or costings or development plans re: buildings and their prospective density. I asked for Transportation reports relating to major infrastructure changes in my area on a roads system already frequently gridlocked, serving a major hospital where ambulances can be trapped in such gridlock. I asked for details of negotiations about swaps of MOL - a major local park and well used playing fields in a Borough where such green space is scarce. The proposals for the infrastructure for the development include the provision of an additional access road. I sought the plans for the options being considered. From what was in the public domain, the proposals appeared to envisage putting an access road across the MOL and significant sites of nature conservation. These were described as such ("going through the golf course", or the Ducker pool - a Borough SINC).”

34. “There are only a limited number of potential routes. The reports on transportation and viability of a limited number of potential sites for this new access road could not affect commercial value, or prevent commercial negotiations. They would be the same issues whatever the developer. The land is owned by the Council where the MOL is, and the access road routes potentially lay. There is extensive and legitimate public interest in the plans to run a road across a Park, or take away much valued, historic MOL and to develop adjoining and partly on the MOL. I did not request any information of commercial value, or costings or plans of the development. There’s no element of bargaining over the road, or a MOL swap. If the information is sensitive, it is not sensitive to protect a legitimate economic interest, it is because of the local uproar such a use of Northwick Park would provoke, and embarrassment trying to keep it out of the public domain.”

The Commissioner's considerations

Is the exception engaged?

35. The Commissioner has considered whether the exception is engaged with reference to the four criteria which must be met, namely; the information is commercial or industrial in nature, the information is subject to a duty of confidence under either the common law of confidence, contract, or a statutory bar, the confidentiality is protecting a legitimate economic interest and, that economic interest and thereby its confidentiality would be adversely affected by disclosure of the information.

36. The Commissioner is satisfied that the withheld information is commercial, relating as it does to the potential development of land for commercial and other options.

37. The Commissioner accepts that the withheld information is subject to an obligation of confidentiality which arises from the commercial nature of the options appraisal and the parties having agreed that it should be kept confidential.

38. The Commissioner considers that to satisfy the third criterion, 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.

39. The Commissioner accepts the reasons provided by the public authority in support of the view that disclosure of the withheld information would adversely affect the legitimate economic interests of the public authority and its partners. Further, she considers that the disclosure of truly confidential information into the public domain would invariably harm the confidential nature of that information. In other words, if the first three criteria are met then the exception will be engaged.

40. Consequently, the Commissioner has concluded that the public authority was entitled to engage the exception at regulation 12(5)(e).

Balance of the public interest

41. In common with all EIR exceptions, the exception at regulation 12(5)(e) is subject to the public interest test set out in regulation 12(1)(b) EIR. Therefore, the Commissioner has considered whether in all the circumstances of the case the public interest in maintaining the

exception outweighs the public interest in disclosing the withheld information.

42. In addition to the general public interest in transparency and accountability, the Commissioner has been mindful of the complainant's view that there is a public interest in knowing whether there are plans to "run a road across a Park, or take away much valued, historic MOL and to develop adjoining and partly on the MOL." The public authority recognises that disclosure of the withheld information would promote greater public awareness and understanding and provide a valuable insight into the potential development options being considered.

43. The Commissioner however shares the view that in the circumstances of this case there is a strong public interest in not disclosing options appraisal further to the development plans before they have been finalised. The benefits of disclosing the exploratory plans must be balanced against the strong public interest in not revealing commercially sensitive information which would adversely affect the economic interests of the public authority and its partners.

44. The Commissioner is mindful that the public authority has committed to full public consultation in relation to the development plans and in her view this adds further weight to the strong public interest in not disclosing the commercially sensitive information at the time of the request.

45. Taking all of the above into account the Commissioner has concluded that on balance the public interest in maintaining the exception outweighed the public interest in disclosure.

Procedural Matters

46. Under regulation 14(2) EIR a public authority is required to issue a refusal notice as soon as possible and no later than 20 working days following receipt of the request.

47. The complainant submitted her refined request (part 3) to the public authority on 6 March 2018. The public authority provided its response to that request on 12 September 2018.

48. The Commissioner therefore finds the public authority in breach of regulation 14(2) EIR.

Right of appeal

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

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.

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 .....

Terna Waya
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