

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

Date: 8 July 2020

Public Authority: London Borough of Merton Council
Address: Civic Centre
London Road
Morden
SM4 5DX

Decision (including any steps ordered)

1. The complainant has requested information on Morley Park, the new public park in West Wimbledon SW20.
2. The Commissioner's decision is that the London Borough of Merton Council ('the Council') has correctly applied regulation 12(5)(e) EIR (confidentiality of commercial or industrial information) to withhold information contained in documents held within the scope of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information redacted in error in the Licence to Underlet as set out in the confidential annex.
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.

Background

5. The complainant explained the background which led to her request for information. She explained that Morley Park is a new public park in the London Borough of Merton that opened in May 2019 after decades of campaigning by the local community. Berkeley Homes were obliged to carry out works to create the Park and transfer the freehold of the Park to the Council by a Section 106 agreement that formed part of the 2011 planning consent for its adjacent residential development. Currently the freehold of the Park has not been transferred to the Council. The Park was instead leased to Merton Council by Berkeley Homes for 22 years in May 2019.

6. The complainant stated:

“In September 2017 the Council issued a Certificate of Completion for all the works Berkeley Homes were required to complete before transferring the freehold. These works included eradication of Japanese Knotweed, but at the time the Certificate was issued it had not been eradicated. The issuance of the Certificate removed all restrictions on Berkeley Homes selling homes on their adjacent development. The day after the Certificate was issued a long- planned opening event was held but the Park was then closed again until May 2019. The delay in the Park opening was explained as due to negotiations on the post transfer liability for Japanese Knotweed. In December 2018 residents were told that instead of transferring the freehold the Park would be leased to the Council for 22 years.”

Request and response

7. On 3 June 2019 the complainant wrote to the Council and requested information in the following terms:

“Could you please provide me with copies of the following documents relating to Morley Park the new public park in West Wimbledon SW20, with access off Cottenham Park Road:

- The lease granted to the Council by Berkeley Homes for Morley Park.
- The document that grants the Council the option to terminate the lease and take the freehold of Morley Park from Berkeley Homes.
- Any Land Transfer Agreement.

- The lease granted to the Ursuline High School by the Council for the use of the Morley Park playing fields and pavilion.
 - Any other documents pertaining to the transfer of Morley Park to the Council and the use of Morley Park by the Council signed since 1 May 2019.
 - The Licence Agreement whereby Berkeley Homes is granted temporary use of parts of Morley Park.”
8. The Council sought clarification of the fifth item in the request. This request for clarification was sent the day before the twentieth working day following receipt of the request.
9. The Council provided a substantive response on 25 July 2019 advising that information within the scope of the request is held and relied on the exceptions at regulation 12(5)(e) – confidentiality of commercial or industrial information & 12(5)(f) – interests of the person who provided the information, to withhold the information except in response to point four of the request regarding the school. The Council considered that the public interest favoured upholding the exceptions. The Council provided the Section 106 8th Modification Agreement; The Dedication and Adoption Deed of the footpath and cycle way; The Licence to Occupy; and the Sub-Lease to the school.
10. Following an internal review the Council wrote to the complainant on 18 September 2019 upholding its initial response.

Scope of the case

11. The complainant contacted the Commissioner on 15 October 2019 to complain about the way her request for information had been handled.
12. During the Commissioner’s investigation the Council reconsidered its position and on 3 April 2020 provided the complainant with redacted copies of the following information:
- The Lease dated 10 May 2019 (also referenced as the Head Lease)
 - The Escrow Agreement
 - The Licence to Under-let (also referenced as the Licence to Sub-let) to the school
13. The Council sought to rely on regulations 12(5)(e), 12(5)(f), 12(3) and 13(2) – personal data to withhold the redacted information.

14. Following receipt of the further response the complainant wrote to the Commissioner on 9 April 2020 advising:

"...the request I made also asked for copies of any other documents regarding the transfer and use of Morley park signed since 1st May 2019. You will see that in the correspondence I previously copied to you the Council said that there is one such document that they withheld. That document was not named. No such document has been provided, redacted or otherwise, and no reason given for the omission in the reply to my request that I received on Friday 3rd."

15. The complainant also explained her concern that the poor quality of the copy of Plan 2 provided in the Head Lease and attached Land Transfer Agreements was such that she was unable to determine the location of paths around the pavilion, referenced in the Head Lease. The Council subsequently provided the Commissioner and complainant with a fresh copy on 22 April 2020.
16. The Commissioner considers the scope of her investigation to be the application of regulations 12(5)(e), 12(5)(f) and 12(3) to redact the requested information.

Reasons for decision

Is the information environmental information for the purposes of the EIR?

17. The complainant has not disputed the public authority's view that the withheld information is environmental information within the meaning of regulation 2(1) EIR.¹
18. The Commissioner considers that the withheld information is environmental information within the meaning of regulation 2(1)(c) EIR.

Regulation 12(5)(e)

19. Regulation 12(5)(e) of EIR states:
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¹ The full text of regulation 2(1):

<http://www.legislation.gov.uk/ukxi/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."

20. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the authority must demonstrate that:

- the information is commercial or industrial in nature;
- the information is subject to confidentiality provided by law;
- the confidentiality provided is required to protect a legitimate economic interest; and
- that the confidentiality would be adversely affected by disclosure.

21. The complainant argues that the information is not commercial:

"All contracts are to some extent commercial in nature. No specific evidence is provided to say why this contract is any way more commercially sensitive than any other. This is a lease for a public park and the Heads of Terms tell us it is at a peppercorn rent... The Head Lease does not involve the sale or purchase of goods for profit or otherwise."

22. The complainant references the Commissioner's guidance in respect of the definition of a commercial activity:

"A commercial activity will generally involve the sale or purchase of goods or services, usually for profit."

23. The Council explained its view that the withheld information is held within "private contracts" which are "commercial in nature".

24. The Council advised that the withheld information is subject to a duty of confidence provided by common law. It explained that the contracts and additional document were negotiated between Berkeley and the Council in the Council's capacity as a land purchaser, in confidence with no expectation that their contents would be made public. It stated that:

"The information is not trivial in nature or in the public domain so a common law duty of confidentiality applies"

25. With respect to the third bullet point highlighted in paragraph 21 above, the Council explained:

"The confidentiality protects Berkeley's legitimate economic interests in the content of private contracts revealing Berkeley's negotiating positions and outcomes."

26. To satisfy the fourth element of the test identified above, disclosure of the confidential information must adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. In this case the Council explained that Berkeley's economic interests would be adversely effected.

The Commissioner's view

27. The remaining information in the scope of the request comprises that set out in paragraph 12 and in addition a further document of which the Council initially advised the complainant. The Council did not refer to this additional document in its final response to the complainant on 3 April 2020, as referenced in the complainant's comment set out in paragraph 14. However, the Commissioner notes that this document remains part of the requested information withheld under this exception.
28. The Commissioner considers that the withheld information is commercial information in that it relates to Berkeley's commercial business activities. Due to the content of the withheld information and the sensitivity of the Council's submissions she is unable to refer to those submissions in full in this notice. These submissions are considered in the confidential annex attached.
29. The exception covers information obtained from a third party, information jointly created or agreed with a third party, or information created by the public authority itself. The withheld information falls within this description, as information agreed between the Council and Berkeley.
30. Confidentiality in law may include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute. In this case the Council is relying on the common law of confidence.
31. In support of this reliance the Council confirmed that the information is not trivial, is not in the public domain and was shared in circumstances creating an obligation of confidence.
32. Having viewed the limited withheld information which is contained in redactions in the Head Lease, one redaction in the Licence to Underlet and the separate document; the Commissioner accepts that the information is not trivial and was shared in circumstances creating an obligation of confidence. She also notes that although the Head Lease is currently being registered at the Land Registry this registration is in its redacted form to protect the economic interests of Berkeley. Therefore,

for the purposes of this element of the exception, she is satisfied that the information is subject to confidentiality by law.

33. 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.
34. The Council advised the Commissioner that it had consulted with Berkeley regarding disclosure of the documents and had taken into account representations made by Berkeley's legal advisors.
35. The Commissioner encourages such consultation, however, she also notes that private companies must recognise that their involvement with public authorities who are subject to the FOIA and the EIR should expect disclosure of information relating to agreements and discussions resulting from that involvement.
36. Regarding the final element of the test set out in paragraph 20, the confidentiality must be adversely affected by disclosure, this is a necessary element of the exception, however, once the first three elements are established the Commissioner considers it is inevitable that this element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would also harm the legitimate economic interests that have already been identified.
37. This was confirmed in *Bristol City Council v Information Commissioner and Portland and Brunswick Squares Association*². The Tribunal stated at paragraph 14 that, given its findings that the information was subject to confidentiality provided by law and that the confidentiality was provided to protect a legitimate economic interest: "it must follow that disclosure... would adversely affect confidentiality provided by law to protect a legitimate economic interest".
38. Consequently, having considered the submissions and the withheld information provided by the Council, the Commissioner has concluded that the Council is entitled to engage the exception at regulation 12(5)(e).

² EA/2010/0012, 24 May 2010

The public interest

39. 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.
40. There will always be some public interest in disclosure to promote transparency and accountability of public authorities, greater public awareness and understanding of environmental matters, a free exchange of views, and more effective public participation in environmental decision making, all of which ultimately contribute to a better environment.
41. The Commissioner considers that there will always be some inherent public interest in maintaining commercial confidences. Third parties would be discouraged from confiding in public authorities if they did not have some assurance that confidences would be respected. It may be important to preserve trust in public authorities' ability to keep third party information confidential. However, the Commissioner does not consider that a generic argument about inherent public interest carries significant weight, a public authority's arguments must be related to specific circumstances.
42. The Council explained:

"Transparency scrutiny and accountability of developments, land transfers and the provision enhancement and protection of public space is in the public interest. Where aspects of these matters are reliant on the outcomes of negotiations between the Council and a private organisation it is in the public interest to ensure that the Council is able to conduct negotiations successfully. To do this trust between the parties is key, particularly trust in the Council's ability to protect the confidentiality of commercial information."
43. The Commissioner considers that the Council has demonstrated that the particular relationship of trust described by the Council serves the public interest. Undermining confidentiality and that relationship of trust by disclosure of the redacted information would undermine its relationship with Berkeley and Berkeley's economic interests. As explained above in paragraph 28 the sensitivity of the Council's submissions prevents further explanation here but is provided in the attached confidential annex.
44. The complainant is particularly concerned about the presence of the Japanese Knotweed and explained to the Commissioner:

“It is hard for the public to understand how the position has changed from one where Berkeley Homes had the responsibility for eradicating the Japanese Knotweed prior to transferring the freehold of the Park to the Council, to one where the Council is taking the Park on a 22 year lease and taking on the responsibility for managing and treating the knotweed after one year.”

45. The Commissioner fully understands the complainant’s concerns and is cognisant of the presumption in favour of disclosure under the EIR. She notes that the withheld information would further inform public discussion about the agreements reached by the public authority and Berkeley. Although a significant amount of the requested information in the agreements has been disclosed, the public interest in the withheld information informing oversight and scrutiny of the total picture of the arrangements agreed should not be underestimated. The complainant is clearly concerned for the best interests of the public with respect to the long awaited park and has throughout sought to understand the Council’s actions.
46. Notwithstanding this, the Commissioner has concluded that in the specific circumstances of this case as a result of the issues discussed in the annex attached and where the withheld information relates to particular agreements which were taken in the public interest, the public interest in withholding the remaining information outweighs the public interest in disclosure. She is therefore satisfied that the exception at regulation 12(5)(e) is correctly applied.

Regulation 12(5)(f)

47. Regulation 12(5)(f) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided that 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 the Regulations to disclose it; and (iii) has not consented to its disclosure.
48. The Council relied on this regulation to withhold the same information as that withheld under regulation 12(5)(e). As the Commissioner has found that regulation 12(5)(e) is correctly applied there is no need for her to make a finding on the application of regulation 12(5)(f).

Regulation 12(3)

49. Regulation 12(3) of the EIR states that the personal data shall not be disclosed otherwise than in accordance with regulation 13.

50. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in Regulation 13(2A), 13(2B) or 13(3A) is satisfied.
51. In this case the relevant condition is contained in regulation 13(2A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
52. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then Regulation 13 of the EIR cannot apply.
53. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

54. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual"

55. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
56. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
57. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
58. The Commissioner notes that no redactions have been made in respect of personal data in the Head Lease with limited redactions the Escrow Agreement.
59. The Council provided the complainant with a redacted copy of the Licence to Underlet. The complainant advised the Commissioner:

"We note that:

- The copy of the sub lease to the school which was previously provided has no redaction. The version attached to Licence to sub-let has the name of the Landlord redacted.
- The redactions in the Licence to Sub-let all appear to be the name of the Landlord which we already know from the unredacted sub lease.

The redactions in the Licence to Sub-let thus appear to be pointless but for completeness we hope that the ICO will require LBM to release the redacted information.”

60. The Council apologised to the Commissioner for the unnecessary redaction of information already provided to the complainant. In these circumstances this information is excluded from consideration, however, for completeness the redactions will be detailed for disclosure in the confidential annex.
61. The Council explained that the information redacted in the Escrow Agreement comprised names, contact details and signatures. The Commissioner is satisfied that this information comprises personal data. However, the fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
62. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

63. Article 5(1)(a) of the GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”

64. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
65. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

66. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of

*the data subject which require protection of personal data, in particular where the data subject is a child*³

67. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-

i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

68. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

69. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

70. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

³ Article 6(1) goes on to state that:-

'Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks'.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

'In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted'.

71. In the circumstances of this case, the Commissioner understands that the complainant represents the interests of the general public regarding Morley Park and this broad representation is a significant legitimate interest. The Commissioner is also aware that the complainant did not raise any concerns over the limited information withheld in this respect.

Is disclosure necessary?

72. "Necessary" means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
73. In the Commissioner's view it is not sustainable to argue that disclosure of the names, contact details and signatures is necessary. Disclosure of such information would not add to the public's understanding of the disclosed information and would not inform the complainant on her particular concerns.
74. Given this finding the Commissioner has concluded that disclosure of the names, signatures and contact details would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure would therefore breach the first data protection principle and thus such information is exempt from disclosure on the basis of regulation 12(3) of the EIR.

Right of appeal

75. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

76. 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.

77. 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

Susan Hughes
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