

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 16 January 2023

Public Authority: London Borough of Lambeth Council

Address: Lambeth Town Hall
Brixton
London
SW2 1RW

Decision (including any steps ordered)

1. The complainant requested, from the London Borough of Lambeth ('the council'), information relating to how the council is considering redeveloping an area. The council applied Regulation 12(5)(e) (commercial confidentiality) to withhold the information from disclosure.
2. The Commissioner's decision is that the council was correct to apply the exception to some information within the document, however the remaining sections of the document should have been disclosed in response to the request.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - To disclose the sections of the document outlined in the Annex to this decision notice.
4. The council 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 19 January 2022, the complainant wrote to the council and requested information in the following terms:
 - “1. What definition and criteria does Lambeth use to determine whether a home is classified as "obsolete" in accordance with the GLA term?
 2. How many homes in total has Lambeth classified as "obsolete"?
 3. Did Lambeth assess its entire portfolio of housing or simply a sub-set? If just a sub-set, how it determine what sub-set of homes to consider?
 4. For the total in (2) above, please provide a breakdown in terms of the current tenure of the resident in that home (e.g., secure tenant, temporary accommodation, property guardian, market rent, leasehold, freehold, long-term void)
 5. For the total in (2) above, please provide a breakdown as to the estate on which they are located (for those in street properties, a simple category of "street property" is sufficient).”
6. The council responded on 16 February 2022. It refused the request on the basis that Regulation 12(5)(e) applied.
7. Following an internal review, the council wrote to the complainant on 30 March 2022. It maintained its position that the exception applies, and withheld the information.

Reasons for decision

8. The following analysis explains why the Commissioner has decided that Regulation 12(5)(e) of the EIR was applied correctly in order to withhold part of the information from disclosure.
9. Regulation 12(5)(e) provides 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.

10. In his assessment of whether regulation 12(5)(e) is engaged, the Commissioner will consider the following questions:
- 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?

11. For clarity, if the first three questions can be answered in the positive, the final question will automatically be in the positive because if the information was disclosed under the EIR, it would cease to be confidential.

Is the information commercial in nature?

12. The withheld information relates to the Greater London Authority's ('the GLA') Affordable Housing Programme 2021-26¹. The withheld information is held within an application for funding from the GLA affordable housing fund. It outlines a bid for funds in order to develop new or replacement housing in various areas of the borough.
13. The council argues that the information is commercial in nature because the grant rates are wholly competitive and negotiated. It argues that the information includes the 'per-unit' price of work that would be commissioned by the authority and this information will eventually be used to procure contractors.
14. The Commissioner accepts that the information is commercial in nature as it relates to a commercial bid for funding in order to deliver new homes in the areas concerned. The information contained within the application may ultimately be used by the council for budgeting purposes when negotiating with contractors to build the properties envisaged.

¹ https://www.london.gov.uk/sites/default/files/201123_homes_for_londoners_-_affordable_homes_programme_2021-2026_-_funding_guidance_fa.pdf

Is the information subject to confidentiality provided by law?

15. The Commissioner also accepts that the information was provided in confidence. The information is clearly more than trivial as it relates to details of a third party's proposals in relation to the proposed project. A third party created the document on behalf of the council. The council confirmed that the information is not otherwise in the public domain, and that it was shared with the GLA on a confidential basis.
16. The Commissioner also notes that council employees who had access to the information would also understand that that information was to be held in confidence. The information therefore has the necessary quality of confidence.
17. The circumstances in which the information was provided, would in the Commissioner's view, be sufficient to impose an obligation of confidence.

Is the confidentiality required to protect a legitimate economic interest

18. The council argues that confidentiality is required in order to protect its commercial position as regards its fund bid. It argues that a disclosure of the withheld information relating to this bid would prejudice its ability to achieve best value.
19. The council argued that if the information was disclosed, it could be used by parties bidding for work as it would identify how much has been budgeted for each category of work covered by the bid. For instance, the information would highlight how much the council has identified as a price 'per unit' to build new houses. Third parties would then be able to take into account the council's figures, and submit bids which are not truly competitive. It therefore argued that confidentiality is required because disclosure could affect its future bargaining position and its ability to run an effective procurement process.
20. The Commissioner accepts that the disclosure of the documents would provide valuable information which could undermine its negotiating position.
21. Finally, the Commissioner is satisfied that the confidentiality would inevitably be affected if the council disclosed this information.
22. The Commissioner has decided that Regulation 12(5)(e) of the EIR is engaged by the information which the council is withholding. He has therefore gone on to consider the associated public interest test.

The public interest test

23. The test is whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
24. Regulation 12(2) also provides that a public authority shall apply a presumption in favour of disclosure.

The public interest in the information being disclosed

25. There is a strong public interest in the council being clear about what it is intending as regards the areas concerned. Its plans would have a significant impact upon the communities concerned.
26. In some sections of the borough there has been a long running issue, with local residents who wish to keep the properties and the estates they live in from being demolished as part of a regeneration programme. This resulted in residents from one area taking a case to the High Court in 2015. The council lost its case and development was prevented in this instance². Arguments against the development of one particular site have been ongoing since that point³⁴.
27. Given the obvious and clear concerns expressed by residents, and the impact such a large redevelopment would have upon them, there is a strong public interest in the council being clear about the intentions which lie behind its current bid.
28. A clear picture of the number of houses, the split between council owned and privately owned, and the number of beds in each type of property which the council intends to build in an area would give local communities a clearer understanding of how the council's plans will effect them, why it intends this, and to an extent, how it intends to fund this.

² <https://www.theguardian.com/housing-network/2015/nov/30/lambeth-council-demolish-homes-illegal-cressingham-gardens-high-court>

³ <https://www.brixtonbuzz.com/2022/08/freedom-of-information-response-shows-redevelopment-of-cressingham-gardens-to-be-unviable/>

⁴ <https://www.brixtonbuzz.com/2021/11/402-objections-for-the-demolition-of-ropers-walk-at-cressingham-gardens-with-only-2-in-support/>

The public interest in the exception being maintained

29. On the counter side, the Commissioner recognises that there is a strong public interest in protecting the budgets which the council will have to take forward its proposals. Information relating to the price per unit and its budgeted figures would highlight to developers the money it has spend per unit. Disclosing these figures would have the effect of levelling out the bids which are submitted to it in any tender around the figures it has budgeted. The Commissioner also accepts that a disclosure of the information would highlight to other councils the size of the council's bid for funding to the GLA.
30. There is a public interest in protecting the ability of the council to create application bids, and seek funding on a budgeted basis without this affecting its future negotiations with third parties. There is a public interest in allowing the market at the time to determine the price of the work to be carried out, and disclosing information which allows companies to determine the amount that the council has budgeted for the price per unit would be likely to undermine this.

The Commissioner's conclusions

31. The council's arguments centre around its budgeting figures and particularly the price per unit which it has submitted. The Commissioner has decided that the public interest in protecting the costs and financial information outweighs the public interest in the information being disclosed, due to the risk to the public purse in future negotiations being undermined by this information being disclosed.
32. The Commissioner notes that the council has taken a blanket approach to withholding the document from disclosure. It has not sought to disclose the majority of the document and redact only the sensitive information which its arguments relate to. The council's arguments in respect of the remainder of the document are limited, and are not persuasive.
33. The Commissioner has therefore decided that the council has not justified its position regarding the remaining information, and the public interest in this information being disclosed outweighs the public interest in the exception being maintained.
34. The Commissioner therefore requires the council to disclose the document, other than the relevant sections highlighted in the annex to this decision notice.
35. For the information which the Commissioner has decided is exempt, and that the public interest rests with maintaining the exemption in this case, Regulation 12(2) of the EIR states that a public authority shall

apply a presumption in favour of disclosure, and the Commissioner has borne this in mind when reaching his decision. However, the above demonstrates that the Commissioner's view is that the public interest in the exception being maintained clearly outweighs that in the information being disclosed at the time that the request was received by the council. Therefore, the Commissioner's decision is that the presumption in favour of disclosure required by Regulation 12(2) does not change the outcome of his decision that the exception was correctly applied by the council in this case.

36. The Commissioner has therefore decided that the council was correct to apply Regulation 12(5)(e) to withhold the information highlighted in the annex section from disclosure, however the remainder of the information should be disclosed.

Right of appeal

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: 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

Ian Walley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

Disclose the document as a whole, other than the sections outlined below.

For the tables provided for each area

Disclose top tables in their entirety

Lower tables - Viability section

Contributions

- Income from rents – withhold
- Initial sales - withhold
- Income from private sales - withhold
- Total – disclose

Costs

- Total Costs – disclose figure from right hand column, withhold the remaining line.
- Price per unit - Withhold entire line.
- Total costs for grant units - withhold entire line.

Scheme Deficit – withhold

Total Grant

- Total grant – Withhold entire line
- Per unit – withhold entire line
- Proportion of TSC – withhold entire line