FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Tribunal Reference:	EA/2013/0162
Appellant:	London Borough of Southwark
Respondent:	The Information Commissioner
Second Respondent:	Lend Lease (Elephant and Castle) Limited
Third Respondent:	Adrian Glasspool
Judge:	NJ Warren
Member:	Dr H Fitzhugh
Member:	P de Waal
Hearing Date:	3-7 and 18 February
Decision Date:	9 May 2014

DECISION NOTICE

A. Introduction

1. On 10 May 2012 Mr Glasspool requested some information from the London Borough of Southwark (Southwark). He asked for "a copy of the financial viability assessment submitted with the planning application which was made on 28 March 2012 – reference number 12/AP/1092". This planning application had been made by Lend Lease (Elephant and Castle) Limited (Lend Lease) and concerned the redevelopment of the Heygate Estate.

2. Southwark did not in fact receive the viability assessment until a few days later but nothing turns on this. The request was refused on 8 June 2012 and again, on review, on 16 August 2012. Mr Glasspool complained to the Information Commissioner (ICO).

3. In April and May 2013 much of the main body of the viability assessment was disclosed to Mr Glasspool but there remained significant redactions. On 16 July 2013 the ICO issued a decision in Mr Glasspool's favour which required Southwark to disclose the rest of the viability assessment to him, excluding any personal data.

4. Southwark have appealed to the Tribunal and we heard this case over a period of six days in February 2014. Southwark were represented by Mr Welfare; the ICO by Mr Facenna; Lend Lease by Mr Pitt-Payne QC and Mr Hopkins; and Mr Glasspool by Ms Stevenson. We express our thanks to all Counsel and to those instructing them for their careful, learned and focussed submissions.

5. We apologise for the delay that has occurred in issuing this decision. This has been due to unforeseeable personal circumstances.

6. We received the remainder of the disputed information in evidence on the basis that it was not disclosed to Mr Glasspool. To do so would have been to defeat the purpose of the proceedings. Our decision takes into account the information which we have seen.

7. At the request of Mr Facenna we also received in evidence, on the same basis, a report from the District Valuer Service which evaluated the viability assessment on Southwark's behalf. We were satisfied that the report discussed the disputed information in such detail that disclosure of it to Mr Glasspool would also defeat the object of the proceedings. In the end, although the report gave us an insight into the rigour of the assessment carried out by the District Valuer Service, it did not influence our conclusions.

8. The receipt of the closed material also involved some evidence in respect of that material being given in closed session. At the end of the closed session we gave those excluded from the hearing a gist of what had been said in respect of the closed material, together with an account of other incidental statements which could have been made in open session.

9. The information given to those excluded was agreed in advance by all Counsel who had attended the closed session.

B. Background – The Elephant and Castle

10. For many years, it has been evident even to a casual visitor that the Elephant and Castle area has been in need of regeneration. The Heygate Estate covers a substantial part of it. Heygate originally provided about 1,100 council homes. It included blocks of twelve storey flats linked by concrete bridges and was completed in 1974. By 1998 it was in need of complete refurbishment. There were a number of defects inherent in its design and construction. Demolition appeared even then an attractive option.

11. The casual visitor can pass on but the Elephant and Castle remains a source of concern and anxiety for Southwark. Years of hard work by council officials came to nothing when a regeneration scheme collapsed in 2002. Southwark rightly sees a successful regeneration scheme for the Elephant and Castle as essential.

12. Local residents are so much more affected. Officialdom may see the 1974 Heygate development as an historic error; the 2002 scheme as a mishap. For the people who live there, it is the place in which their families have grown up and where they have made their lives and made their memories. They have a strong, natural concern about what will happen to the Elephant and Castle and the Heygate Estate.

C. Background – Affordable Housing

13. When the old Heygate Estate was built public money was available to finance developments of houses and flats to be rented out comparatively cheaply to residents by local councils and housing associations; but this is no longer so. Local authorities do still have policies to create "affordable housing". It is calculated that in London as a whole some 13,200 extra units of affordable housing are required each year. The old public rented housing stock is now referred to as "social rented". The rents are up to 40% of market rates. Another category known as "intermediate" means in practice, in Southwark, shared ownership schemes. In

2011 a third category "affordable rented" was introduced. "Affordable" rents were still below market rates but could be up to twice what would be the social rent for an equivalent home.

14. Southwark's answer to the disappearance of public subsidy for the building of affordable homes is to require developers to make provision in their plans for homes to be sold on to "social housing providers" at a price low enough for them to be let out at cheaper rents. About five years ago Southwark set a target that 35% of new housing in the borough should be "affordable". Of this, half should be at a social rent and the other half should be shared ownership. When the extended concept of "affordable rents" was introduced in 2011 Southwark was unable to wholeheartedly adopt the new approach. This was because studies showed that attaching the label "affordable" to rents set at 80% market value did not mean that Southwark residents could in fact afford them. Since then, Southwark have taken a pragmatic approach. "Affordable rents" are defined as those between 40% and 80% of market value. If social rented housing cannot be achieved, Southwark tries to encourage homes at the lower end of the scale of affordable rents.

D. Background – Planning

15. In accordance with its policy on affordable housing, Southwark insists that any request for planning permission for even a medium sized residential development must either meet the 35% target or submit an "open book" appraisal assessing the financial viability of the proposed development. This is what is known as a "viability assessment."

16. We are grateful to Dr Colenutt, a Senior Lecturer in Urban Studies who gave evidence before us, for a definition of "viability" which he takes from a report commissioned by the government from Sir John Harman:-

> "An individual development can be said to be viable if, after taking account of all costs, including central and local government policy and regulatory costs and the cost and availability of development finance, the scheme provides a competitive return to the developer to ensure that development takes place and generates a land value

> sufficient to persuade the land owner to sell the land for the development proposed. If these conditions are not met, a scheme will not be delivered."

So the assessment is not whether a scheme will break even; it includes within it a profit for the developer, often put at about twenty per cent.

17. Southwark's practice is to commission the District Valuer Service (DVS), which is the commercial arm of the Valuation Office Agency, to analyse the viability assessment, check the data and challenge the assumptions. The agency enters into commercially confidential negotiations with the developer before supplying a report to Southwark.

18. It is convenient to interpose here DVS' terms of business under the heading "commercial confidentiality and freedom of information":-

> "We will do all that we can to keep any information gathered or produced during this assignment confidential. The Freedom of Information Act 2000 or Environmental Information Regulations 2004, and subordinate legislation, may apply to some or all of the information exchanged between yourself and the Valuation Office Agency under this engagement. Therefore the Valuation Office Agency's duty to comply with the Freedom of Information Act may necessitate, upon request, the disclosure of information provided by you unless an exemption applies."

The policy goes on to explain that discussions will take place if this issue arises but makes plain that DVS must comply with its statutory obligations.

19. All this has made a big difference, on which different people have different views, to the planning process. Dr Colenutt laments the prominence now given to perhaps temporary economic conditions when traditionally planning decisions have taken a long term view. We heard from Councillor Morris, a member of Southwark's planning committee, who was concerned that members of the committee received only a summary of the viability assessment and of the agency's opinion. Her impressions were that her concerns were shared by other councillors in other authorities. Different authorities will of course have different procedures and we

understand that Southwark does now make more information available, under controlled conditions, to local councillors.

20. By contrast, in the eyes of Mr Bevan, (Southwark's Director of Planning) the present system achieves the best possible package of additional social benefits from commercial developments at a time when local authorities' own resources are diminishing. We heard also from Mr Murray who is an Assistant Director – Planning with the Greater London Authority. For him, planners were now professionals negotiating on behalf of the public interest. In his view there had been great progress over the last ten years demanding more from developers by way of financial contribution, not just to affordable housing, but also to transport investment and new school places.

E. The Heygate Development

21. After the collapse of the first Elephant and Castle project in 2002, it was back to the drawing board. A new procurement exercise began in 2005 and in 2007 Lend Lease were nominated as preferred development partners. The plan for the Elephant and Castle, as it is now, proposes 4,000 new homes and 5,000 new jobs to be delivered over the next twenty years. Southwark began to operate various schemes for Heygate residents to move away voluntarily and the estate gradually emptied.

22. In July 2010 Southwark and Lend Lease signed a regeneration agreement, two features of which we should perhaps mention here. First, in the event of the development proving more lucrative to Lend Lease than expected, it included a formula for sharing some of the profits with Southwark. Second, each party undertook with the other to keep secret and confidential any discussions or negotiations with regard to the agreement. This provision, however, expressly did not prevent any disclosure necessary to comply with the Freedom of Information Act (FOIA) or the Environmental Information Regulations (EIR). At this stage, the hope was for at least 25% social housing and the maintenance of the 50/50 split between social rent and shared ownership. From late 2010 there were about 70

public consultation events. In April 2012 Lend Lease submitted an outline planning permission application in respect of the major part of the Heygate Estate. The viability assessment was sent the following month. The covering letter states:-

> "This viability assessment is submitted on a private and confidential basis as it contains information that is commercially sensitive. It does not form part of the formal planning application".

That assertion may be a technically correct but practically speaking the application would never have got off the ground if no viability assessment had been supplied.

23. The viability assessment has a number of appendices, most of which comprise the evidence held to support the assertions in the main text. The final one of these, Appendix 22, is different. It is a financial model developed by Lend Lease Corporation for use as an analytical tool on large projects. The model allows for different scenarios to be run and tested. It is a "live" piece of work which will alter with time as assumptions change. We need not go into detail here but for the sake of completeness we record that we accept the account of Appendix 22 given in paragraphs 9-29 of the statement of Mr Walsh who is Lend Lease's commercial director. The purpose of including Appendix 22 was to enable DVS, after observing certain confidentiality protocols, to interrogate the model as part of their scrutiny of the viability assessment.

24. It is common ground that in weighing the public interest in disclosure of the information we should consider the circumstances as they were in summer 2012 but we should add a little more about what followed.

25. There were multiple updates to the viability assessment as the negotiations between DVS and Lend Lease continued. DVS produced a draft report in July and following more negotiations an amended outline planning permission application was submitted in September. The viability assessment was also scrutinised by consultants instructed by the Office of the Mayor, who has power to 'call in' such applications.

26. During this time too, more public consultation took place. Mr Glasspool and fellow campaigners in the Elephant Amenity Network felt frustrated in the course of these consultations because challenges to the amount of affordable housing or other social contributions under what is known as the "Section 106 agreement" were rebuffed by reference to the viability assessment, a document to which they did not have access.

27. On 15 January 2013 Southwark's planning committee, accepting a recommendation from officers, gave approval to the demolition of the Heygate Estate and to the outline planning permission application from Lend Lease. Affordable housing made up 25% of the approved scheme, not 35%. Opponents pointed to the comparatively small proportion of social rented homes now included within the development. Proponents argued that 25% "affordable housing" was itself a real challenge.

F. Freedom of Information Act (FOIA) or Environmental Information Regulations (EIR)?

28. Although Southwark originally dealt with Mr Glasspool's request under EIR, they now combine with Lend Lease to submit that the correct legal regime is FOIA. Mr Glasspool and the ICO maintain that Southwark's original stand was correct.

29. We are inclined to agree with Mr Pitt-Payne QC that there may be a tendency to overuse EIR; almost an assumption that, for example, anything to do with land or anything to do with the planning process in England and Wales is outside the scope of FOIA.

30. The answer to this tendency, it seems to us, is not the development of the vague notion of "remoteness". Rather it lies in a purposive application to the facts of a case of the definition of "environmental information" in Reg 2(1) EIR. It may be for example that the phrase "the state of the elements of the environment" is not always given sufficient weight.

31. So far as relevant to this case, "environmental information" means:-

> "… … any information in written, visual, aural, electronic or any other material form on –
>
> (a) the state of the elements of the environment such as air and atmosphere, water, soil, land, landscape and natural sites, including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms and the interaction among these elements;
>
> (b) … …;
>
> (c) measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
>
> (d) … …;
>
> (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
>
> (f) … … ."

32. Southwark's programme for the development in partnership with Lend Lease, of the Elephant and Castle, of which the Heygate Estate forms a large part, is enormous. As Mr Bevan explains, the project is unusual:-

> "Lend Lease will also fund and deliver the infrastructure and energy requirements of the development: it is essentially building an entire town centre at its own risk."

33. In our judgment the project is so large that it is likely to affect the state of the landscape as an element of the environment. The activity or programme, call it what you will, is therefore a measure which falls within subparagraph (c).

34. In our judgment it also cannot be doubted that the viability assessment including Appendix 22 is an economic analysis used within the framework of that measure and activity. By virtue of subparagraph (e) therefore, the information requested falls within EIR and not within FOIA.

G. Which Exceptions Apply?

35. The exceptions to the general right to environmental information are contained in Regulation 12. It is almost common ground that we must consider the exceptions in Regulation 12(5)(e) and (f). In the context of this case, the first of these focusses on the extent to which disclosure would adversely affect the confidentiality of commercial information which protects a legitimate economic interest. Again, in the context of this case, the second of these focusses on the extent to which disclosure would adversely affect the interests of Lend Lease and its consultants, as volunteer providers of the information. [Despite para 22 above, we do not accept Mr Glasspool's submission that the information was not voluntary. The point is that it was not legally required.]

36. Lend Lease and Southwark additionally argue that Regulation 12(5)(c) EIR applies. This deals with the extent to which disclosure would adversely affect intellectual property rights. We agree. In our judgment, in respect of Appendix 22, the ICO was wrong to exclude this issue. We have some difficulty in following the ICO decision notice on this topic. At paragraph 138 the ICO seems to suggest that a "simple" infringement, whatever that may be, of intellectual property rights is not sufficient to adversely affect those rights, a proposition which we do not accept. Similarly, we do not accept a requirement to prove monetary loss. On this, we accept paras 49-54 of Lend Lease's skeleton argument.

37. Southwark also ask us to consider Regulation 12(5)(d) on the ground that disclosure would adversely affect the confidentiality of Southwark's proceedings where such confidentiality is provided by law. In our judgment, this exception is not engaged because it seems to us that "proceedings" is not a concept wide enough to cover everything which a public authority's employees do. Rather, it seems to refer to the more formal proceedings, say, a closed session of the planning committee of the public authority. In our view, however, this issue is not material because this exception does nothing in this case to change the elements in the public interest balancing exercise or the weight which attaches to them.

38. These exceptions apply only if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. By Regulation 12(2) we must apply a presumption in favour of disclosure.

H. The Public Interest Balance – The Big Picture

39. We received detailed argument on the public interest balancing exercise which advocates described as the crux of this case. Many of the arguments overlapped. It seemed to us, having considered all the material, that three issues were dominant and were of such importance as to dwarf other considerations. These were:-

    (a) the project must not be allowed to fail or be put in jeopardy;

    (b) the importance of public participation in decision making;

    (c) the avoidance of harm to Lend Lease's commercial interests.

40. Before turning to these three issues it is convenient to deal briefly with some of the other arguments advanced to us.

I. Some Other Issues

41. We have described the confidential process of negotiation between Lend Lease, Southwark and their expert advisors in the period between the lodging of the planning application and the decision of the planning committee. The courts have recognised a strong public interest in the confidentiality of those negotiations. Disclosure of the viability assessment would be disclosure of the starting point of those negotiations. Would this mean that the negotiations could no longer be confidential? In practice would Southwark feel obliged to drip feed further disclosures in the course of the interrogation of the data contained in the viability assessment? Although troubled by this, we have concluded in the end that the decision which we have reached is consistent with Southwark, Lend Lease and the DVS maintaining confidentiality in their discussions. We are of course not asked to order disclosure of anything which formed part of those negotiations. We do not

accept that our decision, had it been implemented in summer 2012, would have required a rethink of the whole approach to them.

42. It was submitted to us that there is always a public interest in the maintenance of confidentiality and that the important relationship between Southwark and Lend Lease in this private/public partnership might be adversely affected by a breach of confidence. It seems to us that this approach gives insufficient recognition to the fact that the legislature has intervened in public authority relationships through FOIA and EIR. The legislature must be taken to intend that it is not always in the public interest for a public authority to choose to keep information confidential. There is no "breach of trust" when a public authority fulfils its statutory obligation under FOIA or EIR. Private sector partners and their consultants are aware of the legal limits. They recognise in contracts that in an individual case, depending on the circumstances, the public authority may have a duty to disclose.

43. This reasoning, in our judgment, affects the evidence given to us about the effect of disclosure on other developments in London. We doubt very much that private developers have entered into contracts on the basis that the circumstances are such that no obligation to disclose under FOIA or EIR can ever arise. They must know that it all depends upon the facts of the individual case. For this reason, we are doubtful of the claimed "knock on effects" of disclosure in this case. We had evidence that Lend Lease had changed the way it gave access to data as a result of the decision – but no evidence of any project having been put in jeopardy by the ICO's decision taken some six months ago.

44. Mr Pitt-Payne QC rightly drew our attention to the case of Veolia. We are bound by that decision of the Court of Appeal to say that Lend Lease's Convention rights under Article 1, Protocol 1, ECHR and possibly Article 8, ECHR are in issue. In principle, we doubt very much that a properly conducted balancing exercise under Regulation 12 EIR would result in a decision contrary to the Human Rights Act 1998. This is because the balancing exercise, especially as here in the case of a private/public partnership, includes giving proper consideration to the public interest in the maintenance of what might otherwise be seen as private rights. It is

of course important to pause and consider whether the decision reached is in breach of any Convention rights. In our view, the decision we have reached is not.

45. We should perhaps refer to some minor points on which we take a different view from the ICO decision notice. First, at paragraph 92, the ICO claims to have "factored out" of the balancing exercise consideration of Southwark's economic interests. We are unclear as to how this was achieved since those economic interests are intimately connected with the success of the project – and that success, the ICO conceded in argument, was an important factor to be weighed.

46. At paragraph 94 the ICO criticised Lend Lease's arguments on disclosure as being either generic in nature or too speculative and qualified by "could" or "may". That approach seems to us to be unfair. First, when considering the release of the large amount of information comprising this request, discussions must necessarily be generic if they are to be proportionate. Descent into detail, except perhaps for a few striking examples or particular problems, would present an insuperable task for all concerned. Second, the public interest balancing exercise cannot be confined to certainties; it often involves the assessment of risk. It invites the decision maker to speculate on what might happen if disclosure takes place.

47. Finally, we should mention three issues which were canvassed but which did not seem to us, in the end, to carry any weight. The first was the anticipated CPO enquiry and negotiations involving Mr Glasspool's home. These, it seems to us, would have been conducted according to well-known principles irrespective of disclosure under EIR. Second, in the circumstances of this particular case it did not seem to us that Southwark's ownership of the land in question carried any special weight. Third, it was submitted to us that there could be very little public interest in disclosure because the viability assessment was so difficult for a non-professional to understand. It is certainly true that parts of it may appear incomprehensible; but we accept that residents had access to informal advice from a group of people with specialist knowledge. The quality of the submissions made to the planning committee by some of the community groups is testimony to that.

J. Balancing the Public Interests

48. We accept the submissions made to us, by Southwark and by Lend Lease, about the importance of ensuring that the Elephant and Castle project, and the Heygate within it, is successful. We understood Mr Facenna, on behalf of the ICO, to concede this in his closing remarks. Although Mr Glasspool may wish to see a very different kind of development, we do not think he would dissent from the proposition that something must be done. There is now no alternative to the present project, already seven years in the preparation.

49. The importance of public participation was urged upon us by Mr Facenna and Ms Stevenson. Mr Facenna summarised his concerns under the headings:-

    (a) transparency;

    (b) decision making and participation;

    (c) local and national concern.

    These are powerful points. Nor are they inimical to the success of the project. On the contrary, as the first recital to Directive 2003/4, which the EIR are intended to implement, states:-

> "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".

50. Ms Stevenson rightly drew our attention to the controversy on affordable housing as a strong example of the importance of involving the public in decision making – although, of course, once it is accepted that the EIR apply, there is no obligation on a requester to assign a reason for the request.

51. Another essential aspect of the success of the project is a consideration of Lend Lease's commercial interests. As Counsel for Lend Lease pointed out, this is a public/private sector partnership. Once you use private sector profit making

organisations in order to help fund regeneration and to deliver infrastructure, social housing and other public goods, then inevitably considerations of commercial confidentiality and the need to avoid harm to commercial interests must be given full weight when assessing the public interests for and against disclosure.

52. In this connection, Counsel for Lend Lease stressed the advantage given to its competitors by disclosure of Appendix 22; the risk of delay as Lend Lease took stock of its position; the risk of a smaller profit or of a smaller Section 106 contribution as a result of the delay; the unfairness, contrary to the public interest, of other competitors obtaining Lend Lease's expertise and bought in information for free; and the general effect of disclosure on developers sharing information with public authorities in similar schemes.

53. It is convenient to conduct the balancing exercise in respect of all the exceptions taken together.

54. We have concluded that the public interest impacts differently on different parts of the requested information.

55. We take first the question of Lend Lease's development model referred to, but perhaps not confined to, Appendix 22. We accept that this is a trade secret, a commercial interest, incidentally, specifically identified in FOIA as potentially requiring protection. We also accept Mr Heaseman's evidence about the nature of the model and the pleasure and profit other developers might derive from its publication. In our judgment, the harm to Lend Lease's own interests, taken alone, outweighs, in the public interest balancing exercise, the benefits of disclosure. One might add that preventing disclosure of a trade secret might encourage other developers to maintain an open book approach to their local authority partners – although each case, as we have indicated, will always be considered on its merits.

56. We turn next to certain information contained in the viability assessment about sales and rentals. We are concerned here only with rights which will be the subject of commercial negotiation between Lend Lease and other businesses. Lend Lease's calculations in respect of these matters are commercially of great sensitivity. There

is a real risk that future commercial customers would use Lend Lease's projections to their advantage in negotiations. This would be damaging to Lend Lease's profit; and risk a knock on effect if not on the viability of the whole project, at least on the delivery of its social content. Again, weighing all the public interests in respect of this information, in our judgment, the public interest in maintaining the exceptions outweighs the public interest in disclosing the information.

57. This reasoning does not, in our judgment, apply to sales to private purchasers, who are much more likely to be influenced by the market rate at the time. Nor, in our judgment, does it apply to property destined for a social housing provider. It is true that a certain element of commercial negotiation is likely to be involved in such a transaction. On the other hand, there is a countervailing public interest in ensuring that social housing providers obtain a reasonable deal – and in actuality, Southwark, who are privy to the calculations, would almost certainly ensure that their partners, Lend Lease, did not take advantage of social housing providers.

58. The other information in the viability assessment seems to us to be less commercially sensitive; and the arguments against disclosure have much less force in respect of them, once we have safeguarded the operating model and the projections on commercial negotiations. When it comes to the rest of the information, in our judgment the balance is different and the importance, in this particular project, of local people having access to information to allow them to participate in the planning process outweighs the public interest in maintaining the remaining rights of Lend Lease and those subcontractors who contributed to the document. Again, we take into account that all of them were conscious that their work was always potentially subject to a freedom of information regime.

K. What Happens Next?

59. The next task is to divide up the information contained in the viability assessment according to whether or not we have decided that it should be disclosed. We hope we have given sufficiently a clear indication of the dividing line – although it is always possible that there will be grey areas.

60. Here we need the cooperation of all the parties under Rule 2 GRC Procedural Rules.

61. We propose that within 28 days Lend Lease and Southwark should reach joint agreement on the material which should be disclosed in accordance with our decision.

62. That agreement should then be sent to the ICO. If the three parties can then reach agreement we see no reason why disclosure should not then take place. To preserve Mr Glasspool's rights, we give permission for him to apply to the Tribunal in the event of a dispute, but we would expect him to advance serious reasons why the proposal adopted by the other three parties does not accord with our decision.

63. If the ICO is unable to reach agreement with Lend Lease and Southwark then we will reconvene to settle the argument.

NJ Warren
Chamber President
Dated 9 May 2014