

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

Decision notice

Date: 02 September 2013

Public Authority: London Borough of Lambeth
Address: Lambeth Town Hall
Brixton Hill
SW2 1RW

Decision (including any steps ordered)

1. The complainant requested information about the Myatts Field North Estate PFI contract from the London Borough of Lambeth ("the council"). The council supplied some information but withheld some using the exemptions under section 40(2) and 43(2) of the Freedom of Information Act 2000 ("the FOIA"). The Commissioner asked the council to reconsider the request under the terms of the Environmental Information Regulations 2004 ("the EIR") and the council then cited the exception under regulation 13(1), relating to third party personal data and the exception under regulation 12(5)(e), relating to the confidentiality of commercial information.
2. The Commissioner's decision is that the council was correctly to apply Regulation 12(5)(e). He has also decided that the council was correct to apply Regulation 13 to personal information held within the contract.
3. The Commissioner does not require the authority to take any steps

Request and response

4. The complainant requested information from the London Borough of Lambeth ("the council") in the following terms:

"I am writing to make a request for all the information to which I am entitled under the Freedom of Information Act 2000 about the Myatts Field North Estate PFI contract signed around May 4th".

5. The council responded on 30 May 2012 and said that it had attached a copy of the agreement referred to. The council said that it had redacted some information relating to payment rates and other commercial clauses because it considers that this information is exempt under section 43(2) of the Freedom of Information Act 2000 ("the FOIA"), the exemption relating to prejudice to commercial interests. The council also indicated that it had redacted information regarding properties using the exemption under section 40(2) of the FOIA, relating to third party personal data.
6. The complainant requested an internal review on 15 June 2012 and challenged the application of the exemptions cited. She also referred to particular information that she considered should have been provided as follows:
 - "a. All of the documents listed in Schedule 2 'the contractor's proposals'*
 - b. All of the documents listed in Schedule 12 'Authorities Policies' or website links to where these documents can be found where relevant*
 - c. All of the documents listed in Schedule 14 'Project Documents'*
 - d. The list of dwellings referred to in Schedule 30*
 - e. The Tenancy Agreement form referred to in Schedule 31*
 - f. The Leasehold lease referred to in Schedule 32"*
7. The council sent a further response with specific reference to the documentation referred to above. It supplied the majority of this information however it said that it had redacted the documents from Schedule 14 using section 43(2). The council said that the information relates to pricing mechanisms.
8. The council completed its internal review on 6 July 2012. The council said that it wished to maintain its position that the information had been correctly withheld.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way her request for information had been handled. She asked the Commissioner to consider whether the council had correctly withheld the information using the exemptions under section 40(2) and 43(2) of the FOIA.

Reasons for decision

Is the information environmental?

10. The council initially considered the request under the FOIA. However, the Commissioner considers that the council should have dealt with the request under the terms of the EIR. Regulation 2(1)(c) of the EIR states that any information relating to activity that either will affect or is likely to affect the elements and factors of the environment listed will be "environmental information". One of the relevant elements is land. The withheld information relates to plans to redevelop the Myatts Field North Estate ("the estate") in London. The development intends to provide the following:

- build 305 new homes to replace properties that are currently in a very bad condition
- modernise and refurbish 172 existing homes
- provide 146 new affordable homes
- build 357 new homes for sale, 10% of which are full wheelchair access
- create new streets, green spaces and play areas
- provide a new landscaped park with a games area
- build a new community centre
- build a new energy plant to provide more reliable and efficient heating and hot water and substantially reduce the carbon footprint of the homes
- refurbish commercial units and create a new local store
- manage and maintain all the council houses and open spaces for 25 years

This above will clearly affect the land and therefore the information should be considered under the EIR.

Regulation 12(5)(e)

11. This exception concerns the confidentiality of commercial or industrial information where such confidentiality is provided by law. When assessing whether this exception 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?

Is the information commercial or industrial in nature?

12. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity. The essence of commerce is trade and a commercial activity will generally involve the sale or purchase of goods or services for profit. The withheld information relates to a commercial PFI (Private Finance Initiative) arrangement to carry out the redevelopment of the estate in question. The withheld information forms part of a number of agreements between the council and its private commercial partners in the project, the Regenter Myatts Field North Consortium, which comprises Regenter (a joint venture between John Laing and Pinnacle Regeneration Group), Higgins Construction, Rydon Maintenance, Pinnacle PSG and E.ON. The Commissioner accepts that the information is clearly commercial in nature.

Is the information subject to confidentiality provided by law?

13. The Commissioner considers that "provided by law" will include confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
14. The council presented an argument that confidentiality had been imposed via the contract itself. It explained that Clause 58.1.2 of the Project Agreement requires agreement provisions and project documents designated as commercial sensitive information in Part 1, Schedule 19 "to be kept confidential for the period specified in that Part". In addition, the parties agree to "keep confidential all Confidential Information received by one party from the other party relating to this Agreement and Project Documents or the Project". "Confidential Information" is defined in Clause 1.1 of the Project Agreement as:
 - (a) *"information that ought to be considered as confidential (however it is conveyed or on whatever media it is stored) and may include information whose disclosure would or would be likely to prejudice the commercial interests of any person, trade secrets, Intellectual Property Rights and knowhow of either part and all person data and sensitive personal data within the meaning of the Data Protection Act 1998; and*
 - (b) *Commercially Sensitive Information"*
15. The council said that each of the various agreements forming the PFI contract contain the same Schedule 19, which sets out what information amounts to "Confidential Information" in some detail. The council said that the list in Schedule 19 covers the majority of the

withheld information specifically however it stressed that the list is non-exhaustive since the clauses specify that any information which is commercial sensitive will also be deemed to be confidential information.

16. The council also presented an argument that even if there was no contractual obligation of confidence, that the information was covered by the common law of confidence in any event. When considering whether the common law of confidence applies, the Commissioner's approach is similar in some respects to the test under section 41 of the FOIA. The key issues the Commissioner will consider when looking at common law confidences under this heading are:
 - Does the information have the necessary quality of confidence? This involves confirming that the information is not trivial and is not in the public domain.
 - Was the information shared in circumstances importing an obligation of confidence? This can be explicit or implied.
17. The Commissioner's view is that a duty of confidence was imposed specifically, at least to some extent, via the contractual obligations in the various agreements forming part of the PFI contract. However the Commissioner was also satisfied that, in any event, a common law duty of confidence arose in the circumstances.
18. The Commissioner is not aware of any evidence to suggest that the withheld information is in the public domain, although the council has published much of the contract in an aid to provide relevant information to the community. He also does not consider that any of the information is trivial in nature. It is clearly important to the confider, who has objected to its disclosure. The Commissioner therefore concludes that the information has the necessary quality of confidence. The council said that the various agreements were negotiated and executed on the clear understanding that some information would remain confidential and, following consultation with the consortium, redacted versions of the documents were made available to the public on the council's website. Furthermore, the council said that the withheld information is not of the sort that it would typically disclose therefore an implicit duty of confidence would have arisen even in the event that no explicit reassurances were given.

Is the confidentiality required to protect a legitimate economic interest?

19. The Commissioner considers that to satisfy this element of the test disclosure would have to adversely affect a legitimate economic interest of the person (or persons) the confidentiality is designed to

protect. In the Commissioner's view, it is not enough that harm *might* be caused by disclosure. The Commissioner considers that it is necessary to establish on the balance of probabilities that harm *would* be caused by the disclosure. In accordance with various decisions heard before the Information Tribunal, the Commissioner interprets "would" to mean "more probable than not". In support of this approach, the Commissioner notes that the implementation guide for the Aarhus Convention (on which the European Directive on access to environmental information and ultimately the EIR were based) gives the following guidance on legitimate economic interests:

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

20. The council argued that the commercial interests of the consortium would be adversely affected by the disclosure of the withheld information. In line with the decision by the Information Tribunal in the case of Derry City Council v the Information Commissioner (EA/2006/0014), the council was able to present direct evidence from the consortium that the arguments it had presented to the Commissioner represented the genuine concerns of the consortium itself and were not mere speculation on their behalf. This exception will not be engaged in circumstances where public authorities speculate on behalf of third parties. The Commissioner received as evidence a letter dated 11 March 2013 from the Director of Regenter Field North Limited stating the following on behalf of itself and the other consortium members:

"The Consortium agrees that the reasons put forward by the Council also reflect its own views, and that where grounds for non-disclosure relate to the Consortium's commercially sensitive information and/or interests, those grounds fully reflect the Consortium's position".

21. The council's various arguments were presented to the Commissioner in the form of a written letter outlining general and more specific concerns, as well as a schedule of redactions referring more particularly to the withheld information in question.
22. It is important to recognise that the complainant requested the information shortly after the final agreement was signed in May 2012. Some areas of the contract therefore address matters which have yet to be finalised. For instance budgeted figures for maintenance refer only to the ideal price for issues such as ongoing maintenance of buildings or renovations on existing buildings. Land prices may not yet

have been settled etc. The council argues that a disclosure of such information would affect the parties' ability to negotiate with subcontractors on a level playing field. Subcontractors would be aware of the budgets set aside for these activities and would therefore naturally bid at figures close to these maximums rather than significantly below them.

23. In addition to general arguments the council presented more specific arguments about certain "categories" of information. Not all of these are included within this decision notice as the relevant sections are numerous and provide detailed arguments but the Commissioner has considered these within the context of his overall decision.
24. One of the categories was "profit on cost and internal rate of return, developer's return, target return and benchmark figures" **(1)**. The council said that the withheld information reveals details of the formula and figures relating to the amount of profit which the consortium believes it can obtain. The council said disclosure would reveal the efficiency with which the consortium believes it can operate and would provide an insight into overheads, margins and funding costs. The council argued that this information could be exploited by competitors to outbid the consortium and the council in relation to land purchases and undercut them when negotiating and bidding for other opportunities that may arise. Further reference was also made to the prejudicial impact of disclosing funding arrangements in Schedule 12 of the Initial Financing Agreements. The council argued that disclosure would allow competitors to replicate the approach taken or it would reveal weaknesses that could be exploited.
25. Another category was described as "valuations and prices" **(2)**. The council said that the information in Schedule 39 shows the valuation assumptions and therefore the likely sale price per type of dwelling. The council said a number of adverse effects could arise from the disclosure of this information. It said that the information could be used by others selling comparable properties who could undercut the consortium to make their properties more attractive. The council also said that this information, combined with others property details, indicates a value per square feet or metre and would assist those negotiating land process or compensation under compulsory purchase orders to increase the amounts payable to them for their land and properties. The council also said the information would be revealing of the approach to pricing and the proposed sales strategy which would assist the consortium's competitors.
26. The third category was "Purchase prices, sales prices, rental amounts and related details, discount and yield information" **(3)**. The council said that no contracts were in place for property sales or payment of

- ground rent. The council said disclosure of this information would prejudice the commercial bargaining position of the consortium because it would disclose information that potential property buyers or tenants or land sellers could use to leverage the best possible deal. The council also said the consortium's competitors could use the information to undercut the consortium by making competing properties subject to lower ground rents, thereby making them more attractive to buyers. The council also said the information includes information about timings connected to cash-flow which would reveal the consortium's "pressure points" to its competitors who could use that information to gain a commercial advantage over the consortium.
27. The fourth category was "Fees, costs and budget information" **(4)**. The council argued that the figures stated for maintenance, management and repair costs give bidders for the work an unfair advantage in negotiations. The council said bidders could ensure their bids match or are just under budgeted amounts, prejudicing the consortium's ability to obtain the best price. The council said that disclosure would drive up the prices offered in relation to professional fees, marketing activities, lettings and disposals in the same way. The council also argued that the details provide an insight into how the consortium structures its operations to make them profitable, which competitors could exploit to gain commercial advantages.
28. The fifth category was headed "Other (and other financial) information" **(5)**. The council said that the other detailed figures in the agreements, for example, those in Schedule 40, reveal details of financial modelling and economic projections. The council again argued that this information could be exploited by the consortium's competitors in a similar way to the information described above. The council said that in relation to residential property details, information about timings such as details of the construction period and sales period could be used by bidders and suppliers, as well as potential buyers. The council said that knowledge of such details, such as when all the units have to be sold by, could be exploited by third parties to apply pressure and to negotiate lower prices as a result.
29. The council also provided further overviews of the rationale for withholding particular items of information listed in the "Schedule of redactions" provided to the Commissioner. It referred to information which relates to insurance cover **(6)**. The council said that the information reveals the level of insurance cover obtained, or to be obtained, by the parties and the insured risks. The council said that the risks posed by disclosure of this information were multiple. This information could damage the council's or the consortium's commercial relationships with others if they have refused to take on a similar level of risk or liability elsewhere. The council also argued that it would

make it more difficult for the council to negotiate a lesser level of risk in the future if the details of the insurance for this project were revealed. Finally, the council said that the insurance policies have not yet been obtained and if insurers were aware that parties are contractually obliged to take out a certain level of cover, they may seek to charge a greater premium based upon this information. Elsewhere within the correspondence, the council also referred to the commercial prejudice arising from revealing how the consortium had chosen to manage this aspect of the project. It argued that competitors could copy the approach or that financial weaknesses may be revealed and exploited. Finally, the council said potential claims may increase as a result of the disclosure.

30. The council also referred to information in the Schedule of redactions **(7)**. The council said that this information had been withheld because it affects the council's or the consortium's ability to obtain competitive tenders or bids for services.

31. The council also made a series of comments relating to other specific types of information. For clarity however the Commissioner has not included references to particular items where the essential argument being made has already been captured above.

- Information referred to in Schedule 19 of the agreements ("confidential information" as follows: Definition of joint insurance account – The council said that this information relates to the bank details of the parties and would give rise to a risk of fraud if disclosed.
- Information in Schedule 41, part 3 of the Housing Agreement and Project Agreement – The council said that this information reveals the detailed analysis conducted relating to other properties and developments for the purposes of comparison. The council argued that premature disclosure would unfairly aid competitors, buyers, sellers and tenants because they could use the information to anticipate likely value and pricing.
- Information in Schedule 15 of the Project Agreement – The council said that this information sets out the short-term and long-term cost savings there will be in the properties are transferred from tenanted to freehold. The council said these figures had been expertly calculated and form part of the consortium's business model. The council argued that this information could be used by the competitors by, for example adopting a similar business model.

The withheld information and the Commissioner's view

32. Having considered the information and the arguments submitted by the council and its partners the Commissioner is satisfied that should the information be disclosed then harm would occur to the legitimate interests of the parties. The requirement for Regulation 12(5)(e) is that an adverse effect would occur. There is no requirement to show that the harm would be significant in order to engage the exception. However questions about the depth, the severity and the frequency of the harm do play a part in determining whether the public interest lies in a disclosure of the information or not.
33. If the information which has been withheld under Regulation 12(5)(e) were to be disclosed the Commissioner is satisfied that a degree of harm would be caused to legitimate economic interests of the council or to its partners for the reasons provided by the council.
34. The Commissioner must therefore carry out a public interest test as required by Regulation 12. The test is whether the public interest in maintaining the exception outweighs the public interest in the information being disclosed. If it does not then the information should be disclosed in spite of the exception being engaged.

Public interest test

35. Regulations 12(1) and (2) of the EIR provide:

"(1) ... a public authority may refuse to disclose environmental information requested if-

(a) an exception to disclosure applies under paragraphs (4) or (5); and

(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

(2) A public authority shall apply a presumption in favour of disclosure."

36. The Commissioner has also borne in mind the Requirement of Regulation 12(2) that there should be a presumption towards the disclosure of the information.
37. As the Information Tribunal noted in *Bristol City Council v the Information Commissioner (EA/2010/0012)*, regardless of the fact that disclosure of the requester information would involve a breach of

confidence by the council, there is nevertheless a presumption that it should be disclosed to the requester and only withheld if, in all the circumstances at the time of the request, the public interest in maintaining its confidentiality outweighed the public interest in its disclosure.

38. The Commissioner is satisfied that the vast majority of the information has been provided to the complainant in response to her request. It is clear that where redactions have been made the council has taken care to clarify that it, and its partners do consider that damage would be caused by a disclosure of the information. It has not therefore applied the exemptions in a blanket fashion, but has specifically analysed the agreement and exempted only information where it considers that it would be commercially damaging to disclose. The arguments it has provided to the Commissioner are significant in volume and in substance and are specific to the redactions made.

The public interest in maintaining the exception

39. The Commissioner notes this is not a case where green space or the natural environment is being destroyed to create additional housing to any great extent. The area in question is already developed. The consortium's plan is to redevelop an area which will inevitably need to be redeveloped at some point as buildings age and the community requires greater number of properties and new and additional infrastructure. The Commissioner has been unable to find any particularly negative comments regarding the plan to redevelop the area and therefore assumes that for the most part the surrounding community is relatively content with the idea of redevelopment. The council also states that it has carried out surveys which strongly suggest that that is the case. Obviously however the redevelopment will have a negative impact on some individuals or business due to the disruption and the potential use of compulsory purchase orders to acquire vacant possession of properties if residents refuse to move.
40. The Commissioner notes however that the community might feel that it has not been provided with enough information to decide whether it is satisfied with the council's actions in respect of the redevelopment. It does not know how much the project will cost the taxpayer, or if the council may take profit from the scheme. It does not know how the intended redevelopment might affect the landscape, or the community itself by the changes planned in the redevelopment. As an area of the borough which has in the past seen significant problems as regards crime rates and gang related issues it does not know how or whether the redevelopment will address this, and cannot properly consider this yet as full information on the redevelopment, such as potential house

prices or valuation details of social or affordable houses, etc have not been disclosed and these may tie in to the solutions to these problems. It will have some idea of this however from the descriptions and parts of the contract already disclosed, and the majority of the environmental issues which are outlined will be highlighted in the planning applications rather than in the financial information redacted from this document.

41. The majority of the contract has been disclosed, and the community will have a reasonably good idea of the contractual agreement between the parties if not the specifics of financial agreement between the parties. This in itself may leave some people concerned that the council might have put its own costs and profits over the needs of the community however.
42. The council made the general point that the withheld information relates to the consortium's business plans and operations concerning this particular development, and how they can maximise acceptable profit levels over time. This information is closely tied in with the overall financial viability of the development. The council said that for the redevelopment to progress and succeed, the consortium would need to carry out the necessary construction and other services, purchase professional services, maintain the development for a period of 25 years and sell the resultant properties and interests at a price such that it will be able to generate the necessary funds to pay for the affordable housing required, pay its costs, debts and maintain its cash-flow while ensuring that it makes enough overall profit to make the investment worthwhile. The council said that the consortium had invested considerable money and time in the project and given the need to manage the project carefully, withholding commercially sensitive information was imperative to protecting the long-term success of the project. The council suggested that disclosure would cause delay to the project, increased costs, and in the worst case scenario, may result in its complete cancellation. If the development were to be cancelled then the area would not be developed within the timescales envisaged and it may take years, and significantly more tax payer's money to bring about redevelopment which the council considers should have occurred in the 1990's.
43. The council also argued that its own commercial interests would in turn be adversely affected if the withheld information was disclosed. The arguments presented focused on the need to manage the success of a long term investment project. The council said that if the success of the project was undermined by the disclosure, this would result in a waste of tax payer's money. It clarified that it has a financial interest in the profitability of the redevelopment because under the terms of the PFI contract, the council will receive a share of any profits from the

redevelopment. The council also expressed concerns about damage being caused to its relationship with the consortium as a result of the non-consensual disclosure of information. The council raised the prospect that the consortium could pursue legal action against it or terminate the project. It also said that it would have a "chilling effect" on the consortium's willingness to share commercial information with the council in the future. The council therefore considered that disclosure would prejudice the authority's prospects of forging successful commercial partnerships in the future as a result.

44. The majority of the redacted information is financial information rather than descriptions or plans of the actual affects which will occur on the landscape and the community. It describes the financial agreements backing the redevelopment rather than the redevelopment itself.
45. The strongest public interest argument in support of maintaining the exception in this case is that a disclosure of this information may, in the end, result in taxpayers paying more for subsequent deals and for the contract overall. Land and property owners, third party contractors and competitors may all use the information in order to boost their own profits from subsequent deals with the consortium through using this information. The current level playing field would be disrupted with potential side-effects on the property market as a whole in the surrounding area. The council argues that this may even result in the overall viability of the development becoming questionable. This is clearly not in the public interest.

The public interest in the information being disclosed

46. The council has submitted that there is a general public interest in transparency, particularly in relation to planning matters.
47. Additionally the Commissioner has borne in mind the aspirations of the Aarhus Directive for greater public participation in decisions which will have an effect upon the environment. The redevelopment of the Myatts Field area will cause significant and widespread disruption to residents and those living nearby and cause significant changes to the landscape and the environment. In essence the contract has been agreed and actions to implement the contract have already begun however. The Commissioner is also aware that planning laws will allow the individual's to have input into the design and intended plans of the development. The public has the ability to make representation as regards the redevelopment, or parts of it directly within the planning laws. This is a separate question to the financial information which has been withheld in relation to this agreement. The Commissioner recognises however that a disclosure of this information would clearly

allow greater understanding of the overall project in order to inform their views.

48. The Commissioner further considers that the scale of the development which has attracted £150 million in government funding, is also a factor which increases the need for public scrutiny. The Commissioner considers that the council and its partners must have been aware that a large scheme, with the attendant repercussions for the local community would attract public interest and would be subject to enhanced levels of scrutiny.
49. Following the Tribunal decision in *EA/2010/0012*, the Commissioner's guidance sets out that he considers that the particular public interest in public participation in planning matters is likely to carry a significant amount of weight in favour of disclosure in such cases. In particular, the Commissioner notes that the Tribunal gave weight to the Directive (2003/4/EC) which gave rise to the EIR, and in particular to recital (1) which provides the underlying rationale for disclosure of environmental information:

"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. The National Planning Policy Framework (NPPF), which sets out the Government's vision for how local planning authorities should handle planning matters, states:

"The planning system can play an important role in facilitating social interaction and creating healthy, inclusive communities. Local planning authorities should create a shared vision with communities of the residential environment and facilities they wish to see. To support this local planning authorities should aim to involve all sections of the community in the development of Local Plans and in planning decisions...."

51. The Commissioner considers that disclosure of the information would enable the community affected by the development to understand and participate in the council's decision making and would assist the council in meeting one of the goals of the NPPF. He notes however that the actual environmental changes which are likely to occur are not defined within the withheld parts of the information. This relates more to the financial background to the deal rather than the planning and physical development of the land.

52. Nevertheless the Commissioner has not overlooked the issue of public money being used on the project. It is reported that the government has announced £150 Million in funding for the project to go ahead. There is a public interest in allowing scrutiny of the uses that that money is put to, whether the council has agreed a good value deal and whether in the long term the move will benefit the community as a whole. PFI contracts have in the past been criticised as providing bad value for money over the longer term and of hiding debts which the community is then obliged to pay over the longer term. The agreement in this case is set for a period of 25 Years. A disclosure of this information would allow interested parties to assess whether the agreement was in the benefit of the community and to determine what costs (if any) or benefits it may be liable to in the future.
53. The Commissioner notes that there has been very little information disclosed about the overall costs of profits to the public or the potential profits which the council may make from this contract. The public is therefore not aware of the costs or financial benefits of the project. A significant amount of disruption will be caused to current residents, including the council using compulsory purchase orders to obtain the legal ownership of some of the properties. There is therefore a strong argument that further details of the financial aspects of the scheme should be disclosed. Any individuals who lose their properties will then be able to better understand any financial benefits which the council may have factored into their decision to go ahead with this project. This will help to alleviate any potential mistrust as to whether the council agreed to this particular project in order to obtain the best financial deal it could for itself. The Commissioner must be clear however that he is not aware of any specific allegations or rumours to this effect for this project. The council argues that there is high community support for the redevelopment. It may also help the public to consider whether the financial plans have overridden the potential numbers of affordable housing which are planned and whether these have been maximised under the deal. The Commissioner does however recognise that in the current property market contractors may be more careful to ensure that the projects they are entering into will have sufficient profit margins to ensure that there is a significant 'buffer' should property and/or land prices fail to rise or drop further.
54. The Commissioner is satisfied that some of the arguments submitted by the council as to the harm which would occur are weak. For instance it argues that contractors would not wish to enter into commercial agreement with them in the future if commercially sensitive information from this contract is disclosed. The Commissioner considers that these types of agreements are likely to be highly lucrative for contractors and therefore this argument lacks strength. He

does not therefore consider that a disclosure of the information would dissuade contractors from entering into contracts with the council in the future.

55. Similarly the council has argued that contractors may fail to provide commercially sensitive information to such a degree in the future in order to protect their own interests. The Commissioner again does not place a great deal of weight on this argument. Public authorities must seek to obtain the best value for money from agreements. They will be under a duty to ensure that they have all of the necessary information to ensure that the deal is appropriate and that there are not hidden costs to the public purse. Recent criticisms of the PFI system by the government have highlighted this as an issue which public authorities need to be fully aware of when entering into such contracts and the council would therefore be under a duty to require all of the information it needed to ensure that the deal is financially appropriate before entering into such a contract.

Conclusions

56. The council has argued, and the Commissioner agrees harm would occur to the legitimate economic interests of the parties should the financial information which has been redacted be disclosed. The question facing the Commissioner is whether the public interest rests with the disclosure of the information in spite of the harm which would occur. This is partially a question surrounding the likelihood, frequency and severity of any harm which might occur balanced against the public interest factors in favour of disclosure such as damage which would occur to public trust, and to the community should the information remain exempt. Factored into this also is the likelihood of any delays or any potential for the commercial damage to unsettle the overall viability of the project should the information be disclosed.
57. The Commissioner is satisfied that the project is being carried out in a highly competitive market. Should the information be disclosed this could have an effect upon the overall costs of the project as competitors and subcontractors use the information to gain an advantage in negotiations with the council or its contractors. In terms of the public interest this would mean less profits or potentially greater financial input from the public purse into the project. Ultimately the council argues that a loss of potential profits could threaten the viability of the project overall. Clearly in an area which has significant need for redevelopment this would not be in the public interest. Public support for the development would also suggest that the need for redevelopment is high.

58. The financial details within the contract are detailed. A disclosure of all of these figures would give competitors a clear overview of the financial deals between the parties and of the budgets set aside for particular issues. It would allow competitors to the consortium to look at areas where the contractors are weakened, or times when their cash flow is at its weakest and seek to exploit or undermine these for their own benefit. This would potentially be at the expense of the public purse.
59. A disclosure of financial information of this sort could ultimately affect the level playing field in the area. Although this project is intended to run 25 years other similar projects are likely to occur in the near future which some of the participants to the consortium may wish to tender for. A disclosure of this information may affect tender bids made by competitors in this case. The Commissioner recognises that regeneration projects such as this and new build projects are likely to be a major factor in addressing the lack of housing which has been identified within the country. The government is actively seeking to increase or encourage projects of this nature to increase the number of houses available. Consequently competition and the opportunities for tenders on similar projects are likely to be frequent in the future and the commercial approach taken by the parties may play a significant benefit to the parties' competitors if they are disclosed. If a disclosure of this information aids competitors in identifying the competitive advantages which the parties have included within this contract it is likely that they would seek to undermine or outbid these parties and improve their own tenders.
60. Whilst the Commissioner recognises the strong arguments in favour of disclosure in order to help build public trust in developments of this sort and in PFI contracts in particular the Commissioner is satisfied that in this case the public interest rests in the maintenance of the exemption.
61. The Commissioner would stress however that there are strong reasons for providing tax payers with a clear overview of the financial commitments which the council is tying tax payers to for 25 years. For instance he would expect that further financial information will be disclosed as the commercial sensitivity of the information fades in order that the public can assure itself that the individual prices for particular jobs are appropriate and do not vastly exceed prices which would be charged at open market rates.

Regulation 13(1) – Third party personal data

62. This exception provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 ("the DPA").

Is the withheld information personal data?

63. Personal data is defined by the DPA as any information relating to a living and identifiable individual. In this case there are two different types of data which have been exempted by the council. The first is information relating to legal issues, and other matters relating to individual properties. The properties are identified by address, but not by the individuals living within them. The Commissioner considers however that it would be reasonably easy for individuals to be identified from the addresses, and the information would therefore disclose information relating to the property owner or leaseholders circumstances, their legal and financial affairs. The Commissioner considers that this information is therefore personal data.
64. The second type of information is data relating to employees of the contractor. The information provides details of certain job roles. The individual employees are not identified, but their age, gender and date of birth, their grade, job role and time in the role is. The Commissioner is therefore satisfied that these individuals would also be identifiable from the information. This information is also therefore personal data.

Would disclosure breach the Data Protection Principles?

65. The Data Protection Principles are set out in Schedule 1 of the DPA. The relevant principle in this case is the first data protection principle. This requires, amongst other things, that the processing of personal data is 'fair and lawful', and that a condition of schedule 2 is met. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner will consider the reasonable expectations of the individual and the potential consequences of the disclosure.

Property owners

66. The information relating to house occupiers is effectively information relating to their home and family circumstances. It is information on how the redevelopment has affected their financial or legal circumstances, and potentially on their future housing requirements.
67. The Commissioner considers that the individuals would have no expectations that their information would be disclosed to the whole world in response to an FOI request. Responses to FOI requests are

considered to be global in nature. It is possible they are not even aware that their details are held by the council as part of the contract.

68. The Commissioner therefore considers that on the face of it a disclosure of this information would therefore be unfair. He must therefore consider whether the legitimate interests of the public would overwrite the expectations of the individuals. The Tribunal has spoken in the past about a 'pressing social need' for that information to be disclosed.
69. The Commissioner understands why the residents association which the complainant is part of would have some need for that information. Through this it would have further knowledge of the properties which are likely to be affected. He does not however consider that there is a pressing need for the level of detail of information which is included, nor the specific nature of the information included within the contract to be disclosed. Nor would the public as a whole have a pressing social need for that information to be disclosed to them.
70. The Commissioner's decision is therefore that the council was correct to apply Regulation 13 to this information. From this point of view the information is more intrusive into the private lives of individuals whose information is only held as matter of coincidence – they live in properties which the consortium is seeking vacant possession of, and may not even be aware that information is held about them and their circumstances within the contract.

Details of the employees

71. As regards the details of the employees' information the Commissioner recognises that there should be a greater expectation that information on their role, such as their salary and job role should be disclosed as they are effectively dealing with the public in a role as part of a public authority role, (even if they are employed by private companies who have contracted with the council to carry out the role). However the information held within the contract are not details of their roles or salary specifically.
72. The information is personal details regarding the individuals themselves rather than information on the role which they hold. It includes dates of birth and time spent in that role and employment start dates. Although there may therefore be some expectation that some information may be disclosed about them when they are in their roles, there would be no expectation that all of this information would be. The Commissioner therefore considers that the individuals would not have any expectations that that information would be disclosed. The Commissioner also considers that there is no pressing need for the public to have access to that information.

73. The Commissioner therefore considers that it would not be fair to disclose this information for the purposes of the first principle. The council was therefore correct to apply Regulation 13 to this information.

Right of appeal

74. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

75. 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.
76. 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

Andrew White
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