

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

Date: 29 April 2015

Public Authority: London Borough of Tower Hamlets

Address: Town Hall
Mulberry Place
5 Clove Crescent
London
E14 2BG

Decision (including any steps ordered)

1. The complainant has requested the council to disclose a certified copy of the full original Development Agreement dated 19 April 2011 and the related Deed of Variation dated 10 December 2013 in relation to the Blackwall Reach proposed regeneration. The council disclosed some information but refused to release other information citing regulation 12(5)(e) of the EIR.
2. It is the Commissioner's decision that regulation 12(5)(e) does not apply to the remaining withheld information.
3. The Commissioner therefore requires the council to take the following steps to ensure compliance with the EIR:
 - The council should disclose all remaining withheld information to the complainant.
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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 29 May 2014, the complainant wrote to the council and requested information in the following terms:

"A certified copy of the full original Development Agreement dated 19 April 2011 and a full certified copy of the related Deed of Variation dated 10 December 2013 including all relevant Appendices and schedules together with any document which amends or purports to amend or purports to supersede this Development Agreement or Deed of Variation. Please note our request is for a certified copy of the relevant documents not for an electronic form of the document which purports to be a 'conformed copy' or similar electronic version of these documents."
6. The council responded on 27 June 2014. It stated that it was unable to respond within the 20 working day timeframe and required extra time to consider the request.
7. The complainant wrote to the council on 2 July 2014 to express their dissatisfaction with the continued delay.
8. The council responded on 16 July 2014. It disclosed some information but refused to release other information under regulation 12(5)(e) of the EIR.
9. The complainant requested an internal review on 23 July 2014.
10. The council carried out its internal review and notified the complainant of its findings on 19 August 2014. It confirmed that it was now willing to disclose further information but it still remained of the opinion that information was exempt from disclosure under regulation 12(5)(e) of the EIR.

Scope of the case

11. The complainant contacted the Commissioner on 19 September 2014 to complain about the way their request for information had been handled. Specifically, the complainant was dissatisfied with the heavily censored documents they had received and believed further recorded information could be disclosed under the EIR without damaging the commercial interests of the council or any other related party. The complainant also raised concerns about the continual delays they have suffered and the long protracted history of correspondence and previous requests with the council.

12. During the Commissioner's investigation further information was disclosed to the complainant. The remainder of this notice will therefore focus on the remaining withheld information and the council's application of regulation 12(5)(e) of the EIR and whether there has been any procedural breaches of this legislation.

Reasons for decision

13. Regulation 12(5)(e) of the EIR states 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.
14. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the council must demonstrate that:
 - the information is commercial or industrial in nature;
 - the information is subject to confidentiality provided by law;
 - the confidentiality provided is required to protect a legitimate economic interest; and
 - that the confidentiality would be adversely affected by disclosure.
15. This exception is also subject to the public interest test. In addition to demonstrating that this exception is engaged, the council must also explain how it considered the public interest for and against disclosure and how it reached the view that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exception.
16. The council argued that the requested information is a commercial agreement between the council, the Greater London Authority and its development partner to regenerate a substantial site within the borough. The council confirmed that the requested information is commercial in nature because it relates to the provision of services by the development partner.
17. The Commissioner has reviewed the requested information and he is satisfied that the requested information is commercial in nature. The requested information is a commercial contract between the council, the Greater London Authority and a selected developer and proposes to redevelop a substantial area in the borough. The contract outlines the

commercial activities of the parties involved and the agreed terms and conditions applicable to these parties following detailed commercial negotiations.

18. As the Commissioner is satisfied that the first bullet point of paragraph 14 above is met he will now go on to consider whether the requested information is subject to confidentiality provided by law.
19. The council referred the Commissioner to paragraph 31 of the Development Agreement. This states:

“Each party recognises that under this Agreement it may receive Confidential Information belonging to the other.”
20. The council also referred the Commissioner to the definition of “Confidential Information” in this agreement and stated that confidential information includes:

“all information relating to the Client or the existence or terms of this Agreement...”
21. The council confirmed that the explicit reference to confidentiality in the Development Agreement creates an expectation that some of the information associated with the development would not be disclosed. The council also argued that some of the information is covered by a common law duty of confidence in that it is not trivial in nature, has the necessary quality of confidence and was provided as part of the process whereby it was expected by all parties concerned that certain information would be held in confidence.
22. The council advised that it was aware confidentiality clauses cannot apply to entire contracts and that there is no breach of trust when a public authority fulfils its statutory obligation under the FOIA or EIR. With this in mind, the council has already disclosed a substantial amount of information to the complainant.
23. However, the council is of the opinion that the remaining withheld information is commercially sensitive and to disclose it under the EIR would give rise to an actionable breach of confidence.
24. The Commissioner considers “provided by law” includes confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
25. The Commissioner has considered the circumstances in which the requested information was created and the information imparted by the relevant parties. He accepts that the remaining information has the necessary quality of confidence due to the council’s concerns in relation to its commercial sensitivity and the damage that would be caused from

its disclosure. The information is not trivial in nature or otherwise publicly available and so the Commissioner is satisfied that the remaining withheld information is subject to a duty of confidence.

26. Turning now to the third and fourth bullet point, the council argued that disclosure of the remaining withheld information would adversely affect the legitimate economic interests of a number of parties. It explained that the remaining withheld information contains sensitive details about how the commercial deal is structured and how its disclosure would harm the legitimate economic interests of a number of third parties (in addition to itself, the Greater London Authority a housing association and two property developers). In relation to the housing association and property developers, the council explained that disclosure would release valuable commercial information about these third parties to their competitors putting them at a financial disadvantage. Disclosure would also damage the commercial bargaining position of these third parties in existing and future negotiations and would cause significant commercial reputational damage. The council argued that such consequences would then also result in a loss of revenue and income for these third parties.
27. The council also explained that it has a number of regeneration schemes at various different stages of completion, as does the Greater London Authority. Disclosure of the remaining withheld information would affect future agreements as these details would disclose information that would prejudice both the council and the Greater London Authority's ability to obtain best value from this and future development agreements and to attract future potential development partners.
28. The council explained that it considered the disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information. In turn this would harm the legitimate economic interests of those parties involved which the confidentiality clause in such agreements and the common law duty of confidence are designed to protect.
29. The Commissioner agrees with the council viewpoint here. The purpose of this exception is to protect the legitimate economic interests of parties to such commercial arrangements where the information in question is of a truly commercially sensitive nature. However, the Commissioner considers that in this case the council has failed to explain in sufficient detail exactly how disclosure of the remaining information would have the effects described.
30. The Commissioner has afforded the council ample time and opportunities to explain its position and stressed the importance of providing detailed arguments. The Commissioner asked the council to go through all remaining redactions and explain how the contents of each

redaction would have the effects described. The council responded and provided a table outlining the application of this exception per redaction but the arguments themselves failed to explain in any great detail how the specifics of the redaction would adversely affect the interests of the council or any external third parties. For example, details relating to specific timeframes in the agreement have been redacted, as has details of insurance liability. The council has stated that disclosure of this information would have the effects described above but has not explain in what way or how.

31. The council seemed to say that the remaining redactions are specific or pertinent to this development and non-standard terms but little else. The council failed to explain why such specific or unique terms would adversely affect the commercial interests of any of the parties involved whether in relation to this agreement or in future business.
32. It is not the role of the Commissioner to argue on a public authority's behalf. The onus is on the public authority concerned to explain clearly and in sufficient detail why information should be exempt from disclosure under the EIR or FOIA.
33. In this case insufficient submissions have been presented and so the Commissioner has no alternative but to conclude that the application of regulation 12(5)(e) fails at this point in its application. This is not to say that some or all the remaining information is not commercially sensitive. This decision is simply saying that the Commissioner has received insufficient evidence from the council to conclude that disclosure of the information would prejudice the economic interests of either the council or any third parties.
34. As the Commissioner has concluded that regulation 12(5)(e) of the EIR does not apply from the evidence supplied to him, there is no need for him to go on to consider the public interest test.

Procedural breaches

35. The Commissioner can find no procedural breaches of the EIR in this case. Although the council took over 20 working days to respond to the request, in accordance with its obligations under regulation 7 of the EIR, it notified the complainant within 20 working days of the receipt of the request that it required extra time to consider and respond to it. The council's refusal notice of 16 July 2014 was issued to the complainant within the maximum timeframe permitted under regulation 7 of the EIR, which is 40 working days.
36. The council carried out its internal review within 20 working days of its receipt and so there is no breach of regulation 11 of the EIR in this case.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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

Rachael Cragg
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