

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

**Date:** 5 July 2016

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

**Decision (including any steps ordered)**

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1. The complainant has requested the council to disclose the Financial Viability Assessments (FVA's) it received for the proposed redevelopment of Olive Morris House and a site referred to as the 'Triangle Site, as part of the council's 'Your New Town Hall' (YNTH) project.
2. The council disclosed some of the requested information but withheld other information citing regulations 12(5)(e) and 12(5)(f) of the EIR.
3. The Commissioner's decision is that the council has applied regulations 12(5)(e) and 12(5)(f) of the EIR appropriately in this case. However, the Commissioner has concluded that the public interest in favour of maintaining these exceptions is outweighed by the public interest in favour of disclosure.
4. The Commissioner therefore requires the council to take the following steps to ensure compliance with the legislation:
  - The council should disclose the remaining withheld information to the complainant.
5. 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

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6. On 23 April 2015, the complainant wrote to the council and requested information in the following terms:  
  
"Please provide the Viability Assessments submitted as part of the Muse Developments' planning applications for the 'Triangle Site' and for the 'Olive Morris House.'"
7. The council responded on 3 September 2015. It referred the complainant to another request made by a different applicant and its response to that. The council released some information but refused to disclose certain parts of the requested information citing regulations 12(5)(e) and 12(5)(f) of the EIR.
8. The complainant requested an internal review on 24 November 2015.
9. The council responded on 2 December 2015. It advised her that all avenues had been explored and exhausted and to refer the matter to the Commissioner.

## Scope of the case

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10. The complainant contacted the Commissioner on 8 December 2015 to complain about the way her request for information had been handled. Specifically, the complainant disagreed with the redactions made and stated that the project was council-led and the information should therefore be disclosed to the public.
11. During the Commissioner's investigation it was agreed with the complainant that the investigation would focus on regulations 12(5)(e) and 12(5)(f) of the EIR. No enquiries were therefore made into the application of regulation 13 of the EIR and no analysis of its application will be considered in this notice.
12. The Commissioner will first consider the application of regulation 12(5)(e) of the EIR to the remaining withheld information. He will only go on to consider regulation 12(5)(f) of the EIR if he finds that regulation 12(5)(e) of the EIR does not apply to some or all of it.

## Background

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13. The council has office accommodation in a number of buildings in and around the Brixton area. Those buildings vary in age and size and also

in suitability for the demands imposed by modern civic functions. The Council has either owned the freehold of, or has held a leasehold interest in, those existing buildings. Some of the council's functions have been located in Lambeth Town Hall, an early 20<sup>th</sup> century listed building of architectural merit and occupying a prominent location within Brixton. Other functions have been housed in a number of smaller office blocks in different parts of Brixton.

14. As part of its broader strategy, the council brought forward the 'Your New Town Hall' ("YNTH") project, in order to enable it to consolidate functions on to a smaller number of sites and to improve the nature and range of facilities for both residents and staff. Civic facilities would involve demolition and/or refurbishment of existing council office buildings, and the construction of a new civic centre building.
15. Details of the YNTH project can be viewed on line at <http://yournewtownhall.org>.
16. Public consultation on the broad scope of the YNTH project began in December 2012. In October 2013, three sets of proposals from different developers were made available to the public. The council appointed Muse as its development partner. In July 2014, pre-application consultation organised by Muse began, prior to submission of the planning applications on 16 and 17 April 2015. Two planning applications were necessary because of the physically discrete nature of the sites, along with an application for listed building consent in respect of the original Lambeth Town Hall building. One site is known as the Triangle Site (comprising the original Lambeth Town Hall building and various existing council office buildings in the vicinity of that building) and the other site is known as Olive Morris House (comprising an existing office building located some distance away from the original Lambeth Town Hall).
17. Planning permission was granted in October 2015. With regards to the residential development aspect of the scheme, Muse initially asserted that the scheme would be capable of generating only 16% affordable housing which would be well below the council's target level of provision. However, 78 affordable units were agreed with Muse and this was the number affordable units put forward in the planning applications that were submitted in April 2015. The council explained that the purpose of the FVA was to demonstrate the economics of the scheme on the basis of provision of 78 affordable housing units although the FVA states itself that it was felt a much lower percentage of 16% could have been justified.
18. At the time of the request (23 April 2015) the planning applications had only just been received (a week or so beforehand). No public

consultation had taken place and no decision reached as to whether to grant planning permission or not. As stated above, planning permission was not granted until some months after in October 2015.

## Reasons for decision

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19. 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.
20. For the Commissioner to agree that the withheld information is exempt from disclosure by virtue of regulation 12(5)(e) of the EIR, the 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.
21. 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.
22. The council confirmed that the withheld information is commercial in nature because it relates to the redevelopment of existing sites it either owns or holds a leasehold interest in, in conjunction with its private sector developer Muse. The project intends to provide new civic facilities on parts of the site to be retained by the council and new residential and commercial floorspace on parts of the site to be disposed of in due course to Muse.
23. The Commissioner is satisfied that the requested information is commercial in nature. It relates to a development agreement in place between the council and a private sector developer to provide new civic facilities for staff and the public and new residential and commercial floorspace for Muse.

24. As the Commissioner is satisfied that the first bullet point of paragraph 20 above is met, he will now go on to consider whether the requested information is subject to confidentiality provided by law.
25. The Commissioner considers "provided by law" includes confidentiality imposed on any person under the common law of confidence, contractual obligation, or statute.
26. The Commissioner has not been provided with any evidence that an explicit contractual clause relating to confidentiality existed between the council and Muse. He is however satisfied that due to the nature of the remaining withheld information it is covered by a common law duty of confidence. It is not trivial in nature, has the necessary quality of confidence and was provided in circumstances where it was expected that the contents would be treated as private and confidential.
27. Turning now to bullet points three and four, the council has argued that disclosure of the withheld information would adversely affect the legitimate economic interests of both the council and Muse.
28. In relation to the council's commercial interests, it explained that it did not own the freehold for the entire development site at the time of the request; only some of it. There was therefore a strong likelihood that commercial negotiations would need to take place at this time between the council and one or more third parties in order to assemble the site for development.
29. The council confirmed that the withheld information contains information relating to land values for the elements of the site it needed to acquire. If this information had been disclosed at the time of the request and therefore prior to these negotiations commencing, it would have revealed the values the council had placed on certain elements of the development site and hindered its ability to secure the most favourable terms. Disclosure at this time would have placed the council at a commercial disadvantage.
30. Concerning the commercial interests of Muse, the council confirmed that the disclosure of the remaining withheld information at the time of the request would adversely affect Muse's ability to deliver the project. At the time of the request the council had only just received the planning applications and the FVA (contains the remaining withheld information). The proposal had not been considered let alone determined and was still potentially subject to further discussion and negotiation with Muse.
31. The council argued that there is a need to ensure that the project is financially viable for Muse so it can then deliver the residential and commercial elements of the project and in turn the new civic facilities for

the council. The council advised that the remaining withheld information consists of sensitive financial information such as the development costs, construction costs, profit margins, how these have been calculated and broken down, commercial values for the commercial space to be provided, affordable housing values for rented units and shared ownership units and projected sales for these units and so on.

32. In relation to detailed costings and information that can be reversed-engineered to reveal such costings or elements of them, the council argued that disclosure of this information at the time of the request would hinder Muse's ability to tender for and enter into commercial arrangements with private companies and suppliers needed to physically deliver the project. It explained that it is likely that Muse will require one lead contractor to deliver the project which will then be liable for any overspend by sub-contractors that they may use. If Muse's costings - development costs, construction costs, profit margins and how these have been calculated and evaluated - were disclosed prior to the tender process this would enable prospective bidders to tailor their bid accordingly. This would stifle true and fair competition and hinder Muse's ability to secure the best terms it can and to deliver the project.
33. Concerning the social rent units, the council advised that purchasers will be registered providers/social landlords. If the information contained in the FVA relating to these units was released in advance it would enable registered providers to tailor any bid they wish to make accordingly. This would hinder Muse's ability to negotiate freely and fairly and obtain the best deal it can.
34. Regarding the commercial values for the commercial space to be provided, although the project was only at proposal stage at the time of the request, the council explained that Muse had already marketed the commercial space and was expecting some offers in the very near future. It explained that disclosure of this information at this time would adversely affect Muse's ability to negotiate freely and fairly and to secure the best deal it can.
35. The Commissioner is satisfied that regulation 12(5)(e) of the EIR does apply in this case.
36. In the recent First-tier Tribunal hearing of *Mr Jeremy Clyne v The Information Commissioner and London Borough of Lambeth 9EA/2016/0012* ("the Clyne decision") a very similar request was considered. In paragraphs 30 to 57 of this decision similar information is considered to the remaining withheld information in this case and whether disclosure would adversely affect the developer, as the council also alleged in this case.

37. Although the tribunal did not wholly accept that disclosure would have the effects described or at least to the extent claimed, overall, it concluded that the exception was engaged. Due to the similarities between this request and the request considered by the tribunal in the Clyne decision, the Commissioner has adopted the same position here.

38. At paragraph 61 of the Clyne decision the tribunal stated:

"We consider that the common law confidentiality protects a legitimate economic interest in the requested material, which reveals how the developer has priced the scheme. Disclosing the requested information to the public may conceivably attract attention which the developer may then have to invest time in dealing with, and may provide competitors or those involved in future negotiations with information that be of some interest and value to them albeit we consider that it would be highly unlikely to affect negotiation outcomes to the detriment of the developer. We are persuaded here by Mr Joyce who explained that developers tend to be very secretive about pricing schedules. We would accept where confidentiality protects a legitimate economic interest, disclosure causes an adverse effect for the developer because it would be by disclosing the confidential information, albeit, we consider the adverse effect to be limited extent. We accept the Council's arguments here that from a commercial perspective a risk of harm has an effect on financials or the way the business is run and as such is harm itself."

39. The Commissioner will now go on to consider the public interest test.

40. The council stated that it acknowledges there is a public interest in openness and transparency and providing as much information as possible to the public to assist it in understanding why it is felt this project is required. It understands that the project involves the redevelopment of civic facilities; facilities the public will use and therefore the public will have an interest in how this is carried out.

41. However, in this case, the council considers the public interest rests in maintaining the exception. It stated that there is a public interest in ensuring the council and Muse deliver this project effectively. It argued that there is also a public interest in ensuring that Muse is able to obtain the best deal it can when it comes to selling the private residential and commercial facilities and when it comes to putting out to tender the actual construction and delivery of the project, as this will have a knock-on effect on Muse being in a position to deliver the new civic facilities the council requires. It believes it is not in the public interest to hinder this process, as this could result in a poorer deal for Lambeth residents.

42. The council believes that due to the circumstances at the time of the request and the very fact that the project was only at proposal stage,

the public interest rests in maintaining the exception. It also described how it had approached this request and the disclosure of information and advised that it had conducted this process on a piecemeal basis to ensure as much information is released to the public. For some information, the council went against the developer's position and disclosed the information.

43. The Commissioner notes that the council has publicised this development as a development that will pay for itself through the redevelopment of office buildings that are increasingly expensive to run. It has stated that the project will enable the council to run fewer more efficient buildings which it estimates will save the council 4.5 million a year. New homes, new jobs and new spaces for businesses and the community will be created which will ultimately improve the services Lambeth residents get from the council.
44. The Commissioner considers there is much importance in openness and transparency, particularly in proposals such as this whereby it involves the initial expenditure of significant public funds, which it alleges will be clawed back year on year due to the overall savings it will make. The public has a right to know exactly how this decision has been made and evaluate for itself whether it considers it will deliver such savings over the medium to long term.
45. The Commissioner also recognises that there is considerable public interest in viability assessments such as the one being considered here and in the public being afforded the opportunity to interrogate a developers' analysis on affordability to establish itself to what extent the council's core policy strategy on affordable housing is being met. As the tribunal stated in the Clyne decision at paragraph 64(i):

"The EIR objective is to allow the affected community to have relevant information in time to participate effectively in environmental decision-making, which would include before the planning permission was finalised".

While the circumstances at the time of the request are of note, the Commissioner considers there are strong public interest arguments in providing the affected community with access to FVA's so they can be best equipped to participate in the decision making process and raise any objections. If the information is not accessible to the public until after the application is determined, the public is hindered during consultation. At paragraph 64(iii) of the Clyne decision, the tribunal stated:

"There is a deficit if only developers and planning departments have access to the information needed to form an opinion."



And, at paragraph 64(iv):

"...the value of receiving the requested information is not lessened by either the planning application have gone through a thorough consultative process and decided by planning committee, or BNPP having conducted an extensive and expert independent review of viability."

46. The Commissioner notes that this case is slightly different in that the scheme proposes to deliver 47% affordable housing, over and above the council's core strategy policy. However, it is noted from the council's submissions that this is due to an agreement in place with the developer to transfer ownership of some of the site over to it and the Commissioner notes that even though 47% was agreed the developer still wished to maintain that only 16% was justified. The Commissioner considers the fact that the scheme proposes to deliver more affordable housing than the council's target in this case does not lessen the public interest in disclosure. The council appear to say that this is not the norm and only due to specific agreements in place with this developer suggesting therefore that if these agreements were not in place it may well have had to accept affordable housing provision well below its target (around 16%).
47. The Commissioner accepts that there are public interest arguments in favour of maintaining this exception, as the tribunal outlined in paragraph 65 of the Clyne decision. It is acknowledged that the remaining withheld information constitutes the developer's confidential information revealing how the developer has priced the scheme for the purposes of the viability assessment. The tribunal acknowledged in the Clyne decision that the public interest is significant because of the importance of respecting confidential information. However, on the facts of the Clyne case, the tribunal felt that this was vastly outweighed by the public interest in disclosure and the Commissioner is of a similar view in this case.
48. The Commissioner does not accept that disclosure of the remaining withheld information would adversely affect the developer's ability to deliver the project or negotiate with third parties to the extent claimed. It was accepted in the Clyne decision that FVA's are quickly outdated and often only valid for the time that they are actually written, as market conditions, values and costs rapidly change. Any negotiations with contractors and registered providers of social housing will more than likely taken place at some time in the future when compared to the actual date of an FVA and will more than likely be driven by competitive processes, a third party's own assessment of what to bid and the economics of supply and demand rather than the withheld information.

49. Where negotiations with registered providers of social housing is concerned, it was also noted that the point to affordable housing is not to maximise profit but to provide much needed housing for those on low to medium incomes. There are strong countervailing public interest arguments to any alleged adverse effect that it is in the interests of the public to ensure that social housing providers obtain a reasonable deal.
50. Overall the Commissioner is satisfied in this case that the public interest rest in disclosure.
51. He will now go on to consider the council's application of regulation 12(5)(f) of the EIR.
52. Regulation 12(5)(f) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the interests of the person who provided the information where that person –
  - (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
  - (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
  - (iii) has not consented to its disclosure.
53. The council supplied very limited arguments in support of the application of this exception and essentially stated that it considers this exception applies for the same reasons described for regulation 12(5)(e) of the EIR. It stated that the developer was not under any legal obligation to supply the remaining withheld information and has not consented to its disclosure. It confirmed that it considers the developer's interests would be adversely affected by disclosure for the same reasons given in support of regulation 12(5)(e) of the EIR and the public interest rests in maintaining this exception for the same reasons it gave for the application of the public interest test in relation to 12(5)(e).
54. The Commissioner is satisfied that in this case the developer was not under any legal obligation to provide this information to the council and that the exception is engaged for the same reasons outlined in paragraphs 37 and 38 above.
55. In terms of the public interest test, for the same reasons outlined in paragraphs 40 to 50 above, the Commissioner considers the public interest test rests in the disclosure of the remaining withheld information.

## Right of appeal

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56. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

57. 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.
58. 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 .....

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**