

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

**Date:** 6 July 2021

**Public Authority:** London Borough of Lewisham  
**Address:** Town Hall  
Catford  
London  
SE6 4RU

**Decision (including any steps ordered)**

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1. The complainant submitted a request to the London Borough of Lewisham (the Council) seeking a copy of a report about a proposed housing development. The Council provided the complainant with a copy of the report but redacted certain parts of it on the basis of section 43(2) (commercial interests) of FOIA. The Council subsequently disclosed a less redacted version of the report to the complainant and adopted the position that the remaining redactions were exempt on the basis of regulation 12(5)(e) (confidentiality of commercial or industrial information) of the EIR.
2. The Commissioner has concluded that the remaining redactions are exempt from disclosure on the basis of regulation 12(5)(e) and that in all the circumstances of the request the public interest favours maintaining the exception. However, the Commissioner has also concluded that the Council breached regulation 5(2) of EIR by not responding to the request within 20 working days and by belatedly disclosing parts of the requested information.
3. No steps are required.

## Request and response

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4. The complainant submitted the following request to the Council on 17 May 2020:

*"Housing boost for Lewisham as Council agrees to start redevelopment plans to build 200 new homes*

*Up to 200 new homes – 50% of which will be social homes – will be built on the site of the PLACE/Ladywell temporary housing development in central Lewisham, after being given the green light at a meeting of Mayor and Cabinet on 13 March [2019].*

*The redevelopment plans contribute to the council's commitment to deliver 1,000 new social homes by 2022.*

*The site currently houses the award-winning PLACE/Ladywell temporary housing scheme and has always been earmarked for wider development. It was an innovative meanwhile use of a vacant development site to tackle homelessness and meet the high demand for housing in the borough.*

*Councillor Paul Bell, Cabinet Member for Housing, said: "After initial investigations involving our hard-working teams at Lewisham Council and Lewisham Homes, we are now in a position to move forward to carry out detailed feasibility work to build around 200 new homes where 50% will be council-owned social rented properties. This is an important step in delivering much needed homes in our community"*

*Council officers will now begin the process to appoint architects to design the development. Local residents, councillors, community groups and other stakeholders will be consulted about the redevelopment plans.*

*As part of the plans, the PLACE/Ladywell building will be relocated to another part of Lewisham and will continue to be used to temporarily house homeless families while they wait for permanent housing."*

*Please provide a redacted copy of the Part II report in relation to this Mayor & Cabinet report for ease of reference the name of the report [is]*

*Approval for budget to start redevelopment plans at PLACE/Ladywell site<sup>1</sup>*

5. The Council contacted the complainant on 19 June 2020 and provided her with a response to an earlier request she had submitted on 15 March 2019 (in which she had asked for the same document but to which no response had been provided). In this response the Council provided the complainant with a redacted version of Part 2 of a report dated 25 March 2020 which had been submitted to the Mayor and Cabinet about the proposed development at the site.
6. The complainant contacted the Council on 20 June 2020 and sought an internal review of this response. She explained that the information which she was seeking was a copy of the report submitted to the Mayor and Cabinet dated 13 March 2019 rather than the document dating from 25 March 2020 which had been provided to her.
7. The Council responded on 3 July 2020 and provided her with a redacted version of the report dated 13 March 2019. The Council explained that the redacted information was exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 14 July 2020 in order to complain about the Council's handling of her request of 17 May 2020 and its decision to redact information from the document she had requested.
9. During the course of the Commissioner's investigation the Council provided the complainant with a less redacted version of this document. (In providing this version of the document the Council also noted that the copy which it had previously disclosed on 3 July 2020 had a number pages missing; it apologised for this error.) The Council explained that the information which was still redacted was now considered to be

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<sup>1</sup> The quote contained at the beginning of this request is taken from a Council news release about the development from March 2019 <https://lewisham.gov.uk/articles/news/housing-boost-for-lewisham-as-we-agree-to-start-redevelopment-plans-to-build-200-new-homes> Part 1 of the report which is referred to in the request is available within the link at footnote 4 of this notice.

exempt from disclosure on the basis of regulation 12(5)(e) (commercial confidentiality) of the EIR rather than section 43(2) of FOIA.<sup>2</sup>

10. The scope of the Commissioner's investigation has therefore been to consider to whether the remaining redactions which the Council has made to the report of 13 March 2019 are exempt from disclosure on the basis of regulation 12(5)(e) of the EIR.

## Reasons for decision

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### Regulation 12(5)(e) – confidentiality of commercial or industrial information

11. Regulation 12(5)(e) provides an exception to the extent that disclosure of the information in question would adversely affect:

*'the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest'*

12. The wording of the exception sets out a number of tests or conditions that must be met before the exception can be engaged, namely:
  - Is the information commercial or industrial in nature?
  - Is the information subject to confidentiality provided by law?
  - Is this confidentiality provided to protect a legitimate economic interest?
  - Will the confidentiality be adversely affected by disclosure?

13. The Commissioner has considered each in turn below.

*Is the withheld information commercial or industrial in nature?*

14. The Commissioner considers that for information to be commercial or industrial in nature, it will need to relate to a commercial activity of either the public authority concerned or a third party.
15. The Council argued that the withheld information is commercial in nature as it relates to the development of housing on the site in

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<sup>2</sup> The Commissioner had previously explained to the Council that given the subject of the request, it should have considered this under the EIR rather than under FOIA.

question and is relevant to commercial negotiations the Council will have about the site.

16. The Commissioner is satisfied that the information is commercial in nature as it relates to a commercial activity, namely the Council's development of the site, a process which will include the Council contracting with third parties.

*Is the withheld information subject to confidentiality provided by law?*

17. In order to fulfil this criterion, there is no need for public authorities to have obtained the information from another. The exception can cover information obtained from a third party, or information jointly created or agreed with a third party, or information created by the public authority itself. For purely internal information, the question will be whether the employees of the public authority are under an obligation of confidence imposed by the common law, contract, or statute.
18. The Council explained that the information was subject to common law duty of confidence.
19. In assessing whether this is the case the Commissioner considers the key issues as follows:
  - Does the information have the necessary quality of confidence? This will involve confirming that the information is not trivial and is not in the public domain.
  - Was the information shared (or provided to employees) in circumstances creating an obligation of confidence? This can be explicit or implied, and may depend on the nature of the information itself, the relationship between the parties, and any previous or standard practice regarding the status of information. A useful test is to consider whether a reasonable person in the place of the recipient would have considered that the information had been provided to them in confidence.
20. The withheld information is contained in Part 2 of a report submitted to the Mayor and Cabinet on 13 March 2019 about the development at the PLACE/Ladywell site. At the point of Cabinet meeting in March 2019, Part 2 of the report had been withheld from the public as it contained information considered to be financially and commercially confidential. (The press and public were also excluded from the meeting during discussion of this item in line with section 100 (A)(4) of the Local Government Act 1972.) The withheld information which the Council maintains is exempt from disclosure on the basis of regulation 12(5)(e) concerns the costs associated with the scheme, and net present value

and the gross development value of different iterations of the scheme as proposed in March 2019.

21. The Commissioner is satisfied that this information clearly has the quality of confidence as it is more than trivial and is not in the public domain. The Commissioner is also satisfied that information was shared within the Council with the expectation that it would be treated confidentially. She has reached this conclusion given both content of the information and the fact that the Part 2 of the report which contained the requested information was withheld from the public inline with the provisions of the Local Government Act 1972 at the point of the Council meeting in March 2019. Furthermore, the Commissioner is satisfied that these expectations had not changed between the date of the report and the date of the request.
22. The Commissioner is therefore satisfied that the information is subject to the common law duty of confidence and this criterion is therefore met.

*Is the confidentiality provided to protect a legitimate interest?*

23. The First Tier Tribunal confirmed in *Elmbridge Borough Council v Information Commissioner and Gladedale Group Ltd EA/2010/0106*<sup>3</sup> that, to satisfy this element of the test, disclosure of the confidential information would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. It is not enough that disclosure might cause some harm to an economic interest. The public authority needs to establish that, on the balance of probabilities, ie more probable than not, disclosure would cause some harm.
24. The Council argued that disclosure of the redacted information would adversely affect and jeopardise its own economic interests. This is because disclosure of the information would provide any third parties which the Council may engage with to develop the site an unfair advantage in commercial negotiations about the development. The Council argued that this in turn could prevent the Council from receiving the best value for money offers in the future. The Council acknowledged that the redacted information concerned a previous development proposal dating from March 2019 in which the initial proposals for the

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3

[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5B2011%5D DukFTT\\_EA20100106\\_%28GRC%29\\_20110104.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i479/%5B2011%5D DukFTT_EA20100106_%28GRC%29_20110104.pdf)

site were for around 232 new homes and that the current proposals (which the Commissioner understands were put forward to the Mayor and Cabinet in January 2021<sup>4</sup>) were for around 69 homes. However, the Council argued that the current proposal is still for the development of homes, on the same site (albeit to the rear), and in its view contractors preparing to tender for the smaller project could use the un-redacted financial information from the original proposal to calculate a price per unit to benchmark their quotes. The Council noted that the figures are only 2 years old, which would just require an inflation rate to render them current. The Council was therefore of the view that exposing this information now could fetter the competitiveness for the current scheme which is yet to be tendered. (The Commissioner's role is to consider the application of any exceptions at the time of the request, or at the conclusion of the internal review. At the point of the internal review the figures were only 16 months old, ie the figures date from March 2019 and the internal review was issued in July 2020.)

25. The complainant argued that the Council had redacted too much information from the document as it was a high level document. She also noted that some of the options in the report had been rejected. Furthermore, she argued that sufficient time had elapsed and the economic scenarios had changed which meant that the redactions were overzealous.
26. The Commissioner is satisfied that disclosure of the remaining redacted information would harm the Council's commercial interests. She has reached this conclusion because in her view the Council's rationale that the financial details of the previous version of the scheme could still provide potential tenderers with an insight into the revised version of the scheme is a sound one. Furthermore, the Commissioner is satisfied that the specific information that has been redacted by the Council would provide any such tenderers with a clear insight into the Council's expected costs and returns in relation to the process. This would provide such tenderers with an advantage in any competitive tender process to the commercial detriment of the Council.

*Will the confidentiality be adversely affected by disclosure?*

27. Although this is a necessary element of the exception, once the first three elements are established the Commissioner considers it is

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<https://councilmeetings.lewisham.gov.uk/documents/s76839/Future%20of%20PLACE%20Ladwell.pdf>

inevitable that this element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information by making it publicly available, and would also harm the legitimate economic interests that have already been identified.

28. Therefore, the Commissioner accepts that this condition is met and the withheld information is exempt from disclosure on the basis of regulation 12(5)(e).

### **Public interest test**

29. Regulation 12(5)(e) is subject to the public interest test. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions. As stated in the Upper Tribunal decision *Vesco v Information Commissioner* (SGIA/44/2019), *'If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure...'* and *'the presumption serves two purposes: (1) to provide the default position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations'* (paragraph 19).
30. In relation to the balance of the public interest test the Council acknowledged that there was a need for openness and transparency with regard to new developments in the borough but this this should be balanced with the ability to enable the Council to tender schemes in a competitive manner and receive the best value for money. As such, it remained of the view that the public interest favoured maintaining the exception and withholding the remaining redacted information.
31. The Commissioner accepts that there is a strong public interest in the Council being transparent about new developments in the borough. However, in her view this interest is, to some extent, met by the publication of the remaining parts of the document the complainant requested, along with the other information already in the public domain about the proposed development of the site.<sup>5</sup> Although disclosure of the remaining redacted information would provide a further insight into the financial aspects of the development that was proposed in March 2019, the Commissioner is not persuaded that this interest outweighs the

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<sup>5</sup> The Commissioner notes that the agenda reports pack for the Mayor and Cabinet meeting of 13 March 2019 contained information about development at pages 56-64.

<https://councilmeetings.lewisham.gov.uk/ieListDocuments.aspx?CIId=139&MIId=5218>



significant public interest in ensuring the Council achieves best value for money in respect of the future iterations of the development. As a result, in the Commissioner's view, even taking into account the presumption in favour of disclosure, the public interest in maintaining the exception therefore outweighs the public interest in disclosing the information.

### **Procedural issues**

32. Regulation 5(2) of the EIR requires information to be made available on request as soon as possible and no later than 20 working days after receipt of a request.
33. In the circumstances of this request the Council initially took 23 working days to provide the complainant with a version of the document she had requested. Whilst this constitutes a breach of regulation 5(2) of the EIR, the Commissioner fully acknowledges that this request was received during the early stages of the Covid 19 pandemic, a point at which the Council, along with other local authorities, was facing significant challenges to its resources. (The Commissioner also notes that the Council's automatic acknowledgment of the request had advised the complainant of these possible delays.)
34. However, this version of the report provided at the internal review stage had several pages missing and also contained redactions to parts of the information which the Council later disclosed. These parts of the report were only provided to the complainant during the Commissioner's investigation which represents a further breach of regulation 5(2) of the EIR.

## Right of appeal

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35. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

36. 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.
37. 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 .....**

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