

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

**Date:** 3 March 2023

**Public Authority:** Barnsley Metropolitan Borough Council

**Address:** Town Hall  
Barnsley  
S70 2AQ

**Decision**

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1. Barnsley Metropolitan Borough Council ('the Council') has applied regulation 12(5)(e) and 13 of the EIR to some of the requested information about the Hoyland West land development. This exception concerns commercial interests.
2. The Commissioner's decision is that the Council is entitled to withhold the information to which it has applied regulation 12(5)(e) and the public interest favours maintaining this exception.
3. The Council has breached regulation 5(2) of the EIR as it has not made available all the relevant non-excepted information that it holds within 20 working days of the request.
4. If it has not already done so, the Council must take the following steps to ensure compliance with the legislation:
  - Redact the square footage figure from paragraph 16 of the Trustee Agreement document – this matter is discussed at paragraph 32 of this notice.
  - Disclose the non-excepted information in all four Agreement documents and the 2016 email.

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. The complainant made the following information request to the Council on 7 July 2022:

"Thank you for the response to EIR 5073.

I would be grateful for the following new information under EIR regarding the Hoyland West land development.

- [1] What is the legal entity "Wentworth Trust" identified in the public "Hoyland West Masterplan Framework Report" document. Please provide the Ltd Co or Charity number.
- [2] The "Hoyland West Masterplan Framework Report" document specifies that "Wentworth Trust" has "actively promoted the site for employment allocation". Please provide the correspondence relating to this promotion.
- [3] What is the legal entity "Wentworth Fitzwilliam Estate" mentioned in the response to EIR 5073. Please provide Ltd Co, charity number or if this is a sole trader/partnership please provide owner name/s.
- [4] Documents showing role of "Wentworth Fitzwilliam Estate" and details of any due diligence undertaken on it by BMBC.
- [5] List of any offshore organisations that have/had involvement and details of any due diligence undertaken by BMBC. For clarity a offshore organisation resides outside the four nations - i.e. England, Scotland, Wales and Northern Ireland.
- [6] Correspondence between "Wentworth Charity" (Charity Number 1078792), it's representatives, and BMBC and it's representatives.
- [7] Correspondence with Charity Commission.
- [8] Terms of reference and meeting minutes of the "Masterplan Board for Hoyland West". (Referenced in the document kindly supplied in the response to EIR 5073.)"

7. The focus of the complainant's complaint to the Commissioner is the Council's response to parts 4 and 6 of the request.

8. In its correspondence to the complainant, the Council's final position was to withhold the information requested in part 4 under regulation 12(4)(e) of the EIR (internal communications) and to withhold the information requested in part 6 under regulation 12(5)(f), which concerns the interests of the person who provided the information.
9. However, in an initial submission to the Commissioner dated 23 December 2022 the Council advised that, with regard to part 4 and its reliance on regulation 12(4)(e), due diligence was primarily undertaken through online checks by lawyers and discussions that were not formally documented. As such, there were very few documents to actually disclose. The Council said that:

"On reflection, the documents the Council withheld under this exception ought to have been withheld on the basis of commercial confidentiality. We are not therefore minded to disclose but have included clean and redacted versions of the promotion agreement should you take the view that the promotion agreement should be disclosed."
10. With regard to part 6, in the submission the Council indicated that it was now relying on regulation 12(5)(e) to withhold this information, rather than 12(5)(f).
11. Following a number of communications to clarify the situation, the Council confirmed that with regard to part 4 of the request it is relying on regulation 12(5)(e) to withhold a little information in an email, and information in four Agreement documents. The Council said it is prepared to disclose the remainder of this material.
12. With regard to part 6 of the request, the Council confirmed that it is relying on regulation 12(5)(e) to withhold in their entirety eight sets of minutes from 'Hoyland West Masterplan Framework' meetings from 2020.

## **Reasons for decision**

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13. The Commissioner notes that the complainant considers that the Council is "providing incorrect and misleading information about organisations they have been dealing with over significant environmental changes." This may be a reference to the relationship (if any) between 'Wentworth Fitzwilliam Estate,' 'Wentworth Charity' and 'Wentworth Trust.' The Council advised the complainant to contact the Wentworth Trust directly if they had outstanding queries about its legal arrangements.
14. The reasoning in this decision is focussed only on the Council's handling of the complainant's request under the EIR ie whether it is entitled to

rely on regulation 12(5)(e) to withhold information within scope of parts 4 and 6 of the request. This investigation will not consider the personal data the Council has redacted from the information within scope of part 4.

### **Regulation 12(5)(e) – commercial interests**

15. Under regulation 12(5)(e) of the EIR, 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.
16. **Part 4 of the request:** This part is for documents that show 'Wentworth Fitzwilliam Estate's' role and for details of any due diligence the Council undertook on the Estate.
17. The information the Council redacted under regulation 12(5)(e) comprises information in the four Agreement documents and the name of a third-party organisation from an email between legal teams dated 4 February 2016 ('the 2016 email').
18. The Commissioner understands that the Council considers the Agreements are relevant to the element of part 4 that is concerned with the Wentworth Fitzwilliam Estate's role and that the email is relevant to the element of part 4 that is concerned with due diligence.
19. **Part 6 of the request:** Part 6 is for correspondence between "Wentworth Charity" and its representatives, and the Council and its representatives.
20. The information the Council redacted under regulation 12(5)(e) is a series of minutes of 'Hoyland West Masterplan Framework' meetings from 2020. The parties to these meetings are the Council and, the Commissioner understands, representatives of the developers. The Council has categorised the information in these minutes as 'pre-application discussions.'
21. The Commissioner considers four tests when deciding whether the regulation 12(5)(e) exception is engaged. All four elements are necessary for the exception to be engaged:
  1. The information is commercial or industrial in nature.
  2. The confidentiality is provided by law.
  3. The confidentiality is protecting a legitimate economic interest.
  4. The confidentiality would be adversely affected by disclosure.

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

22. The Commissioner is satisfied that the redacted information relevant to both parts 4 and 6 of the request is commercial in nature. It relates to the development of private land which is a commercial matter.

**Is the confidentiality provided by law?**

23. The Commissioner also accepts that the withheld information was provided in confidence. This is because the information is clearly more than trivial as it relates to a large-scale development project. The information includes 'due diligence' matters associated with a third-party organisation (in the 2016 email), detail in the Agreements between the Council and third parties and pre-planning discussions between the Council and parties involved (in the meeting minutes).
24. The circumstances in which the information is held, and the Council's reason for holding it, would, in the Commissioner's view, be sufficient to impose an obligation of confidence on the Council and its employees. Council employees who had access to the information would understand that that information was to be held in confidence until such time as any further related agreements, necessary acquisitions and/or planning applications were achieved and/or agreed. The information therefore has the necessary quality of confidence.

**Is the confidentiality protecting a legitimate economic interest?**

25. For this test it is necessary to consider how sensitive the information is at the date of the request and the nature of harm that would be caused by disclosure. The timing of the request and whether the commercial information is still current are likely to be key factors. Broader arguments that the confidentiality provision was originally intended to protect legitimate economic interests at the time it was imposed will not be sufficient if disclosure would not actually impact on those interests at the time of the request.
26. It is not enough that disclosure might cause some harm to an economic interest. It needs to be established that disclosure would cause harm (on the balance of probabilities – ie more probable than not).
27. Ensuring competitors do not gain access to commercial valuable information is one example of a legitimate economic interest.
28. Regarding whose interests would be affected by disclosure, if the information was jointly agreed or was provided under a contractual obligation of confidence, either party's interests could be relevant.
29. Finally, if a third party's interests are at stake the public authority will need to consult with them, unless the authority has prior knowledge of

their views. It is not sufficient for the authority to speculate about potential harm to a third party's interests without some evidence that the arguments genuinely reflect the concerns of a third party.

30. The Commissioner will consider this third test in relation to part 4 of the request first.
31. As noted, in addition to the 2016 email, four Agreements are within scope of this part of the request; an Agreement between the Council and the Wentworth Charity dated 2015 ('the 2015 Agreement'), and three Agreements dated 2016 ('the Charity Agreement' between the Council and the Wentworth Charity, 'the Trustee Agreement' between the Council and the Wentworth Trustee Company Limited and 'the Developers Agreement' between the Council and the developers.) The Council has sent the Commissioner redacted and unredacted copies of all four Agreements.
32. A very small amount of information has been redacted from the 2015 Agreement, the Charity Agreement, and the Trustee Agreement. The 'Long Stop Date' in the 'Definitions' section has been redacted from the 2015 Agreement, the Charity Agreement, and the Trustee Agreement. A figure related to the square foot of floorspace has been redacted from the first two Agreements but not the Trustee Agreement. The Commissioner assumes that this is an oversight by the Council and that it intends for this figure to be redacted from the Trustee Agreement also.
33. Regarding the Developers Agreement, certain information in the 'Definitions' and 'Schedule 1' sections of the Agreement, a small amount of information in the 'Development Obligations', 'Consequences of Termination' and 'Good Faith and No Ransom' sections and all of 'Schedule 2'.
34. In a submission to the Commissioner dated 13 January 2023, with regard to the third test and both part 4 and part 6, the Council said only that, "the land owners/developers proposals to develop the land have a commercial/economic interest and profit margin which is open to competition from others".
35. The Commissioner asked the Council to explain further why disclosing the information in the Agreement documents and the 2016 email (in the context of that email) would be likely to prejudice its or another body's commercial interests.
36. The Council explained in correspondence dated 8 February 2023 that it had redacted the 'Long Stop Date' and square footage information in the various Agreement documents because this "...is the contractual commercial terms of the grant which if not achieved could result in

financial penalties which could prejudice the developers ability to access borrowing to complete the development." In the Commissioner's view this statement addresses a question that the Commissioner has not asked.

37. In its various written communications to the Commissioner the Council did not provide further explanation about the remainder of the information redacted from those Agreements. However, in a phone conversation with the Commissioner on Tuesday 28 February 2023 the Council indicated that it was withholding information in the Agreements as the world of land development is extremely competitive and disclosing certain detail and information would give the parties' competitors an insight they would not otherwise have. This would give those competitors an unfair competitive advantage.
38. Regarding the information in the 2016 email, the Council explained in its 8 February 2023 correspondence that it had redacted the name because it is the name of the preferred developer partner of the landowner. By its very nature, the Council said "...the information relating to economic development agreements between third party developers, and the landowners is commercial in its nature and was therefore, redacted ... to protect the commercial interests of the developer."
39. With regard to part 4 of the request specifically, in none of the Council's correspondence to the Commissioner has the Council referred to it having consulted with the other parties involved about any concerns they may have about disclosure or indicated that it has prior knowledge of their views. However, with regard to part 6 the Council **has** indicated that it had consulted the other parties. On that basis the Commissioner will accept that the Council also had prior knowledge of the other parties' views with regard to part 4 of the request.
40. As such, the Commissioner will consider whether disclosing the information in the Agreement documents and email exchange would adversely affect other parties' and the Council's (and so taxpayers') economic interests.
41. Taking the information in the four Agreement documents first, the Commissioner considers that the redacted information can be categorised as detail about contract negotiations and the terms of those contracts. Although dated 2015 and 2016, information contained in the Agreements is current and applies to a live planning purchase and development process which is still in process.
42. The Commissioner accepts that disclosing this commercial information would lead to a loss of competitive advantage for the developers and landowners. It would also harm the Council's ability to obtain value for

money in the future, reduce its bargaining position and damage its ability to generate revenue and enter into similar projects in future.

43. Any future commercial contracts involving the developers and the other parties will likely be conducted along similar principles and with similar commercial terms. Disclosing the information would give competitors and landowners insight into their pricing and commercial approach. This would give competitors and potential purchasers an unfair advantage in future competitive tenders and land negotiations.
44. The Commissioner is aware from similar cases (not because of any explanation the Council provided to him) that development and development opportunities are often controversial, and opponents and competitors can and often do seek to undermine development by exerting pressure on commercial factors. Disclosing the information is also highly likely to result in prejudice to commercial interests and policy objectives for that reason.
45. The Council's submissions to the Commissioner regarding the third exception test and the information in the Agreement documents were poor. However, having considered the withheld information, what explanation the Council provided and his past decisions the Commissioner accepts that disclosing the information being withheld would cause a degree of harm to the developers', the landowner's, and the Council's legitimate economic interests. The Commissioner therefore finds that the third test is met with regard to the information in the four Agreements.
46. Taking next the name redacted from the 2016 email, the Council simply stated that information about economic development agreements between a developer and a landowner is commercial and was redacted to protect the developer's commercial interests. Again, the Council did not explain why disclosing the developer's name would be likely to prejudice the developer's commercial interests. However, in this instance the Commissioner will accept that, in the context of the email (the remainder of which has been disclosed) disclosing the developer's name could prejudice its commercial interests by giving its competitors an insight into the Council's relationship with, and view on, the developer. The Commissioner therefore finds that the third test is met with regard to the information in the email.
47. The Commissioner will next consider the third exception test at paragraph 21 in relation to part 6 of the request.
48. With regard to part 6, the Council has explained in its submission of 13 January 2023 that "these conversations were private conversations with landowners/developers who would not have entered into dialogue if the conversations were not kept private and confidential".



49. The Council has again not clearly explained why disclosing the 'pre-application discussions' at the time of the request would be likely to prejudice any party's commercial interests.
50. However, at the point when it had applied regulation 12(5)(f) to this information, the Council had advised the Commissioner that the information related to work which was still ongoing at the time of the request. It said that third-party land acquisition deals, which are required to deliver the scheme, had not been finalised at the time of the request and that the developer had confirmed that it considers that the information was also commercially sensitive.
51. The Commissioner has noted that, with regard to part 6, the Council indicated that it had consulted the developer. He will accept that disclosing the pre-application discussions could prejudice the developer's commercial interests by giving its competitors an insight into its intended approach, its ideas, processes, relationship with the Council and matters associated with the planning proposal generally. Disclosure could also put the Council in a position where it could be more difficult to negotiate and finalise deals, and it could be less likely to obtain best value for the contracts within those deals.
52. To summarise, with regard to both part 4 and 6 of the request the Commissioner accepts that the third element of the exception test has been met and that confidentiality is necessary to protect a legitimate economic interest.

**Would the confidentiality be adversely affected by disclosure?**

53. Although this is a necessary element of the exception, once the first three elements are established, the Commissioner considers it is inevitable that this element will be satisfied. Disclosing truly confidential information into the public domain would inevitably harm the confidential nature of that information and would also harm the legitimate economic interests that have been identified.
54. Since the four elements of the exception test have been met with regard to both parts 4 and 6 of the request, the Commissioner is satisfied that the information that the Council is withholding under regulation 12(5)(e) of the EIR engages that exception. He has gone on to consider the associated public interest test.

**Public interest test**

55. On the evidence and arguments presented to him by both parties, the Commissioner has decided that the public interest in the exception being maintained outweighs the public interest in the information being disclosed in this instance.

56. The complainant considers that the Council is not being transparent. However, regarding part 4 of the request, the Council has now disclosed the majority of the relevant information it holds.
57. Regarding part 6, the statutory formal planning process provides a route for public engagement and public scrutiny. The pre-planning process is a useful tool for both applicant and planning authority. It allows any issues with or concerns about any ideas or plans to be discussed early on, and ironed out in some cases, before a formal application is submitted. It is beneficial for both sides and there is a need to maintain that private thinking space to enable any formal application process to run as smoothly and as efficiently as possible. Pre-planning saves the time and resources of both sides. The formal planning process includes time for people who are interested or concerned to view any formal plans once they have been submitted, and to raise objections or provide statements of support. Often pre-planning applications do not make their way to the formal process. Some plans are abandoned, others are changed to reflect the informal advice they have received. It is not in the public interest to open such informal applications up to public debate and scrutiny when they may not proceed further or change.
58. The Commissioner considers disclosure would deter planning applicants from using the service and volunteering information, often commercially sensitive information, so freely in the future. This is not in the wider interests of the public. It would make the formal planning process more cumbersome, time consuming and costly if the Council were unable to weed out unsuitable proposals before a formal application is received.
59. There is a public interest in protecting information about ongoing negotiations and procurements from disclosure. Disclosing the information in this case would ultimately make it harder for the Council to obtain land and services at best value to taxpayers. It could make negotiations take longer and provide opportunities for competitors or interested parties to seek to undermine negotiations by refusing to sell relevant land, or by buying property prior to the purchases being completed in order to either gain profit through its sale, or to prevent the development from being completed.
60. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure, and the Commissioner has kept that in mind when reaching his decision. However, the Commissioner's view is that the public interest in the exception being maintained outweighs that in the information being disclosed at the time that the Council initially responded to the request.
61. The Commissioner's decision is therefore that the presumption in favour of disclosure required by regulation 12(2) does not change his decision that the Council correctly applied the 12(5)(e) exception in this case.

## **Procedural matters**

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62. Under regulation 5(1) of the EIR a public authority that holds environmental information shall make it available on request, if it is not subject to an exception.
63. Under regulation 5(2) information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
64. In this case the complainant submitted their request to the Council on 7 July 2022. In relation to part 4 of the request the Council has identified information in the four Agreement documents and email that it has said it is prepared to disclose, hence the steps ordered in paragraph 5. As such, the Council has breached regulation 5(2) of the EIR as it has not made this information available within 20 working days of the request.

## **Right of appeal**

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65. 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@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)

66. 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.

67. 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**

**Cressida Woodall**  
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