

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

Date: 25 July 2017

Public Authority: London Borough of Southwark
Address: PO BOX 64529
London
SE1P 5LX

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Southwark (the Council) for a copy of the development partnership agreement it signed with Notting Hill Housing Trust in relation to the redevelopment of the Aylesbury Estate. The Council disclosed this document but redacted certain parts of it on the basis of regulation 12(5)(e) (commercial confidentiality) of the EIR. The Commissioner has decided that for some of the redactions the exception is engaged and the public interest favours maintaining the exception. However, in respect of the remaining information the Commissioner has decided that the exception is either not engaged, or it is engaged but the public interest favours disclosing the information. The Council also breached regulation 11(3) of the EIR by failing to complete an internal review of its original response to the request.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the information previously redacted from the development agreement identified in the annex to this notice as references 2, 4, 10-12, 21 and 27.
3. The public authority 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.

Background

4. This request concerns the regeneration of the Aylesbury Estate, South East London. A report presented to the Council Planning Committee in 2015 provides some useful background to this request and the Commissioner has quoted parts of this report below:

'5. Constructed between 1966 and 1977, the Aylesbury Estate covers an area of 28.5 hectares containing approximately 2700 dwellings. At the time it was built, the plans for the estate were considered innovative and aspirational – elevated walkways linking the blocks would enable people to walk from the Peckham 'Fives Estates' through Aylesbury and the Heygate to the Elephant and Castle. The walkways would separate pedestrian from the traffic, with parking garages at ground floor, and the decks becoming social spaces for the residents. On completion, the Aylesbury was one of the largest housing estates in western Europe.

6. However, over the following 30 years the estate became one of the most deprived areas in south London, with a high incidence of crime, ill health and low levels of employment and educational achievement.

7. In 2002 the council embarked upon plans for refurbishing the estate. However, structural surveys highlighted the extent of works needed to the fabric and it was concluded that the cost of refurbishing the estate to an acceptable standard would be prohibitive. [...] It was decided that in order to secure a long term sustainable future for the area, a more comprehensive programme would be needed, and in 2005 the council took the decision to redevelop the estate.

8. Preparation of the Aylesbury Area Action Plan (AAP) began in March 2007. [...]

10. In 2012 the council began the process of selecting its development partner to deliver the Aylesbury masterplan. Following a lengthy and rigorous procurement process, the council selected Notting Hill Housing Trust (NHHT). In April 2014 a development partnership agreement and business plan were agreed by the partners to secure the comprehensive regeneration of the Aylesbury estate by 2032. NHHT will be working with Barratt London to deliver this comprehensive scheme.

11. The guiding objective of the AAP is to deliver a new neighbourhood, better integrated with the wider area, with a mix of housing types and tenures. It aims to replace the 2700 properties with around 4,200 new houses and flats, together with new shops,

community facilities, workspaces, open spaces and other infrastructure.'

5. The Commissioner has previously considered a request submitted to the Council which sought a copy of the Aylesbury Financial Viability Note submitted by NHHT as part of its planning application for this development. The Commissioner concluded that this document should be disclosed.¹
6. The request which is the focus of this notice concerns the development partnership agreement (DPA) signed between the Council and the NHHT in relation to the redevelopment Aylesbury estate.

Request and response

7. The complainant submitted the following request to the Council on 26 July 2016:

'I am writing to make an information request following the recent decision by the Information Commissioner, directing the disclosure of financial information relating to the redevelopment of the Aylesbury estate (ref:FS50589692).

<https://ico.org.uk/media/action-weve-tak...>

I am writing to request a full and unredacted copy of the Development Partnership Agreement (plus appendices) signed by the Council for the redevelopment of the Aylesbury estate on 28th April 2014.

Please note that in my previous request cited above, the Information Commissioner found that neither regulation 12(5)(e) nor regulation 12(5)(f) of the EIR applied to the financial information relating to the redevelopment, that the Council had redacted. I submit that these same findings apply to the Development Partnership Agreement and that it should therefore be made public in the interests of transparency and public accountability.

I would further note that the Development Partnership Agreement for the Heygate estate was fully published by the Council and that the disclosure of this information did not have any adverse affect on the Council or its development partner Lend Lease.'

¹ [FS50589692](#)

8. The Council contacted the complainant on 10 August 2016, and again on 14 September 2016, to explain that it needed further time to consider the request given its complexity.
9. The Council provided the complainant with a substantive response to his request on 11 October 2016. The Council provided him with a copy of the DPA but explained that certain sections had been redacted on the basis of the exceptions contained at regulations 12(5)(e) (commercial confidentiality) and 12(3) (personal data) of the EIR. The Council explained why it considered regulation 12(5)(e) to be applicable with reference to the specific parts of the DPA which had been redacted on the basis of this exception.
10. The complainant contacted the Council on 24 October 2016 and asked it to conduct an internal review of this decision. In doing so, the complainant provided the Council with detailed submissions to support his view that the DPA should be disclosed in full.
11. The Council did not formally complete its internal review. However, during the course of the Commissioner's investigation of this complaint it disclosed further information to the complainant on 23 and 28 June 2017.

Scope of the case

12. The complainant contacted the Commissioner on 9 January 2017 in order to complain about the Council's decision to redact information contained within the DPA. He was also dissatisfied with its failure to complete the internal review.
13. As noted above, during the course of the Commissioner's investigation some additional information was disclosed by the Council. However, the Council is still seeking to withhold further information on the basis of regulation 12(5)(e) of the EIR. (It is no longer seeking to rely on regulation 12(3) to withhold any information).
14. The redactions which continue to apply are detailed in the annex which is attached to this decision notice.

Reasons for decision

Regulation 12(5)(e) – commercial confidentiality

15. Regulation 12(5)(e) of the EIR provides 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'.

16. In order for regulation 12(5)(e) to be engaged, the following four conditions must be met:

(i) The information is commercial or industrial in nature.

(ii) Confidentiality is provided by law. This will include confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute.

(iii) The confidentiality is protecting a legitimate economic interest. Where the arguments refer to the economic interests of a third party, it will not be sufficient for a public authority to speculate on the potential harm attached to disclosure. Instead, it is imperative that a public authority has evidence that demonstrates the arguments genuinely reflect the concerns of the third party.

(iv) The confidentiality would be adversely affected by disclosure. Although this is a necessary condition, the Information Tribunal² has indicated that the disclosure of truly confidential information into the public domain would invariably harm the confidential nature of that information. In other words, if the first three criteria are met then the exception will be engaged.

(i) Is the information commercial or industrial in nature?

17. The Council explained that the DPA governs the financial arrangements regarding the redevelopment and transfer of land in relation to the Aylesbury estate.

18. Having considered the Council's submissions and examined the withheld information, the Commissioner is satisfied that the information is clearly of a commercial nature and satisfies this element of the exception.

(ii) Is the information subject to confidentiality provided by law?

19. In considering this point the Commissioner has focussed on whether the information has the necessary quality of confidence and whether the information was shared in circumstances creating an obligation of confidence.

² [EA/2010/0012](#)

20. In the Commissioner's view, ascertaining whether or not the information in this case has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain.
21. The Commissioner considers that confidence 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.
22. In his submissions to the Commissioner the complainant emphasised that page 222 of the DPA listed the information that was 'Agreed Commercially Sensitive Information'. The information listed was the following:
 - 1.1 - Definition of "Developer's Priority Return"
 - 1.2 - Schedule 4 in its entirety
 - 1.3 - Business Plan definitions:
 - 1.3.1 - "Developer's Priority Return"
 - 1.3.2 - "Premium"
 - 1.4 - Business Plan Section 12 in its entirety.³
23. The complainant argued that given the existence of this schedule setting out clearly what information is regarded as confidential, it was very difficult to understand why the redactions made to the DPA go well beyond these four items. He argued that there is no reasoned argument for the Council to continue to withhold information, that both it and its development partner did not deem commercially sensitive at the time of signing the agreement.
24. The Commissioner asked the Council to comment on this specific point. In response the Council explained that the list cited by the complainant is clearly very high level and in its view does not constitute an exhaustive list based on a detailed assessment of the DPA itself, rather it sets out information that definitely was considered to be commercially sensitive at that time. The Council argued that it could not be inferred that information not listed in Schedule 2, Part 20 of the DPA was, or is, not considered to be commercially sensitive. Indeed, the Council noted that Schedule 20, Part 1, clause 4.1 of the DPA obliges the parties to keep confidential all matters relating to this agreement and to use all reasonable endeavours to prevent disclosure, save for where information is required by law, and the preceding sections, which set out procedures relating to requests for disclosure of information under various legislation, demonstrate that it is expected that an assessment

³ Schedule 20, Part 2 of the DPA

would be carried out in relation to any proposals for future disclosure of information.

25. The Council explained that a fresh detailed assessment had been undertaken at each stage of the request and at each time information outside of Schedule 20, Part 2 was considered to be exempt from disclosure for the specific reasons given in the annex attached to this notice. Moreover, the Council explained that this process had not been undertaken in isolation but had been based on specific discussions with its development partner as to the nature of the information within the DPA and the impact of disclosure.
26. The Commissioner has some sympathy with the complainant's position. If a contract between two parties contains a provision within it which specifically identifies sections of the contract which both parties consider to be confidential then one would assume that no commercially confidential information would fall outside such a provision. Furthermore, the Commissioner finds it slightly strange that the Council infers that Schedule 20, Part 2 was drafted without a detailed assessment of the DPA in full. Rather, the Commissioner would have anticipated that if such a provision was to be included there would have been some value in fully identifying what information was considered to be commercially confidential, at least at that point in time.
27. Nevertheless, for the purposes of regulation 12(5)(e), as noted above, ascertaining whether or not the information has the necessary quality of confidence involves confirming that the information is not trivial and is not in the public domain. On balance the Commissioner is persuaded that that Schedule 20, Part 2 was not intended as an exhaustive list of information that was considered to be confidential. This would appear to be confirmed by subsequent discussions between the Council and NHHT with regard to what information contained within the DPA should be considered to be confidential. Moreover, having viewed the information that has been redacted on the basis of regulation 12(5)(e) that is not listed in Schedule 20, Part 2 the Commissioner is satisfied that this information is clearly not trivial, is not in the public domain and is obviously of importance to both parties. Therefore, the Commissioner accepts that all of the information redacted meets this criterion.

(iii) Is the confidentiality provided to protect a legitimate economic interest?

28. The Commissioner considers that to satisfy this element of the exception disclosure would have to adversely affect a legitimate economic interest of the person the confidentiality is designed to protect. If the information that is being withheld was jointly agreed – as in this case – either party's interests could be relevant. In the Commissioner's view it is not enough that some harm might be caused by disclosure. The

Commissioner considers that it is necessary to establish on the balance of probabilities that some harm *would* be caused by disclosure.

The Council's position

29. The Council has identified the nature of the economic harm it believes would occur in relation to each of the specific redactions made to the DPA. The Commissioner has replicated these submissions in the annex which is attached to this notice.
30. Furthermore, in response to the Commissioner's specific enquiries, the Council provided further submissions to support its application of regulation 12(5)(e) in relation to some of the individual redactions. The Commissioner has summarised these below:
31. In relation to the redaction at reference 2 the Council explained that the 'Developer's Priority Return' defined the proportions of various elements of the scheme's revenues that the developer is entitled to retain as profit. The Council explained that the percentages are established via the competitive procurement process through which NHHT was initially selected and are based on a commercial decision taken by the individual developer on the basis of each specific project and thereby represents its assessment of the acceptable level of anticipated return, factoring in issues specific to the project such as scale, risk and so on. The Council explained that the 'Developer's Priority Return' is a key factor in the bidding for and negotiation of development agreements for future development opportunities, as part of competitive procurement processes. It explained that each developer may choose to take a different view on its desired return as part of a procurement process for projects of a similar nature and this difference is very likely to be decisive in whether or not it is able to secure future development opportunities.
32. The Council emphasised that NHHT is a registered provider with an active development programme. It continues to seek future development opportunities, which may be via Official Journal of the European Union advertised competitive procurement processes or competitive process through framework agreements, such as the GLA London Developer Panel, through which it bids for development opportunities London-wide, and in which it will continue to make commercial decisions regarding its proposed developer return that will impact its ability to secure these opportunities.
33. The Council explained that it was no longer seeking to redact the developer's profit level relating to Private Sales units as this information

was now in the public domain by virtue of a previous ruling by the Commissioner.⁴ However, the Council emphasised that the information contained in the Aylesbury Financial Viability Note, which was the subject of the Commissioner's previous decision, provided a very high level summary of the viability of the scheme at a point in time over two years ago and the remaining information which had been redacted from the DPA in respect of NHHT's profit levels was not in the public domain.

34. In relation to the redactions made to schedule 4 (reference 8 in the annex to this notice), the Council explained that that it did not agree with the complainant's assertions regarding this information, noting that he had of course not had access to this.⁵ Rather, the Council explained that the redacted sections of Schedule 4 include inter alia descriptions of the operation of various elements of the developer's financial model, including formulae from within it and worked examples illustrating its operation, all of which the Council considered to be commercially sensitive for the reasons set out in the annex attached to this notice. The Council explained that it had also taken into account the information in the public domain within the Aylesbury Financial Viability Note. It explained that the information contained within the redacted sections of Schedule 4 is not explicitly stated within the viability note, nor can it be inferred from it. Consequently, the Council did not concur with the complainant's suggestion that this information is already within the public domain.
35. Finally, the Council explained that references 10, 11 and 12 relate to the contractual amounts of NHHT's management fee, sales and lettings costs cap and sales agency fee respectively. Reference 21 also related to the NHHT's management fee. As with the developer's priority return (reference 2) the Council explained that these fee amounts are proposed by the developer within the competitive procurement stage based on a commercial decision taken by the developer, and these fee levels may influence the outcome of future competitive bidding processes. The Council therefore remained of the view that this information was commercially sensitive.

The complainant's position

36. The complainant noted that the Council had cited a case heard by the First Tier Tribunal in 2013 in relation to the redevelopment of the Heygate estate to support its reliance on regulation 12(5)(e) (the

⁴ FS50589692.

⁵ See below for a summary of the complainant's position.

Southwark decision).⁶ However, in respect of engaging the exception the complainant noted that there were a number of significant differences between the information he had requested and the information which had been the focus of that decision.

37. The complainant noted that the Heygate estate redevelopment was essentially a land sale to a private multinational developer, which argued that its 'financial model' was used in projects across the world and was thus a 'trade secret', whereas the Aylesbury redevelopment agreement is with a housing association – a public sector body. The complainant disputed the Council's position that the redacted parts of schedule 4 of the DPA contained a 'financial model' akin to the model considered in the *Southwark* decision. The complainant explained that as an interested party to this appeal he was aware that the developer's financial model was a spreadsheet containing macros and formulas spanning several thousand pages and formed the supporting background information to a viability assessment. In contrast the information which is the focus of this request is not a viability assessment and contains no such spreadsheet. The complainant argued that there is no evidence to support the claim that the redacted information in schedule 4 of the DPA contains a financial model or even information relating to a financial model. The complainant argued being a non-profit housing association, NHHT cannot claim commercial confidentiality.
38. The complainant also argued that the Council was wrong to cite the *Southwark* decision as this had been superseded by more recent First Tier Tribunal decisions, namely EA/2014/0122 and EA/2016/0012, both of which ruled in favour of comprehensive disclosure.⁷ The complainant also noted that the Council's regeneration agreement for the Heygate scheme has been made public and therefore he could see no reason why the Aylesbury regeneration agreement should not be disclosed.⁸

The Commissioner's position

39. The Commissioner recognises that a range of different information has been redacted from the DPA. She has therefore considered whether

⁶ London Borough of Southwark and The Information Commissioner and others ([EA/2013/0162](#))

⁷ Royal Borough of Greenwich and The Information Commissioner ([EA/2014/0122](#)) and Clyne and The Information Commissioner and London Borough of Lambeth ([EA/2016/0012](#))

⁸ The complainant also argued that the decision notices [FS50627364](#) and [FER0626901](#) supported his position that the redacted information should be disclosed.

disclosure of each of the redactions, ie those identified at the particular references listed in the annex to this notice, would harm a legitimate economic interest. The Commissioner's findings in relation to each of the various references are set out below.

40. However, before doing so she wishes to make two preliminary points. Firstly, the Commissioner recognises that both the complainant and the Council have made reference to a number of previous decision notices and First Tier Tribunal decisions to support their respective positions. The Commissioner has given careful consideration to these previous decisions. However, she wishes to emphasise that whilst these previous cases all relate to a similar subject matter, ie the regeneration of Council owned land, many relate to financial viability assessments as opposed to agreements between a local authority and a development partner. In any event, as with all cases the Commissioner must decide whether any exception(s) apply based upon the specific facts of a particular case. The Commissioner would also note that only decisions of the Upper Tribunal (and higher courts) are binding and therefore previous decisions of the First Tier Tribunal, whilst often providing useful guidance, do not set a precedent which has to be followed.
41. Secondly, the complainant has questioned whether NHHT, as a non-profit housing association, is able to argue that disclosure would risk its commercial position. The Commissioner accepts that a body such as NHHT can have economic, and indeed commercial interests, which merit protection under regulation 12(5)(e) of the EIR. As her guidance on this exception explains legitimate economic interests could relate to a range of areas including retaining or improving market position, ensuring that competitors do not gain access to commercially valuable information, protecting a commercial bargaining position in the context of existing or future negotiations, avoiding commercially significant reputational damage, or avoiding disclosures which would otherwise result in a loss of revenue or income. Whilst some of the issues listed above will not be ones of direct concern to a housing association, the ability of such a body to protect its commercial bargaining position in the context of existing or future negotiation is an issue for such bodies.⁹ To be clear, a public body which is not profit making, can clearly still have a legitimate economic interest in protecting its commercial position in respect of any future negotiations.

⁹ https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf

42. Turning to the specific information which has been redacted, in relation to the developer's priority return (reference 2) the Commissioner accepts that disclosure of this information would harm the economic interests of NHHT. She has reached this decision based upon the detailed submissions provided by the Council, in particular its emphasis that the level of a priority return is a key factor in such bids. In reaching this conclusion the Commissioner considers it vital to recognise that NHHT is, as the Council has emphasised, continuing to actively seek future similar development opportunities. The Commissioner notes that the Council's rationale for redacting the information identified at references 10 to 12 and 21 and 27 closely follows its rationale to withhold the information at reference 2. Similarly, the Commissioner is also persuaded that disclosure of the information identified at references 10 to 12, 21 and 27 would harm the economic interests of NHHT.
43. The Commissioner is not persuaded that the information redacted at reference 4 (Definition of "Rights of Light Report") would harm NHHT's economic interests. She has elaborated on her reasoning for this finding in a brief confidential annex which will be given to the Council only given that this reasoning makes direct reference to the content of the withheld information itself.
44. The Commissioner has considered the information redacted from Schedule 4 carefully (reference 8 and the related information at reference 30). She acknowledges that there is on the face of it, as the complainant suggests, a distinction between the information redacted from this part of the DPA and the nature of the economic model which was discussed in the *Southwark* decision referenced above. However, having had the benefit of examining the redacted information the Commissioner accepts that, as the Council has argued, disclosure of the range of information redacted from this part of the DPA would provide an insight into various elements of the NHHT's financial model, a model which underpins the DPA. In light of the centrality of this model to the DPA and given the range of pricing and information which has been redacted from Schedule 4, the Commissioner accepts that disclosure of this information would harm NHHT's commercial interests by providing other developers with a detailed insight into its approach to such projects.
45. The Commissioner accepts that it is plausible that disclosure of the information redacted at reference 13 could harm NHHT's commercial interests in the way described by the Council. Furthermore, given that NHHT is actively looking for similar projects in the future the Commissioner accepts that disclosure would adversely affect NHHT's commercial interests. For similar reasons, the Commissioner agrees that the information redacted at reference 22 would harm the commercial interests of NHHT. Furthermore, the Commissioner believes that harm would occur to the Council's commercial interests in respect of future

discussions with other developers when negotiating redevelopment of other land.

46. In relation to the redactions described at references 20 and 26, the Commissioner accepts that given the various different ways in which harm could occur to both the Council's own interests, and those of NHHT, disclosure of this information would harm the interests of one or both parties. In the Commissioner's view the likelihood of such harm occurring is arguably increased given that some element of compulsory purchase would appear inevitable in order for the regeneration project to progress.
47. In summary then the Commissioner has concluded that all of the redacted information is exempt from disclosure on the basis of regulation 12(5)(e) within the exception of the information redacted at reference 4.

Public interest test

48. Regulation 12(5)(e) is a qualified exception and therefore the Commissioner must consider whether the public interest in maintaining the exception outweighs the public interest in disclosing the requested information. In doing so, the Commissioner recognises that regulation 12(2) of the EIR specifically provides that public authorities should apply a presumption in favour of disclosure.

Public interest in disclosure of the withheld information

49. The complainant explained that he had submitted his request on behalf of a campaign group of local residents, traders and others, who have a direct interest in the redevelopment of the Aylesbury estate. He noted that the campaign group had been set up in response to the Council's repeated failure to ensure that housing developments in the borough provide the minimum 35% affordable housing quota required by its planning policy. The complainant pointed to the following factors which in his opinion meant that the public interest clearly favoured the disclosure of the redacted information:
50. The complainant emphasised that the Aylesbury regeneration scheme is a partnership agreement for redevelopment of the estate by the Council and a non-profit landlord, being developed for a significant amount of public funding. More specifically, the complainant noted that the scheme has been allocated £46m from the government's Estate Regeneration Fund and £27m from Greater London Authority funding to date and £13m of House and Communities Agency funding (which helped build the completed phase 1 of the scheme). In addition, the complainant explained that the Council had spent a considerable amount of its own funds on the scheme (£28.5m to date), and has committed a further £52m to the scheme over the next three years alone. In addition, the

scheme has received £56m from the government's NDC (New Deal for Communities) programme. The complainant calculated this spending to amount to total of £222m of public funding allocated of which £97.5m has already been spent. He noted that the appendices to the Council's draft development plan for the scheme show that overall estimated public sector funding requirement will amount to £300m.

51. The complainant emphasised the scale of the Aylesbury scheme, which the Council had itself argued was one of the largest projects of its kind in Europe.
52. The complainant explained that the DPA was the result of an extensive public procurement process and extensive negotiations by the Council administration to secure the best possible deal for the regeneration of the estate. He therefore suggested that it was surprising and, indeed concerning, when it was announced early in 2016 that the terms of the agreement had been re-negotiated at the request of NHHT, and that the Council had been requested by NHHT to fund £22m of works that NHHT was originally required to fund under the agreement.
53. The complainant pointed to a recent ruling by the Secretary of State for Communities and Local Government to refuse compulsory purchase orders for the regeneration scheme. The complainant argued that the ruling prompts the need for greater transparency and has increased public concern about the scheme in general. The complainant argued that disclosure of the partnership agreement will show whether the Council has secured a good deal for its residents, whether the agreement does make adequate provision for residents (especially leaseholders) and whether the significant public investment in the scheme to date will pay off in the long run.
54. Finally, the complainant highlighted a number of press articles which in his view demonstrated the level of concern and public interest in the scheme.¹⁰

Public interest in maintaining the exception

55. The Council emphasised that the economic interests of both NHHT and itself were essential to ensuring the success of the Aylesbury regeneration scheme and consequently there was a significant public

¹⁰ [Aylesbury Estate: Southwark Council's judicial review application over CPOs refused; What the Aylesbury estate ruling means for the future of regeneration; Residents resist demolition; Assessing Aylesbury: What's the true cost of demolishing council estates?; The fall and rise of the council estate](#)

interest in withholding information that would harm these interests. The Council also argued that it was against the public interest to harm the economic interests of NHHT in respect of other future projects it is likely to be involved in. Furthermore, the Council also argued that it was against the public interest for its own interests in respect future developments it may undertake in respect of its other land to be harmed.

Balance of the public interest test

56. As noted above a number of recent decision notices and Tribunal decisions have considered requests concerning information about local authorities' regeneration of housing estates. Whilst the circumstances of these cases differ in many respects from this case, the Commissioner believes that the factors identified by the Tribunal in the *Southwark* case serve to form a useful framework for testing the public interest in this complaint. The Tribunal identified in *Southwark* three factors which were of such importance that they dwarfed other considerations (paragraph 39). These were:
- (a) The project must not be followed to fail or be put in jeopardy;
 - (b) The importance of public participation in decision making;
 - (c) The avoidance of harm to a party's commercial interests.
57. In respect of (b) the Commissioner recognises that there is a significant public interest in the Aylesbury regeneration. As noted by the Council itself, this is one of the largest projects of its type in Europe. Furthermore, the Commissioner recognises that a considerable amount of public funds have been spent to date on the project, with additional significant amounts of funds to be committed in future years. Moreover, the Commissioner recognises that that the project has not been without some controversy, as evidenced by the newspaper articles identified by the complainant. The Commissioner believes that the cumulative weight attributable to these arguments is very significant and the public interest in disclosure of the redacted information in order to allow the public to fully understand the basis of the Council's agreement with NHHT to deliver the Aylesbury project should not be underestimated.
58. In respect of (a), it would appear to the Commissioner that the Council is not seeking to argue that disclosure of the redacted information would risk putting the Aylesbury project in jeopardy. In respect of nearly all of the redactions the Council has sought to argue that disclosure of the withheld information would either prejudice its ability to agree terms for the future use of its land or NHHT's ability to competitively compete for projects of a similar nature in the future. Even if such prejudice would occur – as the Commissioner accepts it would for all of the redacted information, the only exception being the redactions at reference 4 – the outcome would not directly impact the Aylesbury project itself. The

Commissioner recognises that the Council's arguments in respect of the redactions at references 8 and 20 make reference to protecting its economic interests in the context of the Aylesbury project itself. However, the extent of the prejudice envisaged if such information was disclosed does not extend to threatening the success of the project itself. Consequently, the Commissioner does not believe that the factor identified at (a) is relevant to this case.

59. In relation to (c), the Commissioner accepts that there is an inherent public interest in ensuring fairness of competition and that organisations are able to protect and sustain their negotiating positions. The Commissioner therefore accepts that it would be counter to the public interest to disclose information which she accepts is exempt from disclosure on the basis of regulation 12(5)(e). Furthermore, in relation to the disclosure of information which would harm NHHT's commercial interests, the Commissioner does not believe that the commercial interests of bodies – private or non-profit ones – should be undermined simply because they have entered into commercial agreements with a body, such as the Council, which is subject to FOIA and EIR.
60. However, in considering the weight that should be attributed to the public interest in protecting the commercial interests of both the Council and NHHT the Commissioner believes that it is necessary to consider the severity of the harm that would occur if each of the individual parts of the redacted information were disclosed.
61. At one end of the spectrum, the Commissioner believes that disclosure of the information at reference 8, and the related information redacted at reference 30 would have a severe impact on NHHT's commercial interests. She also accepts that the same is true of the information redacted at reference 13 given the way this information links to the information contained in schedule 4. As noted above, the Commissioner accepts the Council's position that the information contained within schedule 4 (ie redaction 8) includes detailed information, including formulae from NHHT's financial model. As with the Tribunal in *Southwark*, the Commissioner accepts that there is a very strong public interest in protecting the financial model of developers given the direct advantage disclosure of such information would provide to their competitors. In respect of the redactions at references 8, 13 and 30 the Commissioner believes that the public interest favours maintaining regulation 12(5)(e).
62. At the opposite end of the spectrum, the Commissioner is not persuaded that the severity of harm if the information redacted at reference 2, and the related information redacted at references 10 to 12, 21 and 27 was disclosed, can be said to be as strong. The Commissioner notes that the information contained at reference 2 has effectively been placed into the public domain by the Council's disclosure of the unredacted copy of

document B1 (which previously contained redactions 24 and 25). In relation to the redactions to the professional fees (reference 10); the sales and lettings costs (reference 11); agency fees (reference 12); level of management fee to be released on completion of warranty (reference 21); and the management fee percentage (reference 27) the Commissioner is not persuaded that the severity of the harm that would occur is that severe. In the Commissioner's view it would seem likely that the levels of such fees would be set by the present market conditions for a particular project, assuming that the figures used were not an industry standard. The Commissioner therefore believes that the public interest favours disclosure of the information redacted at references 2, 10 to 12, 21 and 27.

63. Between these two positions there is a range of different information which has been redacted. In respect of the redactions made at references 20 and 26, the Commissioner has concluded that the public interest favours withholding this information. Whilst disclosure of this information would inform the public about the Council and NHHT's compulsory purchase arrangements, the Commissioner believes the public interest in disclosure is outweighed by the public interest in maintaining the exception given that disclosure would harm both the Council's and NHHT's commercial interests. Similarly, the Commissioner believes that the public interest favours maintaining the redactions to the information disclosed at reference 22 given the wider reaching harm that would occur to both the Council's and NHHT's commercial interests if disclosed.

Internal review

64. Regulation 11(3) of the EIR requires a public authority to conduct an internal review of its handling of a request if asked to do so by the requester. In the circumstances of this case the Council failed to complete its internal review, despite being asked to conduct one by the complainant, and therefore breached the requirements of regulation 11(3).

Right of appeal

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@hmcts.gsi.gov.uk
Website: 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

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

Annex – details of redactions applied to DPA

Ref ¹¹	Page of DPA	Information redacted	Council’s submissions	Commissioner’s findings
2	P10-11	Limited selections of text within the definition of “Developer’s Priority Return”	<p>Those elements of the definition that set out the amount of the Developer’s priority return have been redacted to protect the commercial interests of the parties.</p> <p>Disclosure of this confidential and sensitive information would be detrimental to NHHT’s legitimate economic interests. It would prejudice NHHT’s ability to compete in the commercial market for other projects of a similar nature to this one. This would, or would be likely to, cause NHHT significant commercial disadvantage and material financial loss.</p> <p>The Council considers, therefore, that this information should be redacted as its disclosure would, or would be likely to, prejudice the interests of the NHHT.</p>	Regulation 12(5)(e) engaged but public interest favours disclosure of the redacted information.

¹¹ The Council initially applied 30 sets of redactions to the DPA. However, some of this redacted information has now been disclosed. This table therefore only details the information which remains redacted but uses the original reference numbers (ie 1 to 30) used by the Council. As a result the reference numbers in this table are not sequential.

4	P33	Definition of "Rights of Light Report"	<p>Part of the definition has been redacted to avoid prejudicing negotiations that may need to be entered into in order to compensate affected parties in the event they have rights to light and these rights are affected. The Council considers, therefore, that this information should be redacted as its disclosure would, or would be likely to, prejudice the commercial interests of the Council and those of NHHT.</p>	Regulation 12(5)(e) not engaged. Redacted information needs to be disclosed.
8	P86 et seq	Schedule 4	<p>The financial provisions schedule has been selectively redacted to remove sensitive and confidential pricing information to protect the commercial interests of the parties. The schedule contains detailed provisions relating to NHHT's financial model which underpins the DPA.</p> <p>The model is bespoke to this transaction and as such has the characteristics of a "trade secret" as identified in the Tribunal Case of London Borough of Southwark and The Information Commissioner and others (EA/2013/0162). This information is considered to be confidential in its entirety and its publication would enable other developers to benefit from its contents.</p> <p>Disclosure of this part of the DPA would cause sufficient harm to NHHT's interest that would outweigh any public interest in its disclosure. The Council's own economic interests are also a factor as they are intimately connected with the success of this project as a whole.</p>	Regulation 12(5)(e) engaged and public interest favours maintaining the exception.



10	P123 para 5.1.4	Management fee	<p>The amount of the management fee has been redacted to protect the commercial interests of the parties.</p> <p>Disclosure of this information would prejudice NHHT's ability to compete in the commercial market for projects of a similar size and nature. This would, or would be likely to, cause NHHT significant commercial disadvantage or material financial loss.</p>	Regulation 12(5)(e) engaged but public interest favours disclosure of the redacted information.
11	P124 para 7.1.2	Sales and lettings costs	<p>The amount of the maximum cap on sales incentives and PX [part exchange] costs has been redacted as this is commercially sensitive and could affect the ability of NHHT to compete in the market.</p> <p>Disclosure of this information would prejudice NHHT's ability to compete in the commercial market for projects of a similar size and nature. This would, or would be likely to, cause NHHT significant commercial disadvantage or material financial loss.</p> <p>The Council considers, therefore, that this information should redacted as its disclosure would, or would be likely to, prejudice the commercial interests of NHHT.</p>	Regulation 12(5)(e) engaged but public interest favours disclosure of the redacted information.
12	P124 para 7.1.5	Agency fees	<p>The amount of the agency fees has been redacted to protect the commercial interests of the parties.</p> <p>Disclosure of this information would prejudice NHHT's ability to compete in the commercial</p>	Regulation 12(5)(e) engaged but public interest favours disclosure of the redacted information.

			<p>market for projects of a similar size and nature. This would, or would be likely to, cause NHHT significant commercial disadvantage or material financial loss. The Council considers, therefore, that this information should be redacted as its disclosure would, or would be likely to, prejudice the commercial interests of NHHT.</p>	
13	P125 para 9.2.1	Other development costs	<p>The rate of the finance charges where the development cash flow is 100% debt funded has been redacted for reasons of commercial confidentiality. Disclosure of this information would prejudice NHHT's ability to compete in the commercial market for projects of a similar size and nature. This would, or would be likely to, cause NHHT significant commercial disadvantage or material financial loss.</p>	Regulation 12(5)(e) engaged and public interest favours maintaining the exception.
20	P163 para 3.11 and 3.11.4	Amount of CPO indemnity	<p>Disclosure of this information would prejudice the Council's ability to negotiate with third parties, undermining its negotiating position in seeking to acquire all interests within the development area through private treaty negotiation and avoiding the need to rely on compulsory purchase powers. Furthermore, disclosure of this information could prejudice the Council's case at any Upper Tribunal (Lands Chamber) hearing in the event of unresolved compensation claims. This would, or would be likely to, cause the Council significant commercial disadvantage or</p>	Regulation 12(5)(e) engaged and public interest favours maintaining the exception.

			<p>material financial loss.</p> <p>Disclosure of this information would prejudice NHHT’s ability to compete in the commercial market for projects of a similar size and nature. This would, or would be likely to, cause NHHT significant commercial disadvantage or material financial loss.</p>	
21	P168 para 6.4	Amount of management fee to be released on completion of warranty	<p>This item is considered to be commercially confidential.</p> <p>Disclosure of this information would prejudice NHHT’s ability to compete in the commercial market for projects of a similar size and nature. This would, or would be likely to, cause NHHT significant commercial disadvantage or material financial loss.</p>	Regulation 12(5)(e) engaged but public interest favours disclosure of the redacted information.
22	P175 para 1.5.6.4	Amount of payment	<p>The redaction is of the payment to be made for subplot leases and is commercially confidential.</p> <p>Disclosure of this information would prejudice the Council’s ability to meet its statutory duty to ensure best consideration for its land, setting a precedent which undermines its negotiating position in procuring development partners for future redevelopment of its land. This would, or would be likely to, cause the Council significant commercial disadvantage or material financial loss.</p>	Regulation 12(5)(e) engaged and public interest favours maintaining the exception.

			Disclosure of this information would prejudice NHHT's ability to compete in the commercial market for projects of a similar size and nature. This would, or would be likely to, cause NHHT significant commercial disadvantage or material financial loss.	
26	BP4, P15	Developer financial assumptions of leaseholder values	See reference 20	Regulation 12(5)(e) engaged and public interest favours maintaining the exception.
27	BP4, P25 para 4.5.3.5	Management fee percentage	See reference 10	Regulation 12(5)(e) engaged but public interest favours disclosure of the redacted information.
30	BP14, P7-10 section 14.4	Details of developer incentive financial mechanisms	See reference 8	Regulation 12(5)(e) engaged and public interest favours maintaining the exception